Dominion Law Reports

CITED "D.L.R."

A NEW ANNOTATED SERIES OF REPORTS COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT AND THE RAILWAY COMMISSION, TOGETHER WITH CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

VOL. 2

EDITED BY

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1912

CASES REPORTED

TABLE OF ANNOTATIONS

(Alphabetically arranged.)

TABLE OF CASES CITED

TABLE OF STATUTES

Tabl

Volume of other
[1912] A
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
17 B.C.R.
13 Can. Ex
13 Can. Ex
13 Can. Ex
10 E.L.R.
10 E.L.R.
10 E.L.R.
10 E.L.R.
10 E.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.
25 O.L.R.

CONCURRENT CITATIONS

Table of Citations of Concurrent Reports showing where cases also reported in other publications may be found in the Dominion Law Reports

(See also Concurrent Citations in preceding volume.)

Volume and page of other Reports.	*Same case in Dominion Law Reports.*
[1912] A.C. 333	1 D.L.R. 681
17 B.C.R. 1	1 D.L.R. 80
17 B.C.R. 8	1 D.L.R. 38
17 B.C.R. 11	2 D.L.R. 343
17 B.C.R. 13	2 D.L.R. 282
17 B.C.R. 16	2 D.L.R. 523
17 B.C.R. 21	2 D.L.R. 356
17 B.C.R. 24	1 D.L.R. 14
17 B.C.R. 26	2 D.L.R. 345
17 B.C.R. 28	1 D.L.R. 550
17 B.C.R. 31	2 D.L.R. 349
17 B.C.R. 37	2 D.L.R. 340
17 B.C.R. 48	2 D.L.R. 347
17 B.C.R. 50	1 D.L.R. 96
17 B.C.R. 56	2 D.L.R. 568
17 B.C.R. 65	1 D.L.R. 33
17 B.C.R. 69	1 D.L.R. 153
17 B.C.R. 73	1 D.L.R. 91
17 B.C.R. 77	1 D.L.R. 99
13 Can. Ex. R. 502	1 D.L.R. 447
13 Can. Ex. R. 507	1 D.L.R. 243
13 Can. Ex. R. 521	1 D.L.R. 279
10 E.L.R. 320	1 D.L.R. 295
10 E.L.R. 386	2 D.L.R. 557
10 E.L.R. 432	2 D.L.R. 709
10 E.L.R. 461	1 D.L.R. 398
10 E.L.R. 562	2 D.L.R. 654
25 O.L.R. 365	2 D.L.R. 307
25 O.L.R. 420	1 D.L.R. 540
25 O.L.R. 444	1 D.L.R. 646
25 O.L.R. 467	2 D.L.R. 197
25 O.L.R. 475	2 D.L.R. 120
25 O.L.R. 488	2 D.L.R. 114
25 O.L.R. 491	2 D.L.R. 100
25 O.L.R. 492	{1 D.L.R. 501 {2 D.L.R. 84
25 O.L.R. 524	2 D.L.R. 164
25 O.L.R. 550	1 D.L.R. 252
25 O.L.R. 566	2 D.L.R. 501
25 O.L.R. 578	2 D.L.R. 136
25 O.L.R. 633	2 D.L.R. 644
25 O.L.R. 646	2 D.L.R. 619
3 O.W.N. 506	2 D.L.R. 37
3 O.W.N. 510	1 D.L.R. 130
3 O.W.N. 525	2 D.L.R. 577
3 O.W.N. 541	2 D.L.R. 826
3 O.W.N. 545	2 D.L.R. 425
3 O.W.N. 569	2 D.L.R. 917
3 O.W.N. 569	2 D.L.R. 918
3 O.W.N. 571	1 D.L.R. 212
3 O.W.N. 572	2 D.L.R. 949
3 O.W.N. 572	2 D.L.R. 920
3 O.W.N. 573	2 D.L.R. 871
3 O.W.N. 584	2 D.L.R. 391
3 O.W.N. 591	1 D.L.R. 689
3 O.W.N. 604	2 D.L.R. 921
3 O.W.N. 604	1 D.L.R. 756
3 O.W.N. 605	2 D.L.R. 921
3 O.W.N. 606	2 D.L.R. 922
3 O.W.N. 607	2 D.L.R. 197
3 O.W.N. 609	2 D.L.R. 120
3 O.W.N. 613	2 D.L.R. 501
3 O.W.N. 628	2 D.L.R. 588
3 O.W.N. 638	2 D.L.R. 52
3 O.W.N. 641	1 D.L.R. 689
3 O.W.N. 642	2 D.L.R. 114
3 O.W.N. 645	2 D.L.R. 916
3 O.W.N. 646	2 D.L.R. 250
3 O.W.N. 651	2 D.L.R. 468
3 O.W.N. 659	2 D.L.R. 251
3 O.W.N. 664	2 D.L.R. 84
3 O.W.N. 669	2 D.L.R. 105
3 O.W.N. 670	2 D.L.R. 52
3 O.W.N. 672	2 D.L.R. 77
3 O.W.N. 685	2 D.L.R. 100
3 O.W.N. 695	2 D.L.R. 164
3 O.W.N. 701	2 D.L.R. 609
3 O.W.N. 706	2 D.L.R. 644
3 O.W.N. 708	2 D.L.R. 619
3 O.W.N. 711	2 D.L.R. 230

Volume and page of other Reports.	*Same case in Dominion Law Reports.*	*Volume and page of other Reports.*	*Same case in Dominion Law Reports.*
3 O.W.N. 715	2 D.L.R. 501	3 O.W.N. 1080	2 D.L.R. 896
3 O.W.N. 719	2 D.L.R. 14	3 O.W.N. 1082	2 D.L.R. 897
3 O.W.N. 723	2 D.L.R. 161	3 O.W.N. 1083	2 D.L.R. 898
3 O.W.N. 729	2 D.L.R. 830	3 O.W.N. 1083	2 D.L.R. 899
3 O.W.N. 732	2 D.L.R. 131	3 O.W.N. 1084	2 D.L.R. 900
3 O.W.N. 734	2 D.L.R. 113	3 O.W.N. 1085	2 D.L.R. 900
3 O.W.N. 735	2 D.L.R. 152	3 O.W.N. 1086	2 D.L.R. 902
3 O.W.N. 738	2 D.L.R. 136	3 O.W.N. 1152	2 D.L.R. 902
3 O.W.N. 741	2 D.L.R. 55	3 O.W.N. 1153	2 D.L.R. 902
3 O.W.N. 755	2 D.L.R. 239	3 O.W.N. 1153	2 D.L.R. 903
3 O.W.N. 778	2 D.L.R. 854	3 O.W.N. 1154	2 D.L.R. 904
3 O.W.N. 781	2 D.L.R. 843	3 O.W.N. 1155	2 D.L.R. 904
3 O.W.N. 796	2 D.L.R. 227	3 O.W.N. 1155	2 D.L.R. 905
3 O.W.N. 800	2 D.L.R. 841	3 O.W.N. 1156	2 D.L.R. 906
3 O.W.N. 811	2 D.L.R. 246	3 O.W.N. 1157	2 D.L.R. 907
3 O.W.N. 815	2 D.L.R. 859	3 O.W.N. 1159	2 D.L.R. 907
3 O.W.N. 823	2 D.L.R. 863	3 O.W.N. 1194	2 D.L.R. 909
3 O.W.N. 826	2 D.L.R. 866	3 O.W.N. 1195	2 D.L.R. 910
3 O.W.N. 843	2 D.L.R. 871	3 O.W.N. 1196	2 D.L.R. 911
3 O.W.N. 848	1 D.L.R. 924	3 O.W.N. 1230	2 D.L.R. 562
3 O.W.N. 851	2 D.L.R. 678	3 O.W.N. 1238	2 D.L.R. 912
3 O.W.N. 856	2 D.L.R. 479	3 O.W.N. 1239	2 D.L.R. 912
3 O.W.N. 859	2 D.L.R. 190	3 O.W.N. 1240	2 D.L.R. 923
3 O.W.N. 862	2 D.L.R. 732	3 O.W.N. 1240	2 D.L.R. 922
3 O.W.N. 868	2 D.L.R. 208	3 O.W.N. 1241	2 D.L.R. 914
3 O.W.N. 878	2 D.L.R. 881	3 O.W.N. 1242	2 D.L.R. 915
3 O.W.N. 894	2 D.L.R. 882	3 O.W.N. 1243	2 D.L.R. 132
3 O.W.N. 895	2 D.L.R. 883	3 O.W.N. 1285	2 D.L.R. 913
3 O.W.N. 896	2 D.L.R. 884	20 O.W.R. 867	2 D.L.R. 37
3 O.W.N. 906	2 D.L.R. 103	20 O.W.R. 901	2 D.L.R. 917
3 O.W.N. 912	2 D.L.R. 132	20 O.W.R. 929	2 D.L.R. 244
3 O.W.N. 928	2 D.L.R. 885	20 O.W.R. 931	2 D.L.R. 577
3 O.W.N. 929	2 D.L.R. 885	20 O.W.R. 939	2 D.L.R. 917
3 O.W.N. 929	2 D.L.R. 886	20 O.W.R. 941	2 D.L.R. 425
3 O.W.N. 932	2 D.L.R. 887	20 O.W.R. 962	2 D.L.R. 918
3 O.W.N. 948	2 D.L.R. 576	20 O.W.R. 965	1 D.L.R. 554
3 O.W.N. 957	2 D.L.R. 542	20 O.W.R. 974	2 D.L.R. 826
3 O.W.N. 970	2 D.L.R. 888	20 O.W.R. 983	1 D.L.R. 540
3 O.W.N. 971	2 D.L.R. 889	20 O.W.R. 989	2 D.L.R. 920
3 O.W.N. 972	2 D.L.R. 889	20 O.W.R. 1000	2 D.L.R. 921
3 O.W.N. 994	2 D.L.R. 278	21 O.W.R. 55	2 D.L.R. 501
3 O.W.N. 1005	2 D.L.R. 890	21 O.W.R. 65	2 D.L.R. 922
3 O.W.N. 1006	2 D.L.R. 891	21 O.W.R. 75	2 D.L.R 921
3 O.W.N. 1006	2 D.L.R. 892	21 O.W.R. 82	1 D.L.R. 485
3 O.W.N. 1007	2 D.L.R. 893	21 O.W.R. 141	2 D.L.R. 468
3 O.W.N. 1008	2 D.L.R. 893	21 O.W.R. 170	1 D.L.R. 530
3 O.W.N. 1009	2 D.L.R. 894	21 O.W.R. 175	2 D.L.R. 120
3 O.W.N. 1079	2 D.L.R. 895	21 O.W.R. 187	2 D.L.R. 588

Volume and page of other Reports.	*Same case in Dominion Law Reports.*	*Volume and page of other Reports.*	*Same case in Dominion Law Reports.*
21 O.W.R. 194	2 D.L.R. 197	21 O.W.R. 660	2 D.L.R. 246
21 O.W.R. 198	2 D.L.R. 52	21 O.W.R. 665	2 D.L.R. 863
21 O.W.R. 200	2 D.L.R. 391	21 O.W.R. 696	2 D.L.R. 871
21 O.W.R. 219	2 D.L.R. 114	21 O.W.R. 698	2 D.L.R. 882
21 O.W.R. 221	1 D.L.R. 383	21 O.W.R. 701	2 D.L.R. 883
21 O.W.R. 222	2 D.L.R. 916	21 O.W.R. 855	2 D.L.R. 278
21 O.W.R. 224	2 D.L.R. 250	21 O.W.R. 915	2 D.L.R. 542
21 O.W.R. 225	2 D.L.R. 84	21 O.W.R. 929	2 D.L.R. 899
21 O.W.R. 236	2 D.L.R. 251	21 O.W.R. 972	2 D.L.R. 909
21 O.W.R. 247	2 D.L.R. 105	22 O.W.R. 6	2 D.L.R. 911
21 O.W.R. 248	2 D.L.R. 77	22 O.W.R. 31	2 D.L.R. 912
21 O.W.R. 249	2 D.L.R. 854	22 O.W.R. 32	2 D.L.R. 912
21 O.W.R. 269	2 D.L.R. 52	22 O.W.R. 38	2 D.L.R. 562
21 O.W.R. 291	2 D.L.R. 609	22 O.W.R. 48	2 D.L.R. 914
21 O.W.R. 297	2 D.L.R. 230	22 O.W.R. 64	2 D.L.R. 900
21 O.W.R. 302	1 D.L.R. 907	22 O.W.R. 91	2 D.L.R. 913
21 O.W.R. 350	2 D.L.R. 55	22 O.W.R. 104	2 D.L.R. 915
21 O.W.R. 370	1 D.L.R. 689	41 Que. S.C. 370	2 D.L.R. 445
21 O.W.R. 380	2 D.L.R. 644	41 Que. S.C. 412	2 D.L.R. 584
21 O.W.R. 390	2 D.L.R. 501	41 Que. S.C. 433	1 D.L.R. 371
21 O.W.R. 408	2 D.L.R. 479	41 Que. S.C. 511	2 D.L.R. 8
21 O.W.R. 427	2 D.L.R. 190	19 W.L.R. 819	2 D.L.R. 204
21 O.W.R. 430	2 D.L.R. 732	19 W.L.R. 845	1 D.L.R. 14
21 D.W.R. 433	2 D.L.R. 678	19 W.L.R. 905	2 D.L.R. 276
21 O.W.R. 444	2 D.L.R. 208	19 W.L.R. 948	2 D.L.R. 356
21 O.W.R. 449	2 D.L.R. 14	19 W.L.R. 950	2 D.L.R. 345
21 O.W.R. 454	2 D.L.R. 164	20 W.L.R. 1	2 D.L.R. 683
21 O.W.R. 461	2 D.L.R. 239	20 W.L.R. 201	1 D.L.R. 552
21 O.W.R. 483	2 D.L.R. 619	20 W.L.R. 327	1 D.L.R. 825
21 O.W.R. 493	2 D.L.R. 136	20 W.L.R. 332	1 D.L.R. 366
21 O.W.R. 513	2 D.L.R. 886	20 W.L.R. 334	2 D.L.R. 525
21 O.W.R. 515	2 D.L.R. 885	20 W.L.R. 405	2 D.L.R. 690
21 O.W.R. 517	2 D.L.R. 866	20 W.L.R. 466	2 D.L.R. 414
21 O.W.R. 523	2 D.L.R. 884	20 W.L.R. 479	2 D.L.R. 460
21 O.W.R. 530	2 D.L.R. 161	20 W.L.R. 484	2 D.L.R. 110
21 O.W.R. 540	2 D.L.R. 830	20 W.L.R. 544	2 D.L.R. 287
21 O.W.R. 544	2 D.L.R. 113	20 W.L.R. 566	2 D.L.R. 686
21 O.W.R. 546	2 D.L.R. 152	20 W.L.R. 584	2 D.L.R. 204
21 O.W.R. 571	2 D.L.R. 859	20 W.L.R. 603	2 D.L.R. 702
21 O.W.R. 575	2 D.L.R. 226	20 W.L.R. 649	2 D.L.R. 18
21 O.W.R. 628	2 D.L.R. 843	20 W.L.R. 651	2 D.L.R. 11
21 O.W.R. 637	1 D.L.R. 386	20 W.L.R. 671	2 D.L.R. 714
21 O.W.R. 653	2 D.L.R. 841	20 W.L.R. 676	2 D.L.R. 173
21 O.W.R. 655	1 D.L.R. 917	20 W.L.R. 687	2 D.L.R. 106
21 O.W.R. 658	1 D.L.R. 919	20 W.L.R. 690	2 D.L.R. 392

Volume and page of other Reports.	*Same case in Dominion Law Reports.*	*Volume and page of other Reports.*	*Same case in Dominion Law Reports.*
20 W.L.R. 697	2 D.L.R. 270	20 W.L.R. 887	2 D.L.R. 327
20 W.L.R. 705	2 D.L.R. 183	20 W.L.R. 892	2 D.L.R. 306
20 W.L.R. 714	2 D.L.R. 155	20 W.L.R. 902	2 D.L.R. 553
20 W.L.R. 722	2 D.L.R. 94	20 W.L.R. 907	2 D.L.R. 615
20 W.L.R. 729	2 D.L.R. 117	20 W.L.R. 912	2 D.L.R. 354
20 W.L.R. 732	2 D.L.R. 718	20 W.L.R. 921	2 D.L.R. 324
20 W.L.R. 749	2 D.L.R. 397	20 W.L.R. 926	2 D.L.R. 283
20 W.L.R. 772	2 D.L.R. 213	20 W.L.R. 929	2 D.L.R. 762
20 W.L.R. 778	2 D.L.R. 277	21 W.L.R. 7	2 D.L.R. 532
20 W.L.R. 779	2 D.L.R. 318	21 W.L.R. 18	1 D.L.R. 879
20 W.L.R. 794	2 D.L.R. 279	21 W.L.R. 53	2 D.L.R. 634
20 W.L.R. 816	2 D.L.R. 417	21 W.L.R. 80	2 D.L.R. 264
20 W.L.R. 819	2 D.L.R. 313	21 W.L.R. 86	2 D.L.R. 1
20 W.L.R. 825	2 D.L.R. 295	21 W.L.R. 214	2 D.L.R. 696
20 W.L.R. 826	2 D.L.R. 298	21 W.L.R. 222	2 D.L.R. 683
20 W.L.R. 844	2 D.L.R. 290	21 W.L.R. 231	2 D.L.R. 519
20 W.L.R. 847	2 D.L.R. 303	21 W.L.R. 249	2 D.L.R. 209
20 W.L.R. 874	2 D.L.R. 293	21 W.L.R. 254	2 D.L.R. 416
20 W.L.R. 877	2 D.L.R. 331	21 W.L.R. 267	2 D.L.R. 211

RE MANITOBA COMMISSION CO., Limited.

Manitoba King's Bench, Mathers, C.J. April 20, 1912.

MAN.

K.B.
1912

Apl. 20.

1. CORPORATIONS AND COMPANIES (§ VI A—313)—PETITION FOR WINDING-UP —R.S.C. 1906, CH. 144.

Petitioners for the winding-up of a company under the Dominion Winding-up Act on the ground of its insolvency must not only allege, but strictly prove, the existence of one or more of the circumstances set out in section 3 of the Winding-up Act, R.S.C. 1906, ch. 144, which would justify an order for winding up.

2. CORPORATIONS AND COMPANIES (§ VI A—313)—AFFIDAVIT FOR WINDING-UP ORDER.

A petition for a winding-up order cannot be supported by statements verified by an affidavit on information and belief only.

[*Gilbert* v. *Endean*, L.R. 9 Ch. D. 259, applied.]

3. EVIDENCE (§ XII F—951)—INFERENCE AS TO SOLVENCY OF COMPANY.

It cannot be inferred from a letter sent by a company to a creditor, which merely stated "have representative meet the creditors" at a specified time and place, that it was a meeting of the company's creditors called for the purpose of compounding with them, where the proceedings at the meeting are not disclosed, by means of which a special application or significance of the words of the letter might appear.

4. CORPORATIONS AND COMPANIES (§ VI F1—347*a*)—EXHIBITING STATEMENT SHEWING INSOLVENCY.

That a company's president threw open the books of the company to an accountant employed by a creditor, and the accountant embodied the result of his examination thereof in a report to the creditors shewing that the company was insolvent, does not bring the company within sub-section (*c*) of section 3 of the Winding-up Act, R.S.C. 1906, ch. 144, as exhibiting a statement shewing its inability to meet its liabilities.

5. CORPORATIONS AND COMPANIES (§ VI F1—347*a*)—EXHIBITING STATEMENT SHEWING INSOLVENCY.

Where an affidavit offered in support of a petition for winding up a company stated that the deponent, an auditor designated by certain creditors, had examined the company's books and records and, in connection therewith, had obtained from time to time information as to the affairs of the company from its president, and that though the deponent was unable from the limited time at his disposal to make a complete audit or arrive at a balance, he made a sufficient examination and secured sufficient information from the president to arrive at the conclusion that the company was insolvent, such statement is but an expression of the auditor's professional opinion and is not an acknowledgment by the company of its insolvency within sub-section (*d*) of section 3 of the Winding-up Act, R.S.C. 1906, ch. 144.

6. CORPORATIONS AND COMPANIES (§ VI F1—347*a*)—ACKNOWLEDGMENT OF INSOLVENCY.

The acknowledgment of insolvency required by sub-section (*d*) of section 3 of the Winding-up Act, R.S.C. 1906, ch. 144, must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the company's behalf.

[*Re Qu'Appelle Valley Farming Co.*, 5 Man. R. 160, specially referred to; and see Parker and Clark's Company Law, 351.]

MAN.

K. B.
1912

RE MANITOBA COMMISSION CO., LIMITED.

7. CORPORATIONS AND COMPANIES (§ VI F1—347*a*)—ACKNOWLEDGMENT OF INSOLVENCY.

An offer to the company's creditors by the president of a company carrying on a grain commission business, to pay a specified sum in full of all liability upon condition that he be reinstated as a member of the grain exchange, cannot be construed as an acknowledgment of the company's inability to pay its creditors in full.

8. CORPORATIONS AND COMPANIES (§ IV G2—111)—MANAGING PRESIDENT—POWER TO ACKNOWLEDGE INSOLVENCY.

An officer of a company who is at the same time director, president and manager, cannot make the acknowledgment of insolvency specified in sub-section (*d*) of section 3 of the Winding-up Act, R.S.C. 1906, ch. 144, in the absence of authority so to do.

[*Almon* v. *Law*, 26 N.S.R. 340, and *Re Briton Medical Co.*, 11 O.R. 478, specially referred to.]

9. CORPORATIONS AND COMPANIES (§ IV G2—117)—POWERS OF DIRECTORS—ACKNOWLEDGMENT OF COMPANY'S INSOLVENCY.

The directors of a company may, without the sanction of the shareholders, make an acknowledgment of the company's insolvency for the purpose of winding up, as required by sub-section (*d*) of section 3 of the Winding-up Act, R.S.C., ch. 144.

[*Hovey* v. *Whiting*, 14 Can. S.C.R. 515, applied.]

10. CORPORATIONS AND COMPANIES (§ VI A—313)—WINDING-UP PROCEDURE.

Under section 15 of the Winding-up Act, R.S.C., ch. 144, providing that if a company opposes the application for a winding-up order on the ground that it is not insolvent, the Court may make an order for an accountant to inquire into the affairs of the company, the power so conferred can be exercised only where the petitioners have made such a *prima facie* case of insolvency against the company as would justify a winding-up order, and upon their failure so to do, no order for an audit by an accountant will be made.

APPLICATION by W. J. Bettingen & Company to wind up the Manitoba Commission Company, Limited, on the ground that the company is insolvent.

The application was dismissed.

The company was incorporated under the Manitoba Joint Stock Companies Act, on the 4th September, 1901, with power to buy and sell on commission for immediate delivery or for future delivery, grain of all kinds, and other farm produce, and to carry on a general commission business. The nominal capital of the company was $1,000, divided into 200 shares of $5 each, the whole of which was subscribed and paid up. In 1908 supplementary letters patent were issued increasing the capital stock to $25,000 by the issue of 4,800 shares of new stock of the par value of $5 each and conferring somewhat enlarged powers upon the company. So far as appears none of the new stock was subscribed for or paid up.

On the 31st December, 1907, the last year for which a statement was filed with the Provincial Secretary, the shareholders consisted of John M. Chisholm, Alexander Macdonald, N. M. Paterson and H. A. M. Paterson, each holding one share, and Hugh S. Paterson, holding 196 shares. N. M. Paterson and H. A. M. Paterson are the son and wife of Hugh S. Paterson, who was and is president and manager of the company.

The petitioners claimed to be creditors of the company to the extent of $415, which sum represents their loss on the re-sale of

wheat sold by them to the company for October delivery, and which the company refused to accept.

Messrs. *A. J. Andrews*, K.C., and *H. A. Burbidge*, for petitioners.

E. Anderson, K.C., for the company.

MATHERS, C.J.:—As the petition is based on the insolvency of the company, the petitioners must not only allege but strictly prove the existence of one or more of the circumstances set out in section 3 of the Winding-up Act: *Re Qu'Appelle Valley Farming Company*, 5 Man.R. 160; *Re Lake Winnipeg Transportation Company*, 7 Man.R. 255; *Re Rapid City Farmers' Elevator Company*, 9 Man.R. 574; *Re Ewart Carriage Works, Limited*, 8 O.L.R. 527.

The petition alleges facts which, if established, the company must be deemed to be insolvent under sub-sections (*b*), (*c*) and (*d*) of that section.

It alleges that on the 2nd November last the company called a meeting of its creditors for the purpose of compounding with them. It also alleges that a further meeting was called for the same purpose on the 8th November.

It alleges that on the 3rd November the company exhibited, or permitted to be exhibited, or acquiesced in the exhibition of, a statement shewing its inability to meet its liabilities, by producing its books of account to one Bisaillon, who acted as auditor for the company's creditors, and that Bisaillon prepared a statement shewing the insolveney of the company, the correctness of which was admitted by the president and directors of the company.

It also alleges that the company has otherwise acknowledged its insolveney, and, by its president, secretary and treasurer, admitted its inability to meet its liabilities, and has asked certain of its creditors for an extension of time for payment of its liabilities and has asked certain of its creditors to accept a composition, and that the company is in fact insolvent.

The petition is supported by two affidavits, one from Edward James, assistant general manager of the petitioners, and one from the said Bisaillon.

The affidavit of James states in paragraph 2 that he has read over the petition and that:—

> Such statements in the said petition as relate to my own acts and deeds are true, and that such statements in the said petition as relate to the acts and deeds of the said petitioners or to the claim of the said petitioners against the above named company are true, and such of the said statements as relate to any of the acts and deeds of any other person are true to the best of my knowledge, information and belief.

There are no "acts and deeds" of James set out in the petition and the statement verifying his "acts and deeds" in the affidavit is absolutely meaningless. Apart from paragraph 8, which verifies the petitioners' claim, paragraph 18, which iden-

MAN.

K.B.
1912

RE MANITOBA COMMISSION CO., LIMITED.

Mathers, C.J.

tifies a notice calling a meeting for November 2nd, and paragraph 19, stating what took place at that meeting, it appears from the affidavit itself that the deponent had no personal knowledge of any of the facts sworn to, but derived his information from statements prepared by and information derived from the said Bisaillon.

James was cross-examined upon this affidavit, and from his examination it appears that he was not present at the meeting called for either the 2nd or the 8th November, and of course could only know by hearsay what took place at those meetings. It also appears that he had no conversation with Paterson prior to the time the affidavit was sworn to, and the petition filed, at which Paterson said anything which could be construed as an acknowledgment of the company's insolvency even if an admission by him would be sufficient for that purpose.

In my opinion, a winding-up order finally determines the rights of the parties within the principle of the decision in *Gilbert* v. *Endean*, 9 Ch. D. 259, and a petition for such an order cannot be supported by statements on information and belief: *Gilbert* v. *Endean*, 9 Ch. D. 259, has been followed in *Allan* v. *M. & N. W. Ry.*, 9 Man. R. 389; *Braun* v. *Davis*, 9 Man. R. 539, and by myself in *Canada Supply Company* v. *Robb*, 20 Man. R. 33, and the principle is now well established.

By the English winding-up rules, a form of affidavit verifying a winding-up petition on information and belief is prescribed, and is there sufficient; but there is no such rule in force here, and the Court here should be guided by the principle on which it acts in other matters. In my opinion the affidavit of James, in so far as it relates to the allegations of insolvency in the petition, must be entirely disregarded.

The letter from the company calling the meeting of November 2nd does not state the purpose of the meeting. It says, "Please have representative meet the creditors at 3 p.m. to-day in council chamber." Without any account of what took place at the meeting, it would be impossible to infer that it was a meeting of the company's creditors called for the purpose of compounding with them.

The only other evidence in support of the petition is the affidavit of Bisaillon. He cannot speak of what occurred at any meeting, because he was not present at any meeting and does not pretend to state what took place thereat. He says W. J. Bettingen, one of the petitioners, asked him as an auditor to examine the books of the company for the purpose of determining its financial position as near as possible. He says he obtained from H. S. Paterson, president of the company, its books and records, and proceeded to examine the same, and in connection with the examination he obtained from the said H. S. Paterson information from time to time with regard to the affairs of the company.

in order to enable him to ascertain the position of the company. He further says that, owing to the limited time at his disposal, he was unable to make a complete audit or arrive at a balance, but examined the books of the company and secured from Mr. Paterson sufficient information to enable him to arrive at the conclusion that the company was hopelessly insolvent, at which conclusion he did arrive from the examination of the books. That statement is but an expression of the affiant's opinion, and is not evidence of the company's insolvency, much less is it an acknowledgment by the company of its own insolvency.

Bisaillon embodied the result of his examination in the form of a report to W. J. Bettingen. It is not pretended that this report was prepared or sent with the sanction of the company or of Mr. Paterson, and I did not understand counsel for the petitioners to contend that the making of this report by Bisaillon constituted the exhibition of a statement by the company shewing its inability to meet its liabilities within sub-sec. (*c*) of sec. 3 of the Act. There is no evidence from which I could conclude that the making of that report by Bisaillon was the act of the company. Neither do I think that the throwing open of the company's books to examination by Bisaillon brought the company within that sub-section.

Bisaillon's affidavit further states in the seventh paragraph:—

> I communicated with Mr Hugh S. Paterson the result of my examination of the said books, and the said Hugh S. Paterson, president of the said company, admitted to me that the company was insolvent and was unable to pay its debts.

And in paragraph 18, he says:—

> At the time that I was examining the said books as aforesaid, the said Hugh S. Paterson, on behalf of the company, offered the said W. J. Bettingen, representing the said creditors as aforesaid, in my presence, to pay the sum of $5,000 in full of all liabilities of the said company to its creditors other than the said bank, at the rate of $1,000 per month, provided he be reinstated as a member in good standing on the Exchange, and I am also informed and verily believe that at a meeting of the creditors held on the 8th November, 1911, the said company, through its president Hugh S. Paterson, offered the said creditors to pay 33⅓% of the liabilities of the company to the said creditors in full thereof.

It is contended that the statements contained in paragraphs 7 and 18 amount to an acknowledgment of the company's insolvency within paragraph (*d*) of section 3.

There is no evidence that the company in any formal way acknowledged that it was insolvent. Paterson made an affidavit in opposition to the petition upon which affidavit he was examined. In that examination he swears that he is the only person beneficially interested in the company and that he knows no person else who has any interest in it. If that statement is

MAN.

K.B.
1912

RE MANITOBA COMMISSION CO., LIMITED.

Mathers, C.J.

true, then this is distinctly a one-man company; but, notwithstanding the statute having been complied with, it is a legal entity and must be dealt with as such: *Salomon* v. *Salomon* [1897] A.C. 22. The directors of a company, it has been held, may make an assignment for the general benefit of the company's creditors without the sanction of the shareholders: *Hovey* v. *Whiting*, 14 Can. S.C.R. 515. It follows, I think, that the directors without the sanction of the shareholders can make an acknowledgment of the company's insolvency for the purpose of winding up. No act of the board of directors acknowledging the company's inability to pay its debts has been shewn. What is shewn is such an acknowledgment by the president and manager. As president Mr. Paterson, in the absence of anything in the by-laws or charter to the contrary, has no greater authority than any other director: *Almon* v. *Law*, 26 N.S.R. 340; Masten's Company Law 237. As manager his business would be to manage and not to put an end to the company: *In re Briton Medical Company*, 11 O.R. 478. And of course as one director out of a board of three, he could not exercise the powers of the board without a special delegation of powers to him where that is permitted: Lindley on Companies, 6th ed., 205; 10 Cyc. 775.

It follows, I think, that Paterson could not, as director, president or manager, or as all three, make an acknowledgment of insolvency such as is required by sub-sec. (*d*) of sec. 3. Such an acknowledgment to be effective would have to be the act of the company and not merely a statement made by an officer of the company: Parker & Clark Company Law 351.

It is contended that Mr. Paterson is the company; that he is the owner of all the stock, and that no person else has any beneficial interest in it. If that fact were established by evidence that could be looked at as against the four others who appear on the books of the company as shareholders, a serious question would arise as to whether or not an acknowledgment made by him as such sole shareholder could not be treated as the company's act. Generally speaking, shareholders have no agency for the corporation and cannot bind it either by their acts, declarations or admissions: 10 Cyc. 760. But in cases where by the law governing the company the act in question is not one of the matters to be performed by the directors, the shareholders can no doubt control the company.

It does appear, however, that there were at one time four other shareholders, two of whom were directors. There is nothing to shew, except the statement of Paterson, that he is the sole owner, or that these four shareholders, whom I must assume to have been *bona fide* shareholders, have ever parted with their interests. As against these, the statement of Paterson is not evidence, and cannot be accepted. So far as appears, it was made without the sanction, concurrence or knowledge of these

other shareholders. It is true their interest, if any, is small, but it may be a real interest, and the principle is the same whether the interest be great or small.

The evidence falls short of establishing that Paterson is the sole beneficial owner of the shares of the company, and I must therefore deal with the company as a real and not a sham entity: *In re Qu'Appelle Valley Farming Company*, 5 Man.R. 160, former Chief Justice Taylor expressed the opinion that to bring a company within clause (*d*) of sec. 3, there must be something actively done by it as an acknowledgment. The learned authors of Parker & Clark's Company Law, 351, go farther and submit that the acknowledgment must be such an act of the company as would render it liable upon a contract. I agree that it must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the company's behalf. Nothing of the kind is shewn here.

The further statement contained in paragraph 18 of Bisaillon's affidavit does not help the petitioners. It shews that the offer to pay $5,000 in full of all liabilities was upon a condition that he be reinstated as a member of the exchange. I do not think an offer made, accompanied by such a condition, can be construed as an acknowledgment of the company's inability to pay its creditors in full.

Should I come to the conclusion that the material did not justify a winding-up order, the petitioners request me to adjourn the application and to make an order under section 15 for an accountant to inquire into the affairs of the company.

That section provides that if the company opposes the application on the ground that it has not become insolvent such an order may be made. In my opinion the power conferred by that section can only be exercised in a case where the petitioners have made such a *prima facie* case of insolvency against the company as would justify a winding-up order, and the section has no application to a case such as this where the petitioners have failed in that respect. No order can therefore be made under that section.

The petition to wind up the company must be dismissed with costs.

Petition dismissed.

QUE.

Court of Review.

1912

Mar. 22.

FRANK v. FORMAN.

Quebec Court of Review, Moatreal, Tellier, Guerin and Beaudin, JJ.
March 22, 1912.

1. ACCOUNTING (§ I—6)—JUDGMENT—QUEBEC PRACTICE.

A defendant who fails to file the account ordered by a judgment and upon whose failure the plaintiff files an account under the provisions of article 568 C.P., cannot compel plaintiff to furnish the very details he had in his possession and which plaintiff had been endeavouring to obtain, but he may contest the account and supplement it with such details as he deems should go before the Court, and if he fails to do so, he is precluded from later attacking the account as irregular, after it has been approved by a judgment of the Court.

2. PARTNERSHIP (§ IV—18)—HYPOTHECATION BY TRUSTEE FOR PARTNERSHIP.

The hypothecation of a property for his own purposes by a person holding the same in trust for himself and another jointly, may be tantamount to an alienation thereof, and this under article 1092 C.C. (Que.) would give such other person the right to demand the immediate return of money he had contributed in the joint venture if such hypothecation impairs his security.

APPEAL from a judgment of the Superior Court, Greenshields, J., maintaining an accounting filed by plaintiff.

The appeal was dismissed.

L. H. Davidson, K.C., for defendant, appellant.
E. M. McDougall, for plaintiff, respondent.

BEAUDIN, J.:—The facts of this case appear by the judgment of Mr. Justice Lafontaine, that of the Court of Review and also in the judgment of Mr. Justice Greenshields, and it seems unnecessary to repeat them. It will be sufficient to sum up the conclusion to which I have arrived, as follows:—

I am of the opinion that the main contention of defendant, that a new contract or agreement had been substituted to the first by the letter from defendant to plaintiff, of 23rd January, 1904, and that of plaintiff to defendant, of 5th March, 1904, has been decided adversely to defendant, by the judgment of the Court of Review, rendered on the 11th of February, 1911; no appeal has been taken from that judgment; on the contrary, both parties acquiesced in it, and the defendant, in his inscription before the Court, specially excepts the said judgment in Review of above date.

This judgment of the Court of Review should have dismissed the plaintiff's action as premature, if the main point of the defendant had been maintained. On the contrary, the judgment orders the defendant to render an account, clearly indicating that the honourable Judges were of opinion that the original agreement between the parties continued to subsist. The reserve in the judgment, that all "other" conclusions will be passed upon by the final judgment, means, in my opinion, that if it appears by the account to be rendered that the properties are not prop-

erly described in the judgment of Mr. Justice Lafontaine, this description may be varied, and if the account should shew a lesser amount than $40,000 coming to plaintiff, the Court should reduce the sum allowed to plaintiff to the amount which would be finally determined by the account as fixed by the Court, but it is not open to the defendant to re-submit the main proposition again for a decision.

This judgment of the 11th February, 1911, although not final, was "definitive" on the question as to whether defendant owed an account to plaintiff. It constituted "*chose jugée*" on that point. (See *Huot* v. *Huot*, Que. 11 K.B., p. 522. An appeal would lie even to the Supreme Court: *Shaw.* v. *St. Louis*, 8 Can. S.C.R. 385; *La Ville de St. Jean* v. *Molleur*, 40 Can. S.C.R. 139.) The defendant, at any rate, acted on that judgment. Fifteen days had been allowed him to furnish the account; the delay expired on the 26th of February; on the 25th, he asked for an additional delay of three months; his motion was allowed to the extent of giving him fifteen days more; he asked for a further delay, which was denied to him, and having failed to render the account ordered by the Court of Review, the plaintiff took upon him to make it as well as he could under art. 568 C.P., with the materials in his possession, and it was filed in Court. The defendant did not contest the account, but moved to strike the inscription, on the ground that the account did not conform to the judgment of the Court of Review, and did not contain the information required by the judgment.

I think that the defendant cannot oblige plaintiff to furnish the very details he had in his possession, and that plaintiff has tried to get from defendant since all these years. I am of opinion that if defendant was not satisfied with the account as made by plaintiff, he was bound to contest it and supplement it with all other details he wanted to put before the Court. Not having done so, he is foreclosed from doing it now. Our art. 568, C.P., is taken from the Ordinance of 1667, title 29, art. 7, and consequently, the authorities cited at the argument by the plaintiff's counsel are in point and they shew that it was incumbent on defendant to contest the account as made, or supplement it, even if it was not strictly in conformity with the articles of the Code, as the objections now taken are merely questions of form and procedure, and are essentially technical in character. (See S. 1879-1-249, and particularly note 3.—Dalloz-Périodique, 1882-1-451, and particularly note 2.—S. 1863-1-310. Carré and Chauveau, question 1863, *Paquet* v. *Taché*, Que. 1 P.R. 510; *White* v. *Steytler*, Que. 1 P.R. 516; *Chevalier* v. *Cuvillier*, 21 L.C.J. 308.)

The account being admitted by the failure of the defendant to contest it, it seems to me that the judgment of the Superior Court should be confirmed purely and simply. The action of

QUE.
Court of Review.
1912
FRANK v. FORMAN.
Beaudin, J.

the plaintiff was virtually this: You, defendant, asked me to join in a venture to buy certain limits and lands in the counties of Portneuf and Quebec, and I agreed to put $40,000 to help in the purchase of same; in order to secure this advance, you were to put these properties in my name, or at least in our joint name; you have failed to do so, and I want to be reimbursed of my $40,000, but I am willing to continue to be a co-adventurer with you if you want to give me an account of what you have done with my money and put the properties in our joint name. In other words, plaintiff wants his $40,000, but gives the defendant the other alternative, if he so desires. This was evidently what the Court of Review had in mind when it reformed the judgment of Mr. Justice Lafontaine; the considerants of the judgment are to this effect; the defendant pretended that he owed no account to plaintiff, by reason of the substitution of a new contract for the first. If his pretension was declared well founded, it would obviate the necessity of an account, and deciding that question against the defendant, the Court gave him an opportunity, if he so desired, to avail himself of the alternative offered to him by plaintiff in the conclusions of his action; it was even the duty of the Court to decide first whether plaintiff was entitled to ask an account. (See *L'Heureux* v. *Lamarche*, 12 Can. S.C.R. 460.)

The defendant, in his factum, does not complain of the description of the properties, and we must assume that they are correct; the amount of $40,000 stands admitted by the failure of the defendant to contest the account, and I think that Mr. Justice Greenshields was right in ordering defendant to sign a deed in favour of plaintiff for a half interest, and, in default, to pay $40,000. It is to be remarked that plaintiff does not ask that the judgment shall avail to him as a title if defendant refuses to sign, but simply asks for a personal condemnation against the defendant for the amount, and this is the conclusion arrived at by the Superior Court.

Finally, defendant pretends that the sum is not yet due, because he has not sold or disposed, as yet, of the properties; it will be a sufficient answer to say that this point is also covered by the judgment of the Court of Review, and that if he signs a one-half interest to plaintiff of the properties in question, he will not be obliged to pay now the $40,000, but the parties will remain, as before, co-partners in the venture.

Moreover, defendant virtually alienated these properties by the mortgages he put on them, and this would be, of itself, sufficient to give plaintiff the right to claim his money under art. 1092 C.C.; in fact, the defendant has mortgaged these properties for $154,500 at different times since the 7th of January, 1904, date of the first mortgage in favour of M. Peter Lyall, and although it is impossible to say accurately what he has done with these moneys, as he did not file an account, as ordered by the

Court of Review, nor contest the one filed by the plaintiff, yet, from what can be gathered from the whole record, I have every reason to believe that he got enough from the realization of these loans by mortgages to cover all expenses made to date, including the money advanced by plaintiff, and whatever moneys the defendant may have advanced himself for this venture, and still have a balance to the credit side, and this might explain why defendant is or was not anxious to render an account.

I am of opinion to confirm the judgment of Mr. Justice Greenshields, with costs.

TELLIER and GUERIN, JJ., concurred.

Appeal dismissed.

Hannah Louise WILKERSON (plaintiff) v. R. C. McGUGAN and JAMES C. GASTON (defendants).

Saskatchewan Supreme Court. Trial before Brown, J. March 29, 1912.

1. ARBITRATION (§ II—13)—PRIOR PARTICIPATION IN THE DISPUTE BY THE ARBITRATOR.

Where one designated as referee by the parties themselves acted prior to the award as chief adviser to the agent of one of the parties, though with no intent to do wrong, the award must be set aside and the referee removed.

[See Hudson on Building Contracts, 3rd ed., 755.]

2. ARBITRATION (§ III—21)—PROCEEDING UPON ARBITRATOR'S PERSONAL INSPECTION.

Under an agreement stipulating that a builder will complete a house for occupancy "fully in keeping with the kind and quality of house as now standing" and specifying a referee to decide between the parties in case of any dispute between them as to the manner in which the house was completed, such referee has no authority to decide the matters in dispute on his personal inspection of the premises but should provide for a hearing and the taking of evidence if either party wished to adduce evidence.

3. ARBITRATION (§ IV—41)—SUBMISSION TO ARBITRATION—EXCESS OF DELEGATED POWER.

Under an agreement nominating a referee or sole arbitrator, and calling upon him to decide what was necessary for the contracting builder to do in order to complete a house which he had contracted to build for the other party, the referee cannot authorize the purchaser or mortgagee to complete on the builder's default nor can he, in his award, reserve the right so to authorize, nor has he authority to provide in the award that the builder shall not be freed from his obligation to do the work thereby directed to be done by way of completion of the contract until after the referee has approved of the manner of doing such work.

TRIAL of an action to set aside an award of an arbitrator or referee in respect of a building contract.

The action was maintained.

F. R. Turnbull, for plaintiff.
G. F. Blair, for defendants.

SASK.

S.C.
1912

WILKERSON
v.
MCGUGAN
AND
GASTON.

Brown, J.

BROWN, J.:—This is an action to set aside an award; and, although it is the duty of the Court to uphold an award where possible, yet in this case, for several reasons, the plaintiff must succeed in his application. I do not find that the referee, McGugan, acted in collusion with his co-defendant, but he did unquestionably act in a very injudicious manner. He took far too much interest in Gaston's behalf to act the part of an impartial referee. In framing, writing and advising on the letter of July 29th, 1911, which Craig, Gaston's agent, sent to the plaintiff, and generally prior to the award, McGugan seems to have acted as Craig's chief adviser. Arbitrators or referees must observe the fundamental rules which govern judicial proceedings. They have judicial functions to perform, and in the performance of their functions they must not allow either side unknown to the other to use means of influencing their conduct or decisions: *Harvey* v. *Shelton*, 7 Bevan 455; *Gregson* v. *Armstrong*, 70 L.T. 106; Hudson on Building Contracts, 3rd ed. 755. By acting as he did in this case, though not intentionally doing wrong, the referee was likely to become prejudiced in favour of his co-defendant. Gaston's agent was very much at fault in asking the referee to so act, and cannot therefore very well complain of the consequences of this action. Again, the referee did not provide for a hearing or for the calling of witnesses. He simply conferred with the parties themselves separately, and then, after interviewing some experts and viewing the premises himself, he made his award.

It is contended, however, that in this case it was not contemplated by the parties that there should be a hearing or evidence taken, but that the referee had power under the submission to decide the matters in dispute on his own personal view of the premises. A study of the agreement does not permit me to agree with that contention. The agreement stipulates as follows:—

> The builder agrees with the purchaser to fully complete the said house on said lot on or before June 15, 1911, in such a manner that it will be completed for occupancy, fully in keeping with the kind and quality of the house as now standing, and in a manner satisfactory to the purchaser or his agent, and in case of dispute as to the manner in which the house is completed, R. C. McGugan, of Regina, shall be referee to decide fairly what is just and right between the builder and the purchaser, and the builder and purchaser shall abide by and carry out R. C. McGugan's decision.

By virtue of this provision the house was to be completed in keeping with the kind and quality of the house "*as now standing*"; and I fail to see how this referee could know how the house stood at the time of the agreement without evidence being offered or a hearing of some kind had, and he could not arrive at a just decision without knowledge on that point. It is

true that the evidence of McGugan would indicate that he had casually observed the house before the date of the agreement, but not that he made a careful inspection, nor does it appear that the parties to the agreement were aware even of his casual observations at the time of the making of the agreement.

I am therefore of opinion that the referee should have appointed a time to hear both of the parties on the matters in dispute and to have taken evidence with reference thereto if either party wished to adduce evidence. It was also, in my judgment, clearly objectionable for the referee to interview builders or experts in the absence of the parties to the dispute, and to get evidence from them as to what was customary or proper under the circumstances. Again, the referee undertakes to decide many matters which the agreement does not contemplate him doing. It calls upon him to decide, and to decide only, what was necessary on the part of the builder to do in order *to complete this house;* but he goes further, and reserves the right, in default of the builder doing it, to authorise the purchaser to get it done, and further, to authorise the custodians of the mortgage to deduct the cost of getting it done. In addition to all that, he stipulates that the builder shall not be freed from his obligations until he (the referee) approves of the manner of doing the work so ordered. I cannot see that there is anything unreasonable in these stipulations, but they are, in my judgment, clearly outside of the submission, and the award to that extent would be bad.

For the first named reason, however, the award must be set aside *in toto*, and I think also under the circumstances it is better that the referee should be removed. He himself by his pleadings assented to this being done. The counterclaim must be dismissed, as no action can arise under the counterclaim until a proper award has been made. If the parties cannot agree upon a suitable referee, either party will have leave to apply in Chambers to have one appointed. I might add that it is with regret that I have been compelled to reach this conclusion, because the award, with some slight exceptions, seems to me to have been reasonably fair to the parties, and the result is an expensive litigation to very little purpose. I will not allow any costs for or against the referee, because although he acted in some respects very injudiciously, yet, as I have already intimated, I am satisfied he tried to deal fairly in the matter. In this connection see *Haigh* v. *Haigh*, 31 L.J. Ch. D. 420; *Mozley* v. *Alston*, 16 L.J. Ch. 217 at 226; *Chicot* v. *Lequesne*, 2 Vesey Sr. 315; *Lonsdale* v. *Littledale*, 2 Ves. Jr. 451.

The plaintiff will have his costs against the defendant Gaston both on the claim and counterclaim, but as the greater portion of the time at trial was occupied with the findings of the referee as to the work to be done, and which, as I have al-

SASK.

S.C.
1912

WILKERSON v. MCGUGAN AND GASTON.

ready stated, seems to me to be reasonably fair, and likewise most of the witnesses called on the same matter, I will not allow any witness fees, and the counsel fee to plaintiff will be fixed accordingly.

Award set aside and counterclaim dismissed.

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H. C. J.
1912

Feb. 15.

DEMPSTER v. RUSSELL.

Ontario High Court. Trial before Kelly, J. February 15, 1912.

1. TIMBER (§ I—8)—TIME FOR REMOVAL—LICENSE CONTRACT.

Where a license agreement for cutting standing timber contains no time limit, it will be presumed that the cutting must be completed within a reasonable time.

2. TIMBER (§ I—7)—FORFEITURE BY NON-REMOVAL.

Where a sub-licensee of rights to cut standing timber is notified by the first holder that the latter claims the timber as having reverted to him and that the license from himself has expired, when in fact a reasonable time has not elapsed for cutting the timber, and no time limit is specified in the license agreement, the sub-licensee is not entitled to treat such notification as an interference preventing him from performing his own contract with the intermediate licensee.

ACTION for damages for breach of a contract to cut standing timber.

Judgment was given for plaintiff.

A. G. Slaght, for the plaintiff.

M. F. Pumaville, for the defendants.

KELLY, J.:—The plaintiff, by agreement dated the 27th October, 1909, and the 6th November, 1909, bargained and sold to the defendants all the merchantable timber on the south half of lot 1 and on the south half of lot 2 in the 2nd concession of the township of Armstrong, in the district of Nipissing, except certain portions reserved by the agreement; the defendants to have two years to remove the timber; the plaintiff to give the defendants "a free clearance of all incumbrances, timber dues, and Crown dues," and also to give the defendants quiet and peaceable possession for the removal of the timber; the price to be paid being $1.50 per thousand feet log measure; measurement to be with what is known as Scribner's log rule; the payment to be made, $200 on the 1st February, 1910, and the balance of the price of the timber taken out in the season of 1909-1910, on the 1st April, 1910; "and the operations for the season of 1910 and 1911 on the terms and conditions as aforesaid, and all to be completed by the first day of April, 1911, when final settlement will be made as described in this agreement."

The agreement was drawn by the defendant R. S. Russell, and, before being signed, at the plaintiff's request there was added, immediately following the words above-quoted, the words

"and to be all removed in the season of 1910, if possible, or through any unforeseen conditions."

The plaintiff's rights to the timber on the south half of lot 1 were acquired from one David Bass (the locatee of the property), under an agreement dated the 1st March, 1909, a term of which was, that Bass would clear the plaintiff "of all dues on said timber." The plaintiff's rights to the timber on the south half of lot 2 were acquired from one Stafford (the locatee of that property), under an agreement dated the 15th September, 1908, a term of which was, that Stafford would give the plaintiff "a free clearance of all incumbrances such as timber dues and Crown dues;" this agreement also gave the plaintiff three years from its date to clear the timber from that lot. The agreement between Bass and the plaintiff did not fix any time within which the timber on the south half of lot 1 was to be removed.

Stafford transferred his rights in the property to one Neely, in 1909, and these rights were acquired by John Roulston in April, 1910; Roulston admitted at the trial that when he acquired these rights he had notice that the plaintiff had a contract for the timber.

The defendants let the contract to take off the timber to Bass and one Stephenson, who proceeded to cut and remove it.

On the 11th January, 1910, the plaintiff's solicitors wrote the defendants that the plaintiff prohibited them from drawing from his property any logs until they had been properly measured, and that the plaintiff wished an opportunity to be present when the measurement was being made. The letter also stated that the solicitors had written the defendants' two employees warning them not to remove any of the logs until they had been properly measured.

The plaintiff, however, asserts that the instructions he gave the solicitors were to ask to have the logs measured at the mill.

No reply was given to this letter, nor does it appear to have affected the defendants in their operations, for the defendants admit that, when Bass and Stephenson spoke to them of the solicitors' letter, the defendant R. S. Russell told them to go on with the work of taking off the timber. It is also admitted by the defendants that it was not until the summer of 1910 that they decided not to go on with the contract. The work was proceeded with, and during the winter of 1910 timber was removed, for which $459.32 was paid by the defendants to the plaintiff. Before settlement was made by the defendants with the plaintiff for this timber, the plaintiff procured, through Bass and Neely, the necessary "clearance" papers therefor, and delivered the same to the defendants. Some time afterwards, Bass and Roulston made some claim to be the owners of the timber on the lots in question. There appears to have been no foundation for such claim. It was also asserted by one or both

ONT.

H. C. J. 1912

DEMPSTER v. RUSSELL.

Kelly, J.

of them, in the summer of 1910, that the time within which the plaintiff was entitled to remove the timber had elapsed. This claim I find to be without foundation. The three years given for removal by the plaintiff's agreement for the purchase of the timber on the south half of lot 2 had not expired; and, though the agreement for the purchase by the plaintiff of the timber on the south half of lot 1 is silent as to the time within which it was to be removed, I find that, under all the circumstances, a reasonable time for such removal had not elapsed in August, 1910, when Bass claimed to be entitled to the timber. The fact that these claims were set up by Bass and Roulston was no justification for the defendants' refusal or neglect to perform their contract.

Before entering into the contract, the defendants had inspected the properties, and were aware of their condition, and of the improvements made thereon. They were also aware of the manner by which the plaintiff had acquired the timber, his agreements for the purchase thereof having been in the defendants' possesion at or prior to the time the defendant R. S. Russell drew the contract between the plaintiff and defendants, and these agreements were recited in that contract; and there is no evidence that, at the time in 1910 when Bass and Roulston stated that the timber was theirs, anything had happened giving them the right to it. So little, indeed, do the defendants appear to have been affected by these statements, that they did not even make inquiries to ascertain if they were true.

In the summer of 1910, some discussion took place between the defendant R. S. Russell and the plaintiff about the balance of the timber: the plaintiff says that Russell asked him to take it back; and, when he asked Russell to put this request in writing, he refused, but then said he would give the plaintiff to the beginning of September, 1910, to cut and sell the timber to "other parties."

Russell's evidence is, that he gave the plaintiff the privilege until the 1st September to sell the timber to other parties.

The plaintiff did not exercise this privilege, but on the 29th August, 1910, he wrote the defendants as follows:—

Cobalt, Aug. 29/10.

Russell & Sons, New Liskeard, Ont.

Dear Sirs:—This is to notify you that I have not sold timber and that your contract still holds.

I have obtained the best possible legal advice concerning possible interruptions of Bass and Roulston, and find that neither party has any right whatever to timber or to forbid you fulfilling your contract; consequently you must proceed with work until stopped by force. Then I will clear the way for you. In case of any trouble with these parties notify me at once.

J. D. Wilson.
(Witness).

Robt. S. Dempster,
Cobalt, Ont.

The defendants made no reply to this letter, nor did they do anything afterwards towards carrying out their part of the contract.

In view of these facts and of the evidence of the defendant R. S. Russell that there was no interruption by the plaintiff of the defendants' operations, except the solicitors' letter of the 11th January, I find that there was no interference on the part of the plaintiff with the defendants or their men preventing them from performing their contract or entitling the defendants to cease operations, and that the plaintiff did not prevent the defendants from performing their contract.

The defendant R. S. Russell, at the trial, gave, as a reason for the defendants' failure or refusal to fulfill their contract, that he feared, if the plaintiff failed to secure "clearance" papers for the timber, he (the plaintiff) would be subject to payment of penalty dues.

With the knowledge which the defendants had at the time of entering into the contract, they must have been fully aware of the possibility of such dues becoming payable; and I can only assume that they relied on the plaintiff, under the terms of the contract, to protect them against such dues and the consequence of their becoming payable. Moreover, it must not be overlooked that, when the defendants asked for a "clearance" in respect of the timber cut in the winter of 1909-1910, the plaintiff obtained it promptly, and apparently without any objection or difficulty. From this it may readily be inferred that there was then no default in complying with the Crown Timber Regulations. *Cockburn* v. *Muskoka Mill and Lumber Co.*, 13 O.R. 343, *Langmaid* v. *Mickle*, 16 O.R. 111, and *McArthur Brothers Co.* v. *Deans*, 21 O.R. 380, cited by counsel for the defendants, had reference to pine timber, and are not applicable to this case.

The plaintiff, therefore, did not refuse or fail to give the defendants the "clearance" of incumbrances, timber dues, and Crown dues, or to give peaceable possession such as he contracted to give.

It is clear, too, from the evidence, that the plaintiff did not waive his rights under the agreement; and there was no justification for the defendants' failure or refusal to perform their part of the contract.

Then as to the amount to which the plaintiff is entitled. The plaintiff, not being in default and not having waived the contract or treated it as otherwise than in force, was entitled to insist on its performance by the defendants. The defendants, however, allowed the time to run on without doing anything towards cutting and removing the timber, from the spring of 1910 until the time had expired for completion and settlement, and thus made it practically impossible for the plaintiff other-

ONT.

H. C. J. 1912

DEMPSTER v. RUSSELL.

Kelly, J.

wise to get the benefit of the timber, as the time given him by his vendors for removal of it was nearing its expiration, if, indeed, in the case of one lot, it had not then expired.

The uncontradicted evidence is, that there remained on the properties from which the plaintiff sold the timber to the defendants merchantable timber contracted to be sold by the plaintiff to the defendants, to the amount of 881,200 feet. It was shewn that in the case of standing timber, such as is in question here, there is the possibility of there being some affected by rot or decay. Unfortunately, however, the evidence does not shew what percentage of the whole was likely to have been so affected. Making what I believe, under the circumstances, to be a reasonable allowance for such defects, I find the value of the timber agreed to be purchased and paid for by the defendants, and not so paid for, calculated at the rate of $1.50 per thousand feet, to be $1,270.

There will, therefore, be judgment for the plaintiff for $1,270 and interest from the 1st April, 1911, and costs. The claim made by the defendants is dismissed with costs.

Judgment for plaintiff.

RYAN v. GABRIEL.

SASK.

S.C. 1912

Mar. 29.

Saskatchewan Supreme Court. Trial before Johnstone, J. March 29, 1912.

1. FIRES (§ I—7)—BURNING STUBBLE—NEGLIGENCE.

Where for the purpose of getting rid of stubble a person built a fire on his land in a heavy wind, and without having first taken the precaution prescribed by law to prevent its spread, and after burning off the stubble, left the land with no one to look after any smouldering matter, he is guilty of gross carelessness subjecting him to liability for the loss entailed upon the adjoining land by the spread of the fire thereto.

[See also Underhill on Torts, 3rd Can. ed., 200, 202*b*.]

TRIAL of an action for damages caused by the spreading of a fire set out by defendant.

The action was maintained.

W. A. Boland, for plaintiff.
W. R. Parsons, for defendant.

JOHNSTONE, J.:—After a careful examination of the evidence both for the plaintiff and the defendant, I have had little difficulty in arriving at the conclusion that the fire set out by the defendant on his farm on the 20th October, 1910, is the fire which ultimately destroyed the plaintiff's property as claimed by the plaintiff in his statement of claim.

The defendant, for the purpose of getting rid of stubble on one of his fields, a field nearest the roadway, started a fire in the stubble in a heavy wind, without first having taken the precau-

tions prescribed by law to prevent its spread. The stubble was burnt off and the defendant and his two sons left the field for the house for dinner. During the dinner-hour the fire started up again, presumably in some dead grass or rubbish on the roadside, and spread to and across the roadway unto the adjoining lands and thence to the plaintiff's lands, injuring a portion of his property, and totally destroying other portions, of the value of $1,500 or thereabouts, as the plaintiff claims, particulars of which loss and damage were delivered to the defendant.

With the exercise of slight precaution, this fire might have been confined to the defendant's lands; and in abandoning the field at the time he did, without having left some one in charge to look after the smouldering matter, he was guilty of gross carelessness. The efforts of one man alone in the proper place would, owing to the conditions, have been sufficient to have averted the trouble.

It is unfortunate that more care is not observed in the setting out of fires for husbandry purposes by farmers. There were no less than three actions tried at the same sittings for damages sustained through fires started in this manner; and legislation seems to have availed but little in the suppression of prairie fires, which invariably prove so disastrous to the farmer.

The evidence as to the loss sustained in this instance by the plaintiff was not seriously disputed. No witnesses were called by the defendant to prove the loss less than that alleged by the plaintiff. After making some allowances on items as to which it appeared to me some reduction should be made from the values as fixed by the plaintiff, I assess the damages sustained at $1,250.

There will be judgment for the plaintiff for that amount and costs.

Judgment for plaintiff.

GOSSELIN v. BAR OF MONTREAL (NO. 1).

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J. Trenholme, Lavergne, Cross and Carroll, JJ. March 15, 1912.

1. PROHIBITION (§ III—10)—INFERIOR COURT—BAR COUNCIL.

The council of the Bar when investigating a charge against an advocate accused of having committed an act derogatory to the dignity of the profession exercises judicial functions; and as such constitutes an "inferior court" amenable to *certiorari* and prohibition.

[*Honan* v. *Bar of Montreal*, 30 Can. S.C.R. 1, followed; *O'Farrell* v. *Brassard*, 1 L.N. (Que.) 28, distinguished.]

2. SOLICITOR AND ATTORNEY (§ I B—12)—DISBARMENT — INVESTIGATING COMMITTEE.

The *syndic* (or attorney for the Council of the Bar) who lays a complaint in his professional quality has no right to sit as a member of the committee which investigates the charge, and the order of suspension by a committee including the *syndic* is illegal and against the fundamental principles of justice.

QUE.

K. B.
1912

GOSSELIN
v.
BAR OF
MONTREAL
(No. 1).

3. CERTIORARI (§ II—27)—STAYING PROCEEDINGS ATTACKED.

When the Council of the Bar is served with a notice of *certiorari* in respect of a charge of unprofessional conduct against a member, it should suspend all proceedings pending the decision on the *certiorari*, and if it disregards the same and proceeds to decree the suspension of the advocate who had served notice of this *certiorari* the execution of this suspension will be restrained by prohibition.

APPEAL from a judgment of the Superior Court (Lafontaine, J.) of the 23rd of February, 1910, dismissing the plaintiff, appellant's, demand to have declared a writ of prohibition absolute against a sentence of the Bar of Montreal decreeing his suspension from the order for five months.

The appeal was allowed.

Messrs. *Aimé Geoffrion*, K.C., and *L. A. Gosselin*, for appellant:—The sentence pronounced by the respondent was on a complaint which did not disclose any offence, hence a lack of jurisdiction. (The charge was of having entered into contract with the Dominion Mercantile Protective Association, Limited, making certain stipulations as to remuneration and fees, and unlawfully soliciting through such company.) Appellant was the company's attorney and had nothing to do with the business transactions thereof. Secondly, before investigating the charge against appellant and suspending him, respondent had instituted a criminal action against the Dominion Mercantile charging it with such unlawful solicitation, had lost it and carried it to appeal. Appellant had recused the council on this account and yet respondent had seen fit to proceed, and this even though appellant had voluntarily cancelled his contract with the Dominion Mercantile. Finally appellant gave notice of presentation of writ of *certiorari*, but respondent pushed ahead and condemned appellant before the writ could issue. This was a flagrant illegality: C.P. 1296. It was not for respondent to decide whether or no the petition for *certiorari* was well founded, but for the Court and the Court alone: C.P. 1294-5. And for the Court alone also to decide whether the remedy of *certiorari* was available to appellant. And besides the Supreme Court has decided that it does lie, in such a case: *Honan* v. *Bar of Montreal*, 30 Can. S.C.R. 1. It is clear, therefore, that prohibition now lies first owing to lack of jurisdiction, and second because there is no other recourse: *O'Farrell* v. *Brassard*, 1 L.N. 32; *Roberts* v. *Humby*, 3 M. & W. 120; Lloyd on Prohibition, pp. 12 and 13.

Messrs. *J. Crankshaw*, K.C., and *J. L. Perron*, K.C., for respondent. Appellant appealed from the judgment of the council of the Bar of Montreal to the General Council of the Province and thereby admitted the Council's jurisdiction and the General Council confirmed the decision of the local Council. Now, under the Bar Act the Councils of the Bar sitting in disciplinary matters are family councils who examine and weigh carefully

the circumstances which accompany the facts brought to their knowledge and which serve as grounds for their decision.

It is sufficient if the facts be sumitted to the Council, and if they find, after proof and after hearing the accused party, that the acts complained of are derogatory to professional honour and dignity; they apply the by-laws if the case submitted comes within the purview of any of the by-laws, and, in the absence of a by-law applicable to a particular case, they decide, definitely, to the exclusion of all Courts, subject only to appeal to the General Council—whether the conduct of the person accused is contrary to professional dignity or against the discipline of the Bar. (See art. 3527, R.S.Q., 1888, sub-sec. 2.)

In the case now in question, the circumstances upon which the complaint was based were enquired into, evidence was adduced of the facts, and, after being carefully examined and weighed, the Council came to the conclusion set forth in the judgment and sentence.

In the course of the judgment now appealed from, His Lordship Judge Lafontaine maintains the contentions of the defendants (respondents) to the effect that a writ of prohibition does not lie and will not be issued against a tribunal unless it exceeds its jurisdiction, and that prohibition is neither in the nature of an appeal from nor a revision of the judgment rendered by the tribunal, that, moreover, irregularities in procedure give no right to a writ of prohibition, that under the Bar Act, the Bar of Montreal is given the right to decide definitely to the exclusion of all Courts, whether the act complained of is derogatory to the honour and dignity of the Bar, and that the service by the plaintiff of the notice of application for a writ of *certiorari* did not, under the circumstances, take away from the Council of the Bar, the jurisdiction which it had over the complaint in question. R.S.Q. 1909, arts. 3523, 3527.

A writ of prohibition lies only when there is, in the tribunal complained of, an absence or an excess of jurisdiction. See art. 1003, C.C.P. (Quebec); and see *Molson* v. *Lambe*, 15 Can. S.C.R. 253, in which it was held that recourse cannot be had to the writ of prohibition where it appears that the Court against which it is sought had jurisdiction over the matter in which it was acting.

See, also, Wood on Mandamus and Prohibition, at pp. 141 and 147, and High on Extraordinary Legal Remedies, sec. 771. A prohibition will not lie after sentence, unless the want of jurisdiction appear on the fact of the proceedings. See Spelling on Law of Injunctions and Extraordinary Remedies, vol. 2, p. 1432, par. 1760. The fact as to whether the Court acted rightly or not is not open to enquiry. If it had jurisdiction the writ could not issue, however wrong or erroneous the action of the Court may be. See Wood on Mandamus, at p. 147; and see *Vidal* v. *Bar of Quebec*, 27 Que. S.C. 115.

QUE.
K. B.
1912
GOSSELIN
v.
BAR OF
MONTREAL
(No. 1).

Prohibition does not lie to prevent a subordinate Court from deciding erroneously or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. See High on Extraordinary Legal Remedies, sec. 772. Prohibition will not lie when any other remedy exists: *Tessier* v. *Desnoyers*, 12 Que. S.C. 35; *Beaupré* v. *Desnoyers*, 11 Que. S.C. 541; *Bastien* v. *Amyot*, 15 Que. K.B. 22.

Mere irregularities in the proceedings of an inferior Court are not sufficient warrant for granting prohibition, since the allowance of a writ on such grounds would be the exercise of appellate power. See High on Extraordinary Legal Remedies, sec. 771. When there are only irregularities or informalities in the procedure, recourse cannot be had to a writ of prohibition. See *Laliberté & Fortin*, R.J.Q. 2 Q.B. 573.

A. Geoffrion, K.C., in reply.

The Court deliberated and in the January term ordered a re-argument.

Judgment was finally rendered on March 15th, 1912.

TRENHOLME, J., dissented and would have dismissed the appeal, being of opinion that the Council of the Bar was sole judge and master in matters of this kind and that the objections raised by appellant were simply of a technical nature and of no importance.

CARROLL, J., also dissented and would have dismissed the appeal on the ground that the notice of *certiorari* should not prevent the Bar from proceeding with its investigation and that the Bar was in the right in disregarding the same.

The opinion of the majority of the Court was rendered by

ARCHAMBEAULT, C.J.:—Appellant, advocate at the Montreal Bar, complains of a judgment quashing a writ of prohibition wherein he prayed that the Bar be restrained from carrying into effect a sentence suspending him for the space of five months.

Appellant contends that the Council of the Bar acted without jurisdiction, first, because the complaint and the sentence do not disclose that he was guilty of any offence that would render him liable to the punishment inflicted; second, because the Council proceeded with the investigation into the complaint without paying any regard to a notice of application for *certiorari* which appellant had served on it.

Appellant complains, moreover, of irregularities in the proceedings of the Council.

Thus, in the first place, appellant contends that the Council exceeded its jurisdiction inasmuch as it neither alleged nor

proved that he had committed an offence derogatory to the honour and dignity of the Bar.

Article 3510, R.S.Q. (1888) applies to the present case. It empowers the General Council of the Bar to pass by-laws and rules for the maintaining of the honour and the dignity of the Bar and the discipline amongst its members.

And article 3527 adds:—

> In default of a by-law of the general Council applicable to a particular case, the Council of the section decides definitely, to the exclusion of all Courts, subject only to appeal to the general Council, whether the act complained of is derogatory to the honour and dignity of the Bar, or against the discipline of its members, if the position or office is incompatible with the practice of the profession of advocate, and the calling, trade or industry, business or office is inconsistent with the dignity of the profession.

So, then, it is the Council of the section, in the absence of a by-law of the General Council, which decides whether the act complained of is derogatory to the honour and the dignity of the Bar or contrary to the discipline of its members.

Therefore, the Council of the Bar of Montreal in deciding that appellant had been guilty of an act derogatory to the honour and dignity of the Bar acted within the limits of its jurisdiction.

Now, a writ of prohibition is a remedy which can be granted only in cases of absence or of excess of jurisdiction. This is no longer controvertible. This has been held repeatedly by our Courts and more particularly by the Supreme Court in *Honan* v. *The Bar of Montreal*, 30 Can. S.C.R. 1, a case identical to the present one. In this case the late Mr. Justice Girouard spoke as follows:—

> Members of a corporation who submit to extraordinary powers like those enjoyed by the Bar of the Province of Quebec *to the exclusion of all Courts*, have no reason to expect relief from Courts of justice, except where there is absence or excess of jurisdiction. (30 Can. S.C.R. 1.)

The judgment in the case of *O'Farrell* v. *Brassard*, 1 L.N. 32, invoked by appellant, does not apply to the present case. The law at that time was different from what it is nowadays. True, it gave the General Council, as does the present law, the power of making by-laws concerning discipline and honour amongst members of the Bar, but it contained no disposition similar to that of art. 3527.

The Court of Appeal decided in this case of *O'Farrell* v. *Brassard*, 1 L.N. 32, that the Council of a section had no jurisdiction outside of those acts declared by by-law to be derogatory to the honour and dignity of the Bar.

The present law is quite different. It declares in absolute terms that, in the absence of a by-law emanating from the General Council, the Council of a section is to decide finally and

QUE.
K. B.
1912
GOSSELIN v. BAR OF MONTREAL (No. 1).
Archambeault, C.J.

to the exclusion of all Courts, whether the act complained of is or not derogatory to the honour and dignity of the Bar.

Under the old law the Council of a section had, therefore, no jurisdiction in the absence of a by-law emanating from the General Council. Under the present law, on the other hand, it has to decide the case itself.

It follows that in the *O'Farrell* case [*O'Farrell* v. *Brassard*, 1 L.N. 32] prohibition lay seeing the Council of the section had acted without jurisdiction.

Here, on the contrary, the Council of the Bar of Montreal had jurisdiction and prohibition does not lie. The Courts, just as individuals, must submit to the law of the land. And the law on this point declares that the Councils of sections have a final and exclusive jurisdiction (to the exclusion of all Courts).

We cannot leave this enactment aside and substitute the ordinary Courts to the special tribunal which the law has created to decide whether the act complained of is or not derogatory to the honour and dignity of the Bar.

In the second place appellant contends that the Council of the Bar of Montreal paid no attention to the service upon it of a notice of demand of *certiorari* and proceeded notwithstanding with the trial on the complaint and rendered judgment thereon.

Respondents answer that this at the most is only an irregularity which cannot, therefore, give rise to prohibition.

There is no doubt, as we have said, that a writ of prohibition can be granted only for absence or excess of jurisdiction and does not lie in cases of mere irregularities.

But are we in the presence of irregularities or of an excess of jurisdiction?

Article 1295 of the Code of Procedure declares that before a writ of *certiorari* can issue "a previous notice of time and place at which the petition will be presented must be served upon the functionary seized of the case, or who rendered the judgment, as well as upon the other parties in the case;" and art. 1296 adds that—

> The service of such notice on the functionary seized of the case or who rendered the judgment, has the effect of suspending all proceedings in the Court below.

The service of this notice is, therefore, equivalent to an order upon the Court seized of the cause to suspend all proceedings. Such Court should from that moment obey the law and suspend all its proceedings. If it fails to do so and goes on with the case it acts without jurisdiction and the judgment it renders may give rise to a writ of prohibition. Otherwise it would be necessary to hold that in such a case the party complaining has no remedy. The inferior Court could disregard the demand of *certiorari* and there would be neither appeal from its decision nor right to a writ of prohibition. It is impossible for me to

admit such a doctrine. Inferior Courts are subject to the superintending and reforming power, and control of the Superior Court, and this control is exercised by means of *certiorari* or of prohibition.

But this raises necessarily another question. Was the Council of the Bar of Montreal, sitting on the complaint lodged against appellant, an inferior Court subject to *certiorari*.

To my mind there can be no doubt on the subject. It is true that according to art. 1292 the remedy by way of *certiorari* exists in cases where no appeal is given from the inferior Courts mentioned in arts. 59, 63, 64 and 65, to wit, the Commissioners' Court, justices of the peace in the exercise of their civil jurisdiction, the Recorder's Court and the Harbour Commissioners.

But art. 1307 adds that "the procedure regulated by this chapter applies also to all other cases in which the writ of *certiorari* will lie, and against any other inferior Court not referred to by art. 1292," with the exception of the Court of Vice-Admiralty.

This enactment is of a general character and subjects to the remedy of *certiorari* all inferior Courts with the exception of the Vice-Admiralty Court.

Moreover, this is only the sanctioning of another disposition of the law to be found in art. 50 C.P., which says:—

> Excepting the Court of King's Bench, all Courts, circuit Judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the Judges thereof in such manner and form as by law provided.

This article contains everything necessary to enable us to decide which Courts, under our law, are to be considered as inferior Courts. All Courts of justice, with the exception of the Court of King's Bench, which is a Court of appeals, and the Superior Court, which is a Court of original jurisdiction, are inferior Courts. Every Court which is subject to the superintending and reforming power of another Court is an inferior Court; that is the characteristic of an inferior Court.

This doctrine I find laid down in absolute terms in 9 Halsbury's Laws of England, *verbo* "Courts," p. 11. Speaking of inferior Courts he says:—

> They derived their general title of inferior Courts because they were and are, in the great majority of cases, subject to the control and supervision of the Court of King's Bench, or King's Bench Division as a Superior Court. A part of the original inherent jurisdiction of the Court of King's Bench was to examine and correct all errors committed by the inferior Courts, whether in matter of law or in exceeding the jurisdiction that had been conferred upon them.

This question has often come up before our Court. In a case of *Hamilton et al.* v. *Fraser et al.* (Stuart's Reports, p. 21),

QUE.
K. B.
1912
GOSSELIN
v.
BAR OF
MONTREAL
(No. 1).
Archambeault, C.J.

Chief Justice Sewell, speaking for the Court of King's Bench, said:—

> Every Court of limited jurisdiction must be subject to control; for where there is no control there can be no limited jurisdiction.

In another case of *Robillard* v. *Blanchet*, 19 Que. S.C. 383, Andrews, J., maintained a writ of prohibition against the Circuit Court non-appealable, and he said:—

> It may at first sight seem strange for a Judge of the Superior Court to prohibit a proceeding in the Circuit Court presided over by a Judge of the same Superior Court, of absolutely equal authority with himself; but when more closely looked into, the reason becomes apparent. As Chief Justice Sewell said, there must be control. The Superior Court and the Judges of the Superior Court, sitting as such, are controlled by the appellate Courts. If prohibition be issued by them to the Circuit Court, their action becomes at once subject to that control; but if prohibition does not lie to the Circuit Court, then what control or remedy exists even in the most flagrant case of assumption or usurpation of jurisdiction by the Circuit Court. It would then become despotic, irresponsible and almost necessarily tyrannical.

This Court has also decided the question in the same sense as regard the District Magistrate's Court in the case of *Désormeaux* v. *Corporation of Ste. Thérèse*, 19 Que. K.B. 481. Following these same principles we arrived at the conclusion that the District Magistrate's Court is an inferior Court against which prohibition will issue where it exceeds its jurisdiction. And we were unanimous on this question.

Now, in the present case, the Council of the sections of the Bar of the province have been formed into so many Courts to pass upon the acts which are derogatory to the honour and dignity of the Bar. These Courts, as all the other special tribunals of the province, are inferior Courts, and as such are subject to the control and superintending power of the Superior Court. Hence it follows that *certiorari* and prohibition proceedings will lie against them in certain cases.

> A *certiorari* to a subordinate Court or tribunal or an officer operates as a stay of proceedings *from the time of its service* or of formal notice of its issue, unless the judgment or order complained of has begun to be executed. If they afterwards proceed it is a contempt, and the subsequent proceedings are void because *coram non judice*. (6 Cyc. 800.)

But it has been argued that the Council of the Bar in exercising the rights conferred upon it by law did not act as a Court and is not, therefore, subject to the writ of *certiorari*.

I do not hesitate to reject such a proposition. Every Council of a section is a corporation (art. 4479). In the exercise of its disciplinary powers, it may summon witnesses, and to compel them to appear and answer and to punish them in case of refusal it possesses all the powers of the Superior Court (art. 4996).

It may in its discretion condemn one party or the other to pay costs or divide the costs (art. 4496).

It exercises these powers to the exclusion of all Courts and no appeal to the ordinary Courts lies from its decisions (arts. 4501 and 4504). Surely those are judicial functions. The Council is substituted for the ordinary Courts and its functions participate in the nature of the functions of such Courts.

This has been already expressly decided by this Court in *O'Farrell* v. *Brassard*, 1 L.N. 28, and by the Court of Appeals in the case of the *Bar of Montreal* v. *Honan*, 8 Que. K.B. 26.

In the *O'Farrell* case the late Mr. Justice Cross spoke as follows:—

> The Bar of the Province of Quebec, having chosen to accept a charter of incorporation, and to assume the exercise of judicial functions, thereby conferred upon them, have as a consequence abdicated the right of arbitrary expulsion, and subjected their action to the supervision of higher tribunals. (1 L.N. 28.)

In the *Honan* case [*Bar of Montreal* v. *Honan*, 8 Que. K.B. 26] one of the considérants of the Court of Review reads as follows:—

> Considérant que les conseils de section, dans l'exercice de leurs attributions spéciales et disciplinaires, sont des tribunaux inférieurs qui doivent justifier de leur juridiction. (8 Que. K.B. 30.)

In this same case of *Bar of Montreal* v. *Honan*, the late Mr. Justice Girouard, of the Supreme Court, said:—

> Members of a corporation who submit to extraordinary powers like those enjoyed by the Bar of the Province of Quebec, *to the exclusion of all Courts*, have no reason to expect relief from Courts of justice, *except when there is absence or excess of jurisdiction*. (30 Can. S.C.R., at page 13.)

A similar question arose in a case of *Tremblay* v. *Bernier*, 17 Que. L.R. 185. This case dealt with the Chamber of Notaries, which possesses disciplinary powers similar to those enjoyed by the Bar. And Casault, J., expressed himself on the subject:—

> Les fonctions de la commission de discipline de la chambre des notaires, lorsqu'elle entend une plainte contre un notaire, en vue de lui appliquer les peines disciplinaires, sont judiciaires, et partant sujettes à prohibition en cas d'abus par défaut de jurisdiction.

The cases cited herein above have been submitted to about thirty Judges, to all the Courts of the land: Superior Court, Court of Review, Court of Appeals and Supreme Court, and only one Judge, the late Judge Stuart in the *O'Farrel* case [*O'Farrell* v. *Brassard*, 1 L.N. 32], was of opinion that the Bar of the province, when in the exercise of its disciplinary functions, does not act as a Court of law. The jurisprudence is, therefore, well-established in our country, and we see no reason to depart from it.

One last question remains to be examined. Has the right to

QUE.
K. B.
1912
GOSSELIN
v.
BAR OF MONTREAL (No. 1).
Archambeault, C.J.

proceed by writ of *certiorari* been taken away by the statute which incorporated the Bar of the province and created the Councils of sections? There is no doubt that the right to *certiorari* may be taken away by statute in a particular case.

As we have seen art. 3527, R.S.Q. (1888), enacts that the Council of a section decides finally and to the exclusion of all Courts. Does this disposition abrogate the right to *certiorari?* Evidently not.

It is precisely because the Council of the Bar decides finally and to the exclusion of all Courts that the remedy of *certiorari* or of *prohibition* must lie. These are the only remedies allowed by law in such a case, and the writs of *certiorari* and of *prohibition* lie only in the absence of another remedy.

The right to *certiorari* can be taken away only by express statutory enactment. Halsbury is positive on this. At the title "Crown Practice," 10 Halsbury's Laws of England, p. 175, he says:—

> No. 345. It is enacted by various statutes that proceedings under them shall not be removed by the writ of *certiorari*. *Certiorari* is said to be taken away by such statutes. *Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be *finally determined* in the inferior Court, nor by a proviso that no other Court shall intermeddle with regard to certain matters as to which jurisdiction is conferred on the inferior Court.

So then, as the right to *certiorari* has not been taken away by express enactment in the Bar Act, the Councils of sections are subject to this jurisdiction just as any other inferior Court. As to the question of fact it raises no difficulty. The minutes of the meetings of the Bar of Montreal mention the procedure which was followed. We see therein that on July 15th, 1908, the secretary of the Bar communicated to the Council a petition and a notice of application for a writ of *certiorari* to be presented on September 14th.

The Council decided that, in the absence of an order from a Judge or of an order contained in the writ itself, it was not obliged to take cognizance of the petition, and, therefore, it proceeded with its investigation.

Appellant was then called as a witness but he refused to be sworn alleging that the Council had no jurisdiction as a result of the service of notice of presentation of this petition. The meeting adjourned to July 17th. On this day, Gosselin was again called upon to give evidence and he filed the following declaration:—

> Attendu que ce Conseil a décidé de procéder ultérieurement avec cette cause nonobstant le pourvoi par *certiorari* que l'intimé a fait signifier à ce Conseil; et attendu que l'intimé prend exception de cette décision, mais ne désire pas s'exposer aux conséquences de son refus d'être examiné comme témoin sur l'ordre qui lui en est maintenant donné;

A ces causes, l'intimé, sous réserve de tous les droits qu'il peut avoir en droit à cette phase de la procédure, et protestant contre l'ordre qui lui est donné de procéder, se présente comme témoin, et s'objecte à l'examen de tout témoin dans cette cause.

The Council proceeded nevertheless and adjourned again to July 27th. On July 27th it met once more and rendered its decision. Finally, on September 1st, appellant desisted from his petition for a writ of *certiorari* seeing, as he says in this desistment, that the writ could be of no effect as the Council had rendered judgment. He added that he intended opposing such decision by writ of prohibition.

I must add that the reason given by the Council for disregarding the notice for *certoirari* served upon it does not seem to me sufficient justification for its actions. The Code states that the mere service of the notice has the effect of suspending all proceedings. The law should, perhaps, exact an order from a Judge before all proceedings could be thus suspended. But it has not done so and, such as it is, it must be applied by the Courts.

The appeal is allowed with costs.

CROSS, J.:—The grounds urged in support of the demand for prohibition are in substance:

1. Excess of jurisdiction on the part of the Council in proceeding in disregard of a notice of application for removal by *certiorari*.

2. Excess of jurisdiction in assuming to declare an act to be derogatory to the honour of this Bar by mere motion and without law or by-law shewing it to be so.

3. Excess of jurisdiction on the part of certain members of the Council who came in in the course of the trial and took part in the decision without having heard the evidence; and,

4. Bias and interest on the part of the members of the Council.

The material facts are as follows: On the 25th of June, 1908, Mr. Louis Coderre, the defendant's *syndic*, submitted to the Council a draft of complaint against the plaintiff, the recitals of which in substance set forth that the plaintiff had made a contract for professional service with the Dominion Mercantile Protective Association (Ltd.), the covenants of which were derogatory to the honour of the Bar, and was carrying on work in accordance therewith; and it was added, in paragraph No. 9, that the said company had been prosecuted and fined for infringement of the Bar Act, in promoting practice for the plaintiff in furtherance of the agreements. On the same date, the draft complaint was agreed to and accepted by the Council, and the secretary was directed to summon a meeting to proceed upon it.

The complaint is headed "The complaint of Louis Coderre, *syndic* of the Montreal Bar, taken under oath before me,

QUE.

K. B. 1912

GOSSELIN v. BAR OF MONTREAL (No. 1).

CROSS, J.

Honoré Gervais, batonnier of the said Bar, this 25th day of June, 1908," and purports to have been sworn to by Mr. Coderre.

On the 30th of June, 1908, at a meeting of the Council, the hearing of the case was continued to the 14th of July, 1908, by consent, the accused being required to file his answer and exhibits in the interval; and, in respect of the Police Court action against the Dominion Mercantile Company, a minute was adopted as follows: "The account of Mr. Louis Coderre, the *syndic*, amounting to two hundred and thirty-two dollars and nine cents ($232.09) for professional services to the Bar in the Police Court in the case of the *Bar of Montreal* v. *The Dominion Mercantile Protective Association (Limited)* was unanimously approved and its payment was ordered."

On the 14th of July, 1908, upon the case being called, the accused objected to having it proceed until the Police Court case (which had been appealed) would be finally decided. He further set forth that the *syndic* had laid the complaint and that the law will not allow one person to be at the same time accuser and Judge; that the Council was interested in the pending suit and, therefore, precluded from trying the case.

Counsel were heard, and, after deliberation, it was decided as follows:—

"This Council, without admitting that the decision upon such appeals will in any manner bind its decision upon the charges against the respondent of conduct derogatory to the honour of the profession, nevertheless decides to suspend proceedings upon the said ninth paragraph and to withdraw the same from the said complaint, saving its right to lay the matter, charged in said ninth paragraph and similar alleged offences, in a new complaint at any time that may be judged expedient and that the said dilatory exception as to the remainder of said complaint be dismissed."

After further discussion, the case was continued to the 15th July, 1908. On the 15th July, 1908, the Council met and the accused put forward a "so-called recusation" against the members of the Council. It was decided that this proceeding did not have any effect upon the case, and counsel for the complainant were instructed to proceed.

Thereupon a petition for writ of *certiorari* in the name of the accused party was produced, with notice that it would be presented to the Superior Court on the 14th September, 1908. The minutes recite that: "On advice of counsel and agreeably to the unanimous opinion of the Council, it is decided that in the absence of any order of a Judge or of the writ itself, this Council is not bound to take cognizance of the petition for a writ of '*certiorari*,' and counsel for the 'Bar is directed to open the case.'"

It was, therefore, sought to have the accused sworn to give

testimony as a witness, but he refused to be sworn. Other witnesses being called made default. Rules were ordered to issue against them and adjournment was taken to the 17th July, 1908. Amongst the members of Council recorded as being present was Mr. Louis Coderre, *syndic*.

On the 17th July, witnesses being called, the accused objected to witnesses being examined, and declared that he reserved all his rights. Several witnesses were, nevertheless, thereupon examined and adjournment was taken to the 27th July. Mr. Coderre, *syndic*, was present as a member of the Council.

On the 27th July, 1908, other witnesses were examined at the instance of the complainant, and the complainant's case was closed. The accused, being called upon to proceed with his proof, declared that he had no witnesses to examine and no argument to make upon the merits of the case. At the same meeting, after deliberation, a decision was pronounced to the effect that the accused had been guilty of acts derogatory to the honour and dignity of the Bar in making and carrying out the agreement with the Dominion Mercantile Protective Association, Limited, and he was suspended from practice for five months.

At this meeting Mr. Coderre, *syndic*, again sat as a member of the Council. Mr. Greenshields also attended as a member of the Council, and joined in the decision, though the minutes do not record him as having been present on the 17th July, when the trial was commenced.

The accused appealed to the General Council, but his appeal was dismissed on the 1st September, and on that day the present action was commenced. It will be observed that the trial and decision of the complaint were completed before the date on which the petition for *certiorari* was to have been presented to the Superior Court.

There is in the record now before us a copy of a declaration by the plaintiff, dated the 1st September, to the effect that the *certiorari* having become ineffective in consequence of the Council having gone on with the case, he desisted therefrom, reserving his recourse by way of prohibition as being the only remedy left open to him. I do not find satisfactory proof that such a declaration was served, and filed in Court on the 1st September, or that the petition for *certiorari* was lodged in Court then or afterwards.

The question for decision is whether or not, on the foregoing state of facts, the plaintiff appellant has made out a case for prohibition upon any of the grounds above mentioned.

The respondent objects that the Bar is not an "inferior Court" but a public body exercising administrative or domestic functions and is not subject to the writ of prohibition. It was argued that the prohibition is in effect an injunction, that the

QUE.
K. B.
1912
GOSSELIN
v.
BAR OF
MONTREAL
(No. 1).
CROSS, J.

principle of art. 958, C.P., which forbids the injunction to restrain the exercise of any officer in a public or in a private corporation, applies, and that the same end is not to be attained by calling the proceeding a "prohibition," which is forbidden when it is called an "injunction." Clause 2 of section 4501 R.S.Q., is cited to establish that the Council of a section can decide "finally, to the exclusion of all Courts" whether the act charged is derogatory to the honour or dignity of the Bar.

I consider that this argument does not apply. The object of the present action is not to restrain the exercise of an office in a corporation, but to stop the execution of a decision which is alleged to have been arrived at without legal authority. Upon the strength of section 4501, a contention was put forward to the effect that the Bar of a section is not answerable to process of *certiorari* or prohibition issuing from the Superior Court.

Such a contention cannot prevail, in view of the power of control by the Superior Court declared in art. 50, C.P. It is true, as pointed out by counsel for the defendant, that the Code makes express provision for *certiorari* in respect only of the Courts mentioned in arts. 59, 63, 64, and 65 of the Code of Procedure, and that the Bar Council is not there mentioned.

It is also true that art. 50, C.P., in declaring the superintending and reforming power of the Superior Court, provides for its exercise "in such manner and form as by law provided," thus apparently opening up ground for the argument that the recourse by *certiorari* is not available to test decisions given in disciplinary proceedings by the Bar Council as the Code does not so provide. I consider that the words "in such manner and form as by law provided" do not have such a restrictive or excluding effect. I think that the superintending and reforming power in question, as originally conferred upon the former Court of Queen's Bench, was brought into existence with the idea of setting up a Court of wide original jurisdiction modelled upon the English King's Bench—the Court of the Sovereign, to whose process everybody was answerable. And, as is well known, that is the view to which effect has been given in practice for many years. The words quoted are simply a modernized rendering of the phrase "in such sort, manner and form as by law provided," contained in C.S.L.C., ch. 78, sec. 4, under the application of which it was held in *Re Thompson*, 2 Q.L.R. 115, that *certiorari* could issue to bring up the proceedings of a military Court martial.

It is, besides, apparent from section 4482, R.S.Q., that the powers of a Bar corporation are "the powers conferred upon civil corporations by the laws of this country," a phraseology which is repugnant to the idea that the Council of the Bar is removed from the control of the Superior Court to the extent which has been claimed in argument.

In section 4496, R.S.Q., it is provided that the Council may "take the initiative in the exercise of its disciplinary powers." This provision serves to explain how the Council, in deciding on the 14th July, 1908, to withdraw paragraph No. 9 of the complaint, could add the reservation, "Saving its right to lay the matter, charged in the said ninth paragraph and similar alleged offences, in a new complaint at any time that may be judged expedient," language which, proceeding from the mouth of a Judge to a person on trial before him, would, but for such a statutory provision, be incomprehensible, not to say unwarrantable.

We find then by the effect of statutory provisions that the Council of the Bar is not merely authorized to be accuser, but the Act purports to empower it in the act of finding an accused party guilty, actually to constitute by its decision the offence of which he is declared guilty—a power which no law Court can exercise—and to decide to the exclusion of all Courts of justice.

The legal effectiveness of such an enactment is disputed by the plaintiff, but, in view of the conclusion arrived at on the other grounds, it is not necessary to express an opinion upon the serious question so raised.

Subject to the effect of these provisions, however, it is, in any event, clear that the party charged has a right to have his case fairly heard and tried, and if anything arises in the course of the proceedings which constitutes an excess of jurisdiction, it is clear that resort can be had to the Superior Court to prohibit such excess.

And it is well here to point out that the word "jurisdiction," as applicable to justices and to the functionaries of those Courts or bodies which are subjected to this controlling power of the Superior Court in proceedings by *certiorari* and prohibition, has a meaning different from that given to it in the language of ordinary civil procedure. In civil procedure a Judge liable to be excused is not spoken of as not having jurisdiction. On the other hand, in matters of *certiorari* and prohibition, where there exists what is called "bias" on the part of a justice or functionary whose proceedings are in question, such bias is held to affect his jurisdiction. In this sense, absence of jurisdiction may be founded either on the character and constitution of the tribunal, or upon the nature of the subject matter of the enquiry, or upon certain proceedings which have been made essential preliminaries to the enquiry, or upon facts to be adjudicated upon in the course of the enquiry. Illustrations of such defects of jurisdiction can readily be found in such decisions as *Colonial Bank of Australasia* v. *Willan* (1874), 5 P.C. 417 at p. 442; *R.* v. *Woodhouse*, [1906] 2 K.B. 501 at p. 515*; *Dood* v. *Pearson*, 27 Times L.R. 376; *The King* v. *Duff* (*No.* 2), 15 Can. Cr. Cas. 454.

*NOTE.—The decision in *R.* v. *Woodhouse; Ex parte Ryder*, [1906] 2 K.B. 501, was reversed, *sub nom. Leeds Corpn.* v. *Ryder*, [1907] A.C. 420.

QUE.
K. B.
1912
GOSSELIN
v.
BAR OF
MONTREAL
(No. 1).
CROSS, J.

It appears further to be authoritatively established that bias on the part of a magistrate constitutes such a ground of defect of jurisdiction: *R.* v. *Justices of Middlesex* (1875), 1 Q.B.D. 173; *R.* v. *Farrant* (1887), 20 Q.B.D. 58, at p. 60; *R.* v. *Handsley* (1881), 8 Q.B.D. 383, at p. 387.

That being so, it follows that prohibition is an appropriate form of remedy, and we, therefore, are brought to consider whether or not the facts above set out disclose the existence of bias or probability of its motive. I consider that there can be no doubt that they do. The test to be applied has been stated in *Allinson* v. *General Council of Medical Education*, [1894] 1 Q.B. 750, as follows:—

> In the administration of justice, whether by a recognized legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biassed.

It is true, as was pointed out in *R.* v. *Burton*, [1897] 2 Q.B. 468, that upon a complaint by the Law Society, a magistrate was not rendered incompetent to sit by the fact of his being a member of the Law Society in a case where it appeared that the charge could be prosecuted only by the society and that the circumstances shewed no probability of bias. In the matter of the charge here in question it is shewn that Mr. Louis Coderre, a member of the Council who tried the case, had not only expressed an opinion adverse to the party charged, but in fact had sworn to it, and it further appears that at the same time he was the paid agent of the Bar in the Police Court case against the other party to the same reprobated contract, which formed the groundwork of the charge against the present plaintiff. In such circumstances there was not merely ground of suspicion of bias, but there was bias actually confessed and declared in writing.

It may be suggested that by virtue of his office, the *syndic* had the right to be present at and take part in the trial and that he must be presumed to have acted in pursuance of his duty. That view, however, is untenable upon the facts, because as I read the minutes of the trial before the Council, they can mean nothing else than that the *syndic* was present at all the meetings and that when the accused party and counsel engaged in the case were excluded from the room on the occasions of two, if not three, of the deliberations, the *syndic* remained in the Council. He was a member of the Council (art. 4496, R.S.Q.). In the absence of a clear recital to the contrary there can be no other conclusion than that he participated in the trial and decision of the charge. It is impossible to imagine how the party charged could expect even-handed justice from a bench of Judges of whom his prosecutor was one. And it is to be observed that

it is no answer to say that the decision of the Council was unanimous and would have been the same if the *syndic* had not participated. It is not a case where counting of votes can be resorted to. If one member of a bench of justices is disqualified the competency of the entire bench is destroyed: *R.* v. *Hertfordshire Justices* (1845), 6 Q.B. 753; *R.* v. *Great Yarmouth Justices* (1882), 8 Q.B.D. 525.

I, therefore, consider that there was an overstepping of jurisdiction arising from the unwarranted participation of the *syndic* in the decision, and that prohibition should issue against giving effect to it.

It is recited in the judgment and argued for the respondents that irregularities in procedure do not open the way to prohibition, but I consider that an objection to a tribunal or bench on the ground that it is wrongly constituted in the sense above pointed out is much more than an objection of irregularity and is, in fact, directed against a disregard of fundamental right and justice.

The further ground relied upon by the plaintiff to the effect that the power of the Council to try the complaint did not exist in consequence of having been suspended by notice of petition for *certiorari*, also appears to me to be well founded. Article 1296, C.P., plainly shews that service of the notice suspends the proceedings. It is consequently the law itself which operates the suspension and not a writ or Judge's order. I, however, prefer to found my decision upon the other ground above mentioned as it is one which is not concerned with mere procedure, but goes to the essential justice of the case.

It may be opportune to add certain observations upon other grounds of defence relied upon by the defendants. It was pleaded that the plaintiff had exercised a right of appeal from the decision of the Council of the section to the General Council and it was argued that owing to right of appeal it was not a case for prohibition. It is to be observed that this remedy by appeal to the General Council lies "only when it appears on the face of the complaint, decision or sentence that the Council had no jurisdiction." An appeal so circumscribed was a mere futility in a case where the decision appealed against was worded in the form of the one in question. Such as it was, the appeal was taken and the statutory recourse exhausted, but the defendants fail to shew that prohibition should not be granted because of the existence of another adequate remedy. Nor do I consider that the resort to that appeal is to be considered a waiver of the right to apply for prohibition, in view of the fact that the plaintiff did not acquiesce in, but, in fact, objected to the composition of the Council which tried the case. In *Lee* v. *Cohen*, 71 L.T. 824, a writ of prohibition was granted in appeal, of the judgment of the first Court, whereby it had been refused,

QUE.
K. B.
1912
GOSSELIN
v.
BAR OF
MONTREAL
(No. 1).
Cross, J.

being reversed, and it was held that "Where an action has been commenced in the Mayor's Court, the defendant does not, by entering an appearance, not under protest, and taking other steps, waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is."

It was further objected for the defendants that prohibition will not lie after sentence unless the want of jurisdiction appear on the face of the proceedings. The rule is stated in Short on Informations at page 460 as follows:—

> And in the considered judgment in *Bodenham* v. *Ricketts*, 6 N. & M. 176, delivered by Lord Denman, we find the law thus stated: "There is no doubt that in the case of prohibition to be granted for the sake of trial (as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment) the rule is established that a party neglecting to contest the jurisdiction in the first instance and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition unless the defect appear on the face of the pleadings."

But, farther on, the author explains that

> the excess of jurisdiction may depend only on the defence set up orally by the defendant and may appear only in the course of the trial; and judgment may follow almost as soon as the defence is understood. . . In cases of this kind where the defendant objects in the Superior Court to its jurisdiction, this, on application for a prohibition, is the same as if the want of jurisdiction appeared on the face of the proceeding. (Page 461.)

The same view is perhaps better expressed in *Mayor of London* v. *Cox* (1867), L.R. 2 H.L. 239, at p. 282, where it is said:—

> If it (the defect of jurisdiction) be not apparent, but the party, instead of moving for a prohibition, pleads in the special or inferior Court the facts ousting the jurisdiction, and such Court improperly decides that it has jurisdiction, he may, notwithstanding such decision, upon satisfying a Superior Court that it was erroneous, obtain a prohibition.

I, therefore, consider that recourse by way of prohibition is available to the plaintiff.

Upon the whole, and speaking in the foregoing observations for myself only, I would maintain the appeal and grant the prohibition.

Appeal allowed and writ of prohibition maintained.

GOSSELIN v. BAR OF MONTREAL (No. 2).

QUE.
K.B.
1912
Mar. 30.

Quebec King's Bench, Archambeault, C.J., Trenholme, Cross and Carroll, JJ. March 30, 1912.

APPEAL (§ XI—721)—GRANTING LEAVE—CERTIORARI AND PROHIBITION CASES—QUEBEC PRACTICE.

Leave to appeal to the Privy Council will not be granted by the Quebec Court of King's Bench from a decision of that Court in matters of *certiorari* or of prohibition unless it be shewn that future rights are involved.

[*O'Farrell* v. *Brassard* (1878), Ramsay's Appeal Cases (Que.), 55, followed.]

PETITION of the Bar for leave to appeal to the Privy Council from the judgment of the Court of King's Bench, maintaining the writ of prohibition issued against it: *Gosselin* v. *Bar of Montreal*, 2 D.L.R. 19.

E. Lafleur, K.C., for the petitioner.

A. Geoffrion, K.C., for respondent.

The Chief Justice delivered the opinion of the majority of the Court.

ARCHAMBEAULT, C.J., stated that the petition must be rejected as in matters of *certiorari* and prohibition there was no appeal "*de plano*" to the Privy Council unless it could be shewn that future rights were involved. No future rights were involved in the present case. The Bar could always move to the Privy Council for special leave to appeal: *O'Farrell* v. *Brassard*, Ramsay's App. Cases, Que. 55, followed.

TRENHOLME, J., dissented.

Leave refused.

THOMSON v. PLAYFAIR.

ONT.
H. C. J.
1912
Jan. 6.

(Decision No. 1.)

Ontario High Court. Trial before Riddell, J. January 6, 1912.

1. CONTRACT (§ I E 4—88)—SALE OF CROWN LICENSE TO CUT TIMBER—STATUTE OF FRAUDS.

Rights granted under a Crown license to cut timber, pursuant to R.S.O. 1897, ch. 32 (which include the right to take and keep exclusive possession and to sue for trespass) are an "interest in lands" within the meaning of the Statute of Frauds.

[*Hoeffler* v. *Irwin* (1904), 8 O.L.R. 740, followed; see also Leake on Contracts, 6th ed., 165.]

2. CONTRACT (§ I E 6—121)—PART PERFORMANCE—POSSESSORY ACTS.

Where there has been part payment on a contract to purchase timber limits not sufficiently evidenced by a writing under the Statute of Frauds, the subsequent entry upon the lands by the purchaser's agents or employees and their examination of the timber, may constitute a taking of possession and a part performance of the contract sufficient to take the case out of the operation of the Statute of Frauds, if the vendor as a licensee under the Crown Timber Act, R.S.O. 1897, ch. 32, sec. 3, had the exclusive right of possession and the acts of the purchaser were not referable to or justifiable from any circumstance other than the contract in question.

ONT.

H. C. J.
1912

THOMSON
v.
PLAYFAIR.

3. PRINCIPAL AND AGENT (§ III—30)—WARRANTY OF AUTHORITY—MISREPRESENTATION.

There is no cause of action for breach of implied warranty of authority of an alleged agent where there is no misrepresentation of the fact of authority, *ex. gr.*, where the person signing in a representative capacity tells the person with whom he is dealing that he has no authority, but the negotiations proceed in anticipation of their being confirmed by the principal.

[*Jones* v. *Hope* (1880), 3 Times L.R. 247*a*, followed; *Polhill* v. *Walter* (1832), 3 B. & Ad. 114, distinguished.]

ACTION for specific performance by the defendants Playfair and White of an alleged contract to purchase from the plaintiff the timber upon Yeo Island, Manitoulin district, or, in the alternative, for damages from the defendant Byers for misrepresentation of authority to bind his co-defendants.

December 21, 1911. The action was tried before RIDDELL, J., without a jury, at Toronto.

D. Robertson, K.C., for the plaintiff.

R. McKay, K.C., for the defendants Playfair and White.

O. E. Klein, for the defendant Byers.

January 6, 1912. RIDDELL, J.:—The plaintiff had from the Crown the right to remove all the timber from Yeo Island; her brother and agent, W. A. Thomson, was trying to dispose of it. After some dickering, unnecessary here to consider, he made a sale to Playfair and White, a firm in a large way of business, through their agents Thompson and Byers. Thompson acted as a sort of foreman in buying ties, etc., and Byers in shipping them; but I cannot find that either had the right to enter into such a contract as this. Thomson gave Byers a receipt in the following form:—

> Playfair & White, Dealers in Ties, Posts, Cedar Squares, etc.
> Wiarton Branch, C. E. Byers, Agent.
> Wiarton, Ontario, May 22nd, 1911.
>
> Received from Playfair & White the sum of one hundred dollars, being part payment on purchase of timber on Yeo Island. The purchase price of said timber to be five thousand five hundred dollars. Balance of this amount to be paid within one month.
>
> CATHARINE THOMSON,
> *Per* "Alex. Thomson."

At the same time a copy was made of this receipt (excepting the signature), and Byers signed it thus: "Playfair & White, Per C. E. Byers."

This was marked "copy of receipt," and handed to Thomson—Byers telling him that he did not "know as he had any right to give him an agreement."

The $100 was paid by a draft on Playfair and White by Byers, explicitly "on account of purchase of Yeo Island."

The receipt signed by Thomson was sent by Byers, on the 24th May, to the defendant firm at Midland, in a letter:

Yeo Island.

Mr. Thompson and I tried to get you by 'phone on Monday, but they said you and Mr. White were both out of town, so we have closed for the Island, at least we have bound the bargain.

This was received by Playfair and laid by him with the receipt on White's desk for his attention on his return home.

On the 2nd June, an entry is made in the firm's books thus:—

June 2. Yeo Island.....100.00
To Playfair & White on a/c purchase Yeo Island Miss Catharine Thomson 100.00
(on T. folio 5).

In the tie-book ledger an account had already been opened with Yeo Island, and the full account stood at the time of the trial:—

1911.	Yeo Island.		Dr.	Cr.
May 20	To Sundries	493	22.00	
June 2	Order to Miss Thomson a/c of Island	5	100.00	
July 13	Ex. C. E. Byers			
Sept. 1/30	To Island with tug.....	31	18.00	
	To Tug to Island.....	50	6.00	

Playfair & White say that they looked upon the transaction as a mere option, and not a purchase—that they, as a matter of business, open account with any intended purchase; and this last statement is perfectly intelligible and good business method.

On the 31st May, the firm write Byers:—

Am pleased that you have secured Yeo Island, and trust it will turn out a good one for cedar. You might send me an estimate of what you found on it, so I can figure it out.

This was written by Playfair—White being away in the south. On the 5th June, Byers sends his estimate.

On the 16th June, Thompson writes Thomson:—

I will have to ask you for another thirty days option on Yeo Island, as the other parties are not satisfied without seeing more of it . . so if you will give us another thirty days on it, I think it will be all right. If you cannot give this thirty days we will have to throw up the option.

Thomson thereupon wrote the firm on the 20th June:—

Replying to your letter of sixteenth inst., consider contract of sale of lumber on Yeo Island to you closed. I gave no option. Will wait two weeks for payment of balance, if you request.

On the 26th June, Byers writes Thomson asking how many acres "they are" in Yeo Island, "as I am going up to see it myself, and I want to get away as soon as I can." Thomson replies, on the 19th July, insisting on the sale having been made—and threatening suit. Byers went up and examined the Island; and that is what the subsequent entries in the ledger

ONT.

H. C. J.

1912

THOMSON v. PLAYFAIR.

Riddell, J.

account in the tie-book refer to. He reported to his principals favourably.

On the 22nd August, suit is threatened by the solicitors, and action brought two weeks thereafter, against the firm and Byers. The firm set up a general denial; that Byers had no authority to enter into such a contract for them; and the Statute of Frauds. Byers says that he is only an agent; that Thompson agreed with Thomson to buy the timber on Yeo Island for $5,500—$100 down and $5,400 in one month—and that, on Thompson's instructions, he gave the draft as the firm's agent, and had drawn up "as evidence of sale and purchase of said timber the papers or documents . . . set out in the . . . statement of claim."

At the trial, he changed his story and set up an option. I entirely discredit this story, and think that he was telling the truth when he gave instructions for the defence.

I am much obliged to counsel for the very able arguments presented for all parties—and now proceed to dispose of the case.

The first question is, "Does the Statute of Frauds apply to the sale of such property as is the subject-matter of the present action?"

Whatever might have been the answer, were the question an open one—I think that I am bound by authority in our own Courts to hold that what was sold was an interest in land within the meaning of the Statute of Frauds.

Much ingenious distinction is to be found in the older cases, but I do not think any reasonable doubt can exist since the case in the Court of Appeal of *Hoeffler* v. *Irwin* (1904), 8 O.L.R. 740.

Webber v. *Lee* (1882), 9 Q.B.D. 315, is a less strong case—and I do not discuss the cases in the English Courts or our own before *Hoeffler* v. *Irwin*, by which I am bound.

The fact that the document relied upon is not signed by those attempted to be charged is immaterial, if it be signed by an agent with authority—and it is of no importance that the name of the principal does not appear (at least in a document not under seal). See the cases collected in *Standard Realty Co.* v. *Nicholson* (1911), 24 O.L.R. 46.

I have found as a fact that neither Thompson nor Byers had any authority either to buy the timber or to sign a contract for the purchase.

The plaintiff contends, however, that their act was ratified by Playfair and White.

I have since the trial given the case great consideration, and cannot change the view, taken at the trial, that these defend-

ants knew that Byers had bought for them—and not simply taken an option. The statement in the letter of the 24th May, I think, did not in fact give them a different impression—"We have closed for the Island, at least we have bound the bargain." The answer of the 31st May, already cited, also is significant.

Knowing that their ostensible agent had bought the timber, they did not repudiate the agency or the contract, as they should have done if they did not intend to adopt the contract.

I think that they did adopt the contract, whatever it was.

Then they are in the position of having bought the timber, paid $100 on the purchase, and signed a copy of the receipt given them by the agent of the plaintiff.

This is the only document signed by them or for them, except indeed the draft for $100 given to the plaintiff; and I am of opinion that it is defective to charge them, when the Statute of Frauds is pleaded.

Nor, as at present advised (but I give no decision on this point), do I think that the rule in *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, referred to and followed in *Kendrick* v. *Barkey* (1907), 9 O.W.R. 356, can be appealed to. It is the simple case of one contracting party setting up the statute to defeat an action on a contract not properly verified as the statute requires—the defendants had received no property, etc., under the contract.

But the action of the defendants' agents going to and landing upon the island, examining the timber, etc., are acts which are claimed to be acts of part performance—of course the part payment is not.

The Act R.S.O. 1897, ch. 32, gives the licensee the right, not only to the timber, but also (sec. 3 (1)) "to take and keep exclusive possession of the lands," and (sec. 3 (3)) "to institute any action against any . . . trespasser." If the defendants had not bought the property from the plaintiff, they had no right to send their agent upon the island as they did—their act was a taking possession of the land, and, in my view, an act of part performance: Fry on Specific Performance, pp. 290 *et seq.* [Fry on Specific Performance, 5th ed., secs. 578 *et seq.*]

There will be judgment for the plaintiff against these defendants for $5,000, interest thereon from the 22nd June, 1911, and full costs of suit.

As to Byers, the action should not have been brought against him at all.

The theory of the plaintiff is, that she has an action against Byers as on an implied warranty of authority to make the contract and sign the document evidencing it for his co-defendants. The rule is: "Where an agent assumes an authority which he does not possess and induces another to deal with him upon the faith that he has the authority he assumes, it must be taken that the

ONT.

H. C. J. 1912

THOMSON v. PLAYFAIR.

Riddell, J.

person making the claim of agency undertook that he was agent and he is liable personally for the damage that has occurred:" *Firbank's Executors* v. *Humphreys* (1886), 18 Q.B.D. 54; *Oliver* v. *Bank of England*, [1901] 1 Ch. 652, [1902] 1 Ch. 610; *Starkey* v. *Bank of England*, [1903] A.C. 114. And it makes no difference that the claim is made *bonâ fide*, and there is no fraud. But this is not the case where there is no misrepresentation of fact: *Jones* v. *Hope* (1880), 3 Times L.R. 247*n* (C.A.)

Here Byers told the plaintiff's agent that he did not know that he had any power to give him a contract—the vendor's agent was not in fact misled, but took the document with Byers's signature for what it was worth.

The case relied upon by the plaintiff's counsel is distinguishable—*Polhill* v. *Walter* (1832), 3 B. & Ad. 114. There the defendant, who had formerly been in partnership with H., had an office which H. also still continued to occupy in part. A bank clerk called with a draft on H.; H. was out of town, and the defendant asked for a few days' delay. This was refused; and one A. (one of the payees) assured the defendant that "it was all correct"—the defendant acted upon the assurance and accepted per proc. of H.—the payees indorsed it over to the plaintiff. H. refused to pay; the plaintiff sued him, and was nonsuited; whereupon he sued the defendant. The jury negatived fraud, and Lord Tenterden dismissed the action. On appeal, it was held that the indorsement per proc. was a representation to all who should thereafter be the holders of the bill that the defendant had the authority to accept for H., and judgment was entered for the plaintiff. There the plaintiff was misled; in the present case she was not.

The action will be dismissed as against Byers. Had his conduct been throughout as impeccable as in the signing of the document, etc., he should have his costs; but it is impossible not to recognize that he has allowed his desire to shield his employers to modify his views of the transaction in question. He stated substantially the facts to his solicitor, and his solicitor put them in formal shape in the pleadings; but subsequently Byers completely changed his recollection of the facts—it is possible not corruptly.

There will be no costs *quoad* this claim.

The delay in giving judgment is due to the fact that counsel asked for and obtained permission to put in authorities—these have reached me just this week.

Full credence is to be given to the plaintiff's agent, Thomson.

Judgment against Playfair.
Dismissal as to Byers.

N.B.—An appeal has been taken from the above decision.

Annotation—Contracts (§ I E 6—121)—Part performance—Acts of possession and the Statute of Frauds.

ONT.

Annotation

Part performance and the Statute of Frauds.

The scope of this note is not intended to be confined to cases where the contract is for the sale of timber limits only but to cover the question of the taking possession of real property, or the exercise of acts of dominion as part performance of a contract to purchase lands, sufficient to take it out of the operation of the Statute of Frauds.

The general rule may be stated that under certain circumstances the Court will recognize part performance of a contract falling within the Statute of Frauds, as supplying the want of writing and as enabling the Court to uphold the contract. This was a doctrine of the old Court of Chancery, but is now of general application. It has been said to be confined to contracts for an interest in land: *Britain* v. *Rossiter* (1883), 11 Q.B.D. 123; and see Leake, on Contracts, 6th ed., 205, or to cases in which a Court of equity would entertain a suit for specific performance if the alleged contract had been in writing: *McManus* v. *Cooke* (1887), 35 Ch.D. 681. Sir E. Fry would somewhat extend this application: Fry's Specific Performance, 5th ed., p. 298.

In *Britain* v. *Rossiter*, *supra*, the limits of the doctrine were stated differently by each of the three learned Judges: Brett, L.J., confined it to "cases concerning land," Cotton, L.J., to "questions relating to land," and Thesiger, L.J., to "sales of land."

In *Maddison* v. *Alderson*, 8 A.C. 467, 474, Lord Selborne, referring to the decision in *Britain* v. *Rossiter*, seemed to doubt how far it was consistent with the views of Lord Cottenden in *Hammersley* v. *De Biel*, 12 Cl. & F. 64n, and *Lassence* v. *Tierney*, 1 McN. & G. 551.

And in *McManus* v. *Cooke*, 35 Ch.D. 681 at p. 687, Kay, J., after considering the grammatical construction of the clause of the statute referring to no action being brought to charge a person "upon any contract or sale of lands, tenements, or hereditaments, etc.," criticized the case of *Britain* v. *Rossiter*, 11 Q.B.D. 123, and discussed several relevant authorities, and concluded that probably it would be more accurate to say that the doctrine of part performance of a parol agreement "applies to all cases in which a Court of equity would entertain a suit for specific performance if the alleged contract had been in writing." See also *Scott* v. *Rayment*, L.R. 7 Eq. 112, at p. 115, and *Crowley* v. *O'Sullivan* (2), [1900] 2 I.R. 478, 490.

It may be questioned whether this statement of the extent of the doctrine would not be made more accurate by omitting the words "for specific performance."

It has been further held that the doctrine of part performance does not extend to enable the Court to award damages on a parol contract: *Lavery* v. *Pursell*, 39 Ch.D. 508, 519; Fry's Specific Performance, 5th ed., 298.

Reference to the following cases will shew the foundation of this doctrine of part performance; also see annotation to the case of *Knight* v. *Cushing*, 1 D.L.R., p. 354.

In *Lord Wampole* v. *Lord Orford*, 3 Ves. 401 (a) at p. 420, Lord Loughborough (afterwards Earl of Rosslyn) states as follows: "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this Court, must be certain and defined; secondly, they must be equal and fair; for this Court, unless they are fair, will not

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—Contracts (§ I E 6—121)—Part performance—Acts of possession and the Statute of Frauds.

execute them; and thirdly, they must be proved in such manner as the law requires."

In regard to objections founded on the want of any of these qualities in the contract . . . the Court is, from obvious motives of justice, somewhat unwilling to entertain the objection when it is made after part performance, from which the defendant has derived benefits, and the plaintiff cannot be recompensed except by the performance of the contract *in specie*.

Where the plaintiff sold lands to the defendants, a municipal corporation, who by the deed of sale covenanted forthwith to make a road and erect a market house on the land. They entered and made the road, but neglected to build the market house. Wigram, V.-C., observed in his judgment that the defendants, having had the benefit of the contract *in specie*, the Court would go any length that it could to compel them to perform their contract *in specie*: *Price* v. *Corporation of Penzance*, 4 Ha. 506; see also *Pembroke* v. *Thorpe*, 3 Sw. 437n; *Oxford* v. *Provand*, L.R. 2 P.C. 135.

Where a contract has been partly executed by possession having been taken under it, the Court, it has been said, "will strain its power to enforce a complete performance": *Parker* v. *Taswell*, 2 DeG. v. J. 559, 571; see Fry's Specific Performance, 5th ed., p. 165.

The part performance of a contract by one of the parties to it may, in the contemplation of equity, preclude the other party from setting up the Statute of Frauds, and thus render it, although merely resting in parol, capable of being enforced by way of specific performance, though not by way of damages, even since the Judicature Acts. See *per* Chitty, J., in *Lavery* v. *Pursell*, 39 Ch.D. 508.

This exception seems to be based on the view that if a man have made a bargain with another, and allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arose: *Maddison* v. *Alderson*, 8 A.C. 467.

There can be no part performance of an incomplete contract, for acts to amount to part performance, the contract, "must be obligatory, and what is done must be done under the terms of the agreement and by force of the agreement: *per* Lord Brougham in *Lady E. Thynne* v. *Earl of Glengall*, 2 H.L.C. 131; *Ex parte Foster, Re Foster*, 22 Ch. D. 797.

Where possession is taken not under a contract, but adverse, the circumstance that there is no common law remedy does not suffice to give the Court jurisdiction: *East India Co.* v. *Northumbadoo Veerasawmy Moodelly*, 7 Moo. P.C.C. 482.

Where possession of the land contracted for has in fact been delivered and accepted under the contract, the Court will receive evidence of the contract without regard to the statute, in order to carry out the terms upon which possession was given. This exception probably arose by permitting a party to sue upon a contract, disclosed by the facts, given in evidence in support of a plea of justification to an action for trespass to land at the common law, but the principle is now rested on this—that possession of land of another is presumed not to be wrongful, but by agreement, and therefore it is necessary to enquire into the agreement in order to limit the possession according to its terms and conditions: Grant,

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—Contracts (§ I E 6—121)—Part performance—Acts of possession and the Statute of Frauds.

M.R., in *Gregory* v. *Mighell* (1811), 18 Ves. 328; Plummer, M.R., in *Morphett* v. *Jones* (1818), 1 Swanst. 172; Leake, on Contracts, 6th ed., p. 204.

What possession or acts of dominion are sufficient to bring the doctrine into operation must be determined by the circumstances of each particular case, thus the admission of a tenant into possession under an agreement for a lease takes the agreement out of the statute and admits parol evidence of the terms for the purpose of enforcing the lease: *Gregory* v. *Mighell* (1811), 18 Ves. 328; *Morphett* v. *Jones* (1818), 1 Swanst. 172.

Where a father verbally promised in consideration of his daughter's marriage to give her a house and upon marriage taking place put her into possession, it was held that the promise was taken out of the statute and might be proved by parol evidence in support of the possession: *Ungley* v. *Ungley* (1877), 46 L.J. Ch. 854, 5 Ch. D. 887; *Sharman* v. *Sharman* (1892), 67 L.T. 834.

Entering on land and giving directions respecting alterations and improvements to a house in course of erection, are sufficient acts of part performance by a purchaser to entitle the vendor to enforce the contract against him: *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.

The right of a party to enforce a contract upon the ground of part performance is dependent upon the title and acts of the party sued, and the knowledge of the party seeking to enforce the verbal contract: *Morgan* v. *Milman* (1853), 3 DeG. M. & G. 24; *Ecclesiastical Commrs.* v. *Wodehouse*, [1895] 1 Ch. 552.

In *Coates* v. *Coates*, 14 O.R. 195, it was held that the staying of an action according to an agreement relating to the land in question was a sufficient part performance of the contract relating thereto to take the case out of the Statute of Frauds. Proudfoot, J., in his judgment cited extensively from Fry's Specific Performance, concluding that the plaintiff, with the consent of the defendant, had stayed his action, and was thus delayed in the prosecution of his remedy, and it would be a fraud to allow the defendant to benefit by the act and escape performance because the agreement was not in writing.

Where possession is relied on as an act of part performance of a contract not evidenced by writing under the Statute of Frauds, in order to entitle the plaintiff to a decree for specific performance, the possession must be such as is referable to the contract and not to any other cause. The possession must be such that no explanation could be given it without reference to the contract. *Canning* v. *Catling*, 4 New Reports 259.

The authorities in the United States support the above proposition, see Annotation 3 L.R.A. (N.S.), p. 807, but in England the cases on the subject are not reconcilable. See Fry's Specific Performance, 5th ed., p. 29.

Possession is in some cases equivocal in respect to the title to which it is to be referred; in other cases it is not; therefore the possession of a tenant after the expiration of lease which was referable only to a contract for a renewal, has been considered part performance of such a contract: *Dowell* v. *Dew*, 1 Y. & C.C.C. 345, 12 L.J.Ch. 158; compare it to *Buckmaster* v. *Harrop*, 13 Ves. 456, 474; *Millard* v. *Harvey*, 13 W.R. 125, 10 Jur. N.S. 1167; *Powell* v. *Lovegrove*, 8 DeG. M. & G. 357, 367; distinguish *Brady's Case*, 15 W.R. 753.

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—Contracts (§ I E 6—121)—Part performance—Acts of possession and the Statute of Frauds.

"The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has been constantly received as evidence of an antecedent contract": *per* Plumer, M.R., in *Morphett* v. *Jones*, 1 Swanst. 172, at p. 181; see accordingly *Butcher* v. *Stapely*, 1 Vern. 363; *Pyke* v. *Williams*, 2 Vern. 455; *Earl of Aylesford's Case*, 2 Str. 783; *Kine* v. *Balfe*, 2 Ball & B. 343; *Pain* v. *Coombs*, 1 DeG. & J. 34; see, too, *Miller* v. *Finlay*, 5 L.T.N.S. 510.

Continuance in possession if unequivocally referable to the contract alleged, may be a sufficient act of part performance, although the taking of possession was antecedent to the contract: *Hodson* v. *Heuland*, [1896] 2 Ch. 428.

Even where the possession has been taken without consent, yet if the owner afterwards allows the stranger to remain in possession, this will, it seems, operate as an act of part performance: *Gregory* v. *Mighell*, 18 Ves. 328; *Pain* v. *Coombs*, 1 DeG. & J. 34, 46; see also *per* Lord Kingsdown in *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, at p. 170.

To maintain a contract on the ground that it is taken out of the Statute of Frauds by part performance, the Court will require it to be shewn that the party seeking relief has expended money or otherwise acted in reliance on and in the execution of the agreement, and that non-performance would amount to a fraud upon him. Specific performance will not be enforced merely because the defendant has done acts on the property which, unless construed as acts of ownership, would, in the absence of license, amount to a trespass: *Phillips* v. *Alderton*, 24 W.R. 8.

If defendant has concurred in a material unequivocal act, by which he has obtained a substantial part of his object, as taking possession or accepting a considerable part of the purchase-money, he shall not be allowed to retract, and plaintiff's right to a full execution of the contract has attached; but acts merely ancillary and introductory, though attended with some expense, will not sustain an agreement on the ground of part performance. Acceptance of a trifling earnest would probably not be deemed sufficient. See *Simmons* v. *Cornelius*, 1 Ch. Rep. 128; *Voll* v. *Smith*, 3 Ch. Rep. 16; *Anon.*, 2 Freem. 128; *Seagood* v. *Meale*, Pre. Ch. 560.

In *Clerk* v. *Wright*, 1 Atk. 12, it was held that giving directions for drawing a conveyance, and viewing the property, were not enough to serve as an act of part performance.

To take a case out of the statute, the possession must be such that no explanation could be given it without reference to the contract. Where the possession is explainable by a written memorandum different from the alleged oral contract, it will not do: *Canning* v. *Catling*, 4 New Reports, 259.

Possession is part performance both by and against the stranger and the owner: *Wilson* v. *West Hartlepool R. Co.*, 2 DeG. J. & S. 475, 485; the owner has allowed the stranger to do an act on the faith of the contract, viz., enter on the land; the stranger has allowed the owner to do an act on the faith of the contract, viz., withdraw from the land. They are therefore both bound. See Fry's Specific Performance, 5th ed., p. 300 *et seq.*

It is well to consider the meaning of "possession of land"; it has been defined as "the holding of it and exclusive exercise of dominion over it."

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—**Contracts** (§ I E 6—121)—**Part performance—Acts of possession and the Statute of Frauds.**

The legal idea of possession, though varying according to circumstances, still embraces the idea of right as well as of physical control. It implies a present right to deal with the property at pleasure and to exclude other persons from meddling with it: *Sullivan* v. *Sullivan*, 66 N.Y. 37, 41, quoted in *Baragiano* v. *Villani*, 117 Ill. App. 372, and *Garvey* v. *Union Trust Co.*, 52 N.Y. Suppl. 260.

In an instrument dealing with real estate "possession" means broadly one of two things. It may mean what has been styled "physical possession," as when a tenant in fee occupies and farms his own land, or if not farming his own land, still occupies in the sense of receiving his rents from his tenants. In that connection, the alternative to "possession" natural, proper, technical, strictly legal, is receipt of the rents and profits. Again, "possession" in a legal instrument is frequently used with reference to the title, and to designate that title which is enjoyed *in presenti* as distinguished from that which is to be enjoyed *in futuro*—the distinction being between an estate in possession and an estate in remainder, reversion or expectancy. In most legal instruments . . . it is generally possible to give to the word "possession" either one or the other of these two meanings, although, no doubt, they occasionally overlap one another: *Leslie* v. *Rothes*, [1894] 2 Ch. 499, 506, 63 L.J. Ch. 617, 71 L.T. Rep. N.S. 134, 7 Reports 600; Cyc. vol. 31, p. 924 *et seq.*

Possession is either actual or constructive. The actual continued occupancy or exercise of full dominion may be an occupancy of the whole, that is, in possession, or an occupancy of part thereof, in the name of the whole: *McColman* v. *Wilkes*, 3 Strobb (S.C.) 465, 471. Mere presence upon the premises is insufficient to establish possession: *Kerslake* v. *Cummings*, 180 Mass. 65, 67.

Bouvier states "that in order to complete a possession two things are required: (1) that there be an occupancy, and (2) that the taking be with an intent to possess." See *Walters* v. *People*, 18 Ill. 194, 199.

To take a case out of the operation of the statute, the possession must be such that it is referable only to the alleged parol agreement. In the case of *Meisner* v. *Meisner*, 36 Can. S.C.R. 34, affirming the judgment in favour of the plaintiff, *sub nom. Meisner* v. *Meisner*, 37 N.S.R. 23, the possession of part of the land in question was referable to a lease of the land as well as to the alleged parol agreement and part performance was not proved. Mr. Justice Nesbitt, Idington, J., concurring, dissented from the majority judgment, holding that apart from the possession, the execution of the deed in pursuance of and on the faith of the father's promise, was an act of part performance, taking the case out of the Statute of Frauds; the dissenting Judges referred to the following cases: *In the matter of the estate of Earl of Longford; In re Cook's Trustee Estate*, L.R. Ir. 5 Eq. 99, and *Lincoln* v. *Wright*, 4 DeG. & J. 16.

The following American decisions will be found instructive:

In *Brown* v. *Lord*, 7 Or. 302, it was decided that the possession must have been actual, open and notorious; to operate as an act of part performance, it must have been distinct, visible and notorious.

In *Shelly's Estate*, 3 Del. Co. R. 223, the Court said it was the notoriety of a change of possession more than anything else that took an oral sale of lands out of the statute.

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—**Contracts** (§ I E 6—121)—**Part performance—Acts of possession and the Statute of Frauds.**

Where there is no change of possession pursuant to the contract of sale, there is no such possession as to make out an act of part performance: *Carlisle* v. *Brennan*, 67 Ind. 12.

Where possession can be naturally and reasonably accounted for otherwise than by a contract between the parties, it will not be sufficient: *Andrew* v. *Babcock*, 63 Conn. 109, 26 Atl. 715.

When possession is not in pursuance of a contract to convey, or if it can be accounted for in some other way than by such a contract, it will not ordinarily avail as part performance: *Meigs* v. *Morris*, 63 Ark. 100, 37 S.W. 302.

Where the evidence leaves it uncertain whether the acts relied upon as shewing possession were mutually known and accepted by the parties as done by virtue of the contract, the possession cannot be taken as an act of part performance to overcome the bar of the statute: *Munsell* v. *Loree*, 21 Mich. 491.

The possession must be definite and exclusive, and indicates the beginning of a new interest, and be shewn to be pursuant to an oral contract. There must be no equivocation or uncertainty in the case: *Bresnahan* v. *Bresnahan*, 71 Minn. 1, 73 N.W. 515.

All the authorities shew that possession, to take a parol contract out of the statute must be exclusively in the vendee: *Greenlee* v. *Greenlee*, 22 Pa. 225.

In *Cloud* v. *Greasley*, 125 Ill. 316, 17 N.E. 826, it was held that possession as an act of part performance was not sufficiently shewn where one seeking a conveyance of vacant land was not let into possession, but took possession through an agent.

In *Bean* v. *Valle*, 2 Mo. 126, it was said that taking of possession with the knowledge of the owner was not equivalent to delivery of possession, and would not remove the bar of the statute.

In *Purcell* v. *Coleman*, 6 D.C. 59, it was held that the delivery of a key of the premises to one of the parties to the contract for the exchange of lands was not sufficient.

In *Benedict* v. *Bird*, 103 Iowa 612, 72 N.W. 768, a purchaser under a parol contract went upon the place, examined the house and cellar, and rented the property to his son, who was with him. He picked up some lumber around the barn, and drove in a few nails that were loose, and told the owner that he had rented the place, and the latter said it was all right. Neither he nor his son ever slept in the house or occupied it, and neither of them was ever on the premises afterwards. This was held insufficient evidence of possession taken or held under and by virtue of the contract as provided by an Iowa statute.

In *Frostburg Coal Co.* v. *Thistle*, 20 Md. 186, a debtor orally agreed to give his creditor possession of land in satisfaction of a debt, and told him to go and take the property. The creditor walked over the land and then offered it for sale. This was held not to be a certain and exclusive possession, such as could be relied on as an act of part performance to take the contract out of the statute.

The deposit on a lot of building material not intended to be used in the construction of a building on the lot, but left there until it could be taken away and used elsewhere, is not a sufficient act of possession, as it

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—Contracts (§ I E 6—121)—Part performance—Acts of possession and the Statute of Frauds.

cannot be said to point unmistakably, or at all, to the contract by the owner for a sale of the lot; nor does it amount to the exclusive possession of the lot: *Hunt* v. *Lipp*, 30 Neb. 469, 46 N.W. 632.

In *Chamberlain* v. *Manning*, 41 N.J. Eq. 651, 7 Atl. 634, the Court said that going upon a vacant piece of land and digging a ditch were not a sufficient taking of possession to constitute an act of part performance of an oral contract to convey.

In *Neibert* v. *Baghurst*, N.J. Eq., 25 Atl. 474, it was held that the fact that the vendee went upon land alleged to have been sold to him, and grubbed the underbrush, under permission given him by the vendor, because the vendee was out of work, did not constitute possession under the contract, sufficient to take it out of the statute.

In *Gangwer* v. *Fry*, 17 Pa. 491, 55 Am. Dec. 578, it was held that a parol sale of woodland in the mountains would not be taken out of the statute by possession which consisted of entry upon the land with wood choppers and the cutting of timber and the erection of a temporary cabin for the making of sugar. The Court said it was no power to the objection to these acts as insufficient for the purpose; that they constitute the only possession usually taken of uncultivated timber land. The Court said: "The purchaser may clear, enclose and cultivate wild land if he is disposed to do so; and where he does so and his improvements are so extensive as to make it inequitable to deprive him of the land, his case would be taken out of the statute. But where nothing of this kind appears, and the purchaser has only entered for the purpose of stripping the land of its valuable timber and lining his pockets with the proceeds, such acts do not constitute such an equity as entitles him to protection from the operation of the act."

Further for American decisions see Annotation to *Roberts* v. *Templeton*, 3 L.R.A. (N.S.) 790.

In *Townsley* v. *Charles*, 2 Grant Ch. (U.C.) 313, a seller wanted an oral contract for the sale of land specifically enforced. He alleged that the buyer had gone into possession of the lands, and had exercised acts of ownership over them, "and, amongst other ways, by offering them for sale, and entering into and carrying on negotiations with divers persons for the sale of the said lots, or some, or one or more of them, by going over the said lots at different times, as entitled to the possession thereof." The Court said it was obvious that no act of part performance had been shewn sufficient within the authorities to take the case out of the statute.

In *Bodwell* v. *McNiven*, 5 O.L.R. 332, on negotiations for the purchase of land, the owner's agent told the defendant the lot was his. Defendant went on the lot and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase:—Held, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to specific performance.

In *Cameron* v. *Spiking*, 25 Grant 116, where a written agreement of purchase was within the Statute of Frauds because it did not specify the names of the vendors, delivery of possession to the vendees was held sufficient part performance to let in parol evidence as to who the vendors were.

In *Crane* v. *Rapple*, 22 O.R. 519, 20 Ont. A.R. 291, possession was

ONT.

Annotation

Part performance and the Statute of Frauds.

Annotation (*Continued*)—**Contracts** (§ I E 6—121)—**Part performance—Acts of possession and the Statute of Frauds.**

delivered to a purchaser by parol, and improvements were made by him, and the case was held taken out of the statute by part performance. But the fact that improvements were made did not seem to weigh in the decision, the Court asserting that possession was a sufficient act of part performance to remove the bar of the statute.

Adolph v. *Good*, 1 D.L.R. 750, 20 W.L.R. 401, decided that no taking of possession sufficient to satisfy the requirements of the Statute of Frauds occurs where one in possession of a piano under a storage arrangement orally agrees to exchange certain land for the piano, and merely continues in possession of the piano without any overt act or writing to indicate a change in the character of the continued possession.

While the authorities appear to support the proposition laid down in *Thomson* v. *Playfair*, above reported, as to acts not referable to anything but the alleged parol contract, the weight of authority seems to be distinctly against the holding that acts of the class indicated in the above opinion of Riddell, J., are to be considered as acts of dominion which will take an oral contract of sale of lands out of the Statute of Frauds.

QUE.

S. C. 1912

April 17.

MASON v. H. E. LEDOUX & CO., Limited.

Quebec Superior Court, Montreal. Motion before Charbonneau, J. April 17, 1912.

1. PEREMPTION (§ I—3)—QUI TAM ACTION.

Under the Quebec Revised Statutes of 1888 the plaintiff in a *qui tam* action is the legal representative of the Crown suing for a penalty and therefore such action cannot be perempted (nonsuited) after two years have gone by without any steps being taken to bring the case on to trial, as peremption does not lie against the Crown.

[Accord, *Croysdill* v. *Copeland-Chatterson-Crain Co.*, 12 Que. P.R. 311.]

2. PARTIES (§ I A—47)—QUI TAM ACTION—QUEBEC PRACTICE.

An objection that the plaintiff has no legal status to sue cannot be raised on peremption proceedings, but only by exception to the form or on the merits.

[*Lamontagne* v. *Grosvenor Apartments*, 20 Que. K.B. 221, approved.]

MOTION by defendant to have plaintiff's action perempted (nonsuited).

The motion was dismissed.

J. C. H. Dussault, for the motion.

M. Honan, *contra*.

CHARBONNEAU, J.:—This is a motion of the defendant to have plaintiff's action declared perempted.

Plaintiff opposes this motion on the ground that as he is acting as well in his own name as on behalf of the Crown no peremption of his action can lie seeing that no peremption can take place against the Sovereign (C. P., 281). To this the defendant answers that plaintiff had no right to bring his action

both in his name and in that of the Crown and consequently that he is not entitled to claim the privilege of the Crown's exemption from the law of peremption. His theory is based on arts. 6096 and 30 R.S.Q. 1909.

It is true that art. 6096, the only one that could apply to the present case, states that the action may be brought by an individual in his own name or by the Attorney-General on behalf of His Majesty, but the Revised Statutes of 1909 only came into force on March 29th, 1910, and the present action was taken on November 11th, 1909; consequently it must be governed by art. 4759 R.S.Q. 1898, which justifies this antiquated and hybrid procedure brushed away by the last revision of the Statutes.

But even if the Revised Statutes of 1909 applied it seems to me that this ground can hardly be invoked on a motion for peremption. I am quite ready to admit that when the legal entity which claims a status as plaintiff has no such status in law, then the action may be dismissed on an exception to the form as was done in the case of *Lamontagne* v. *Grosvenor Apartments Co., Ltd.*, 20 Que. K.B. 221. I also believe that the inexistence of this juridical person could be invoked at the hearing on the merits and that by simply calling the Court's attention to the fact of this inexistence the defendant could obtain the dismissal of the action. This ground, therefore, cannot be invoked on peremption proceedings which have a distinct character of their own and which cannot, under any pretence, be transformed into a preliminary exception or even an exception on the merits.

The action must, therefore, be considered as having been well taken by Mason as well in his own name as on behalf of His Majesty.

There now remains to be seen what is this juridical being created by art. 4759 of the 1898 Statutes of Quebec. Is it a plaintiff in two persons forming but one legal entity, unique and indivisible, or else a joinder of two plaintiffs, Mason and the Crown? or again, is it the Crown acting through Mason as in other cases it acts through the Attorney-General or any other of its officers.

I am rather inclined to adopt this last hypothesis. The fine belongs, logically, to the authority imposing the same; in the absence of contrary dispositions if the fine is imposed by a municipal by-law, it belongs to the municipality; if it is imposed by the legislative authority, it belongs to the Crown.

When the law which imposes a fine allots a part thereof to the informer or to the individual who assumes the risk of instituting proceedings it is as an indemnity given to him in return for his work, his disbursements and advances, but the fine nevertheless always remains the property of the authority which imposed the

QUE.

S. C. 1912

MASON v. LEDOUX & CO., LIMITED.

Charbonneau, J.

same; so that if there were nobody specially authorized to claim such fines as are involved in this case the Crown could always claim them as a debt due to it.

The right of action in this cause must be considered, therefore, as appertaining to the Crown, and the action itself as having been taken by the Crown just as if the Attorney-General himself had taken the suit.

The possibility of dividing or severing the action and of declaring it perempted as regards Mason personally, has been suggested, just as if there were two plaintiffs. Although the conclusions of the declaration may have suggested this argument to the defendant, I do not think the action can be so divided. The fine must be considered as a whole and this is clearly shewn by the amendment introduced by 6 Ed. VII. (Que.) ch. 37, which compels the defendant to deposit the entire fine in the prothonotary's hands in order to obtain a valid discharge. He cannot pay anything directly to the informer, although part of the fine will revert to the latter subsequently. If the action were dismissed as to Mason there would no longer be any plaintiff in the case as the Crown would no longer be represented.

For these reasons the Court is unable to grant defendant's motion and the same is dismissed with costs.

Motion dismissed.

ONT.

H. C. J. 1912

Feb. 14.

CLARKSON v. McNAUGHT et al.

(Decision No. 1.)

Ontario High Court, Britton, J. in Chambers. February 14, 1912.

1. JUDGMENT (§ I F—46)—SUMMARY JUDGMENT FOR LIQUIDATED DEMAND.

The power of summarily directing judgment to be entered for the plaintiff for a liquidated demand on a Chambers application where it appears that there is no real defence (Ont. Rule 603, C.R. 1897), is to be exercised with caution and only where it is plain that the facts set up by the defendant could not possibly entitle him to defend, and the plaintiff's proofs are complete.

[*Farmers Bank* v. *Big Cities Realty and Agency Co.* (1910), 1 O. W.N. 397, applied; and see 1912 Yearly Practice, p. 120.]

2. PLEADING (§ I A—12)—SPECIAL LEAVE—APPEAL FROM DISMISSAL OF MOTION FOR SPEEDY JUDGMENT.

In a proper case the plaintiff whose motion for summary judgment has been denied may be granted leave to deliver his pleading without prejudice to a pending appeal from the order denying summary judgment.

APPEAL by the plaintiff from the order of the Master in Chambers, dismissing an application by the plaintiff, under

Con. Rule 603,* for summary judgment in actions on promissory notes.

The appeal was dismissed.

F. R. MacKelcan, for the plaintiff.

F. Arnoldi, K.C., for the defendants.

BRITTON, J.:—Upon the best consideration I can give to all of the many facts in these cases, and to the argument of counsel, I am of opinion, and for reasons stated by the learned Master, that the motion for speedy judgment should not prevail. It was hardly strenuously contended that, apart from the consent or agreement given to Mr. Stavert by Mr. Arnoldi and others, this was a case which properly came under the Rule. Apart from that agreement, there was apparently a defence which might or might not succeed, but which the defendants were entitled to set up and to have tried.

Then, assuming that this appeal could be treated as a motion to a Judge in Court to enforce the agreement, is it an agreement such as, after action brought, should be enforced in so summary a way? I do not think it is.

The agreement relied on is dated the 13th January, 1909. It is only in the form of a letter to Mr. Stavert, then trustee of the Sovereign Bank. By an instrument under seal and dated the 5th May, 1911, Mr. Stavert, for alleged valuable consideration, assigned to the plaintiff individually the full benefit of the alleged contract of the 13th January, 1909, and he authorised Mr. Clarkson to enforce the said contract and the undertakings therein contained, either in his (Stavert's) name or in the plaintiff's name, and to commence, institute, and prosecute all necessary proceedings for that purpose.

This action was commenced on the 26th October, 1911. The writ was specially indorsed. There is no reference in the writ to the enforcement of the contract of the 13th January, 1909.

* Ontario Consolidated Rule 603 (Rules of 1897) is as follows:—

603—(1) Where the defendant appears to a writ specially indorsed, under Rule 138, and the plaintiff is not entitled to a judgment or order under the preceding rules, he may, on an affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action and stating that in his belief there is no defence, move before the Court or Judge for final judgment for the claim so indorsed, with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Court or Judges, unless satisfied or otherwise, that the defendant has a good defence to the action on the merits, or has disclosed such facts as may be deemed sufficient to entitle him to defend the action, may award judgment.

(2) Such motion may be made in respect of a cause of action specially indorsed under Rule 138, though the writ may also be indorsed with any other claim, and such order may be made in respect of the cause of action so specially indorsed as might be made if no other claim were indorsed on the writ of summons.

(3) On any such motion any amendment of the writ which might be ordered on a substantive motion may be directed, and judgment may be awarded in accordance with the writ as amended.

ONT.

H. C. J.
1912

CLARKSON
v.
MCNAUGHT.

Britton, J.

If the defendants, upon the facts, outside of the contract referred to, would be entitled to defend, they are not, in my opinion, precluded from doing so by reason of the contract. They may, if so advised, and if the facts warrant it, question the contract, its assignability, and the assignment of it.

The appeal should be dismissed with costs to the defendants in the cause.

The plaintiff asked that, in the event of this appeal being dismissed, and in view of the plaintiff appealing from my decision, that the plaintiff should be allowed to deliver a statement of claim, and that the defendants should plead thereto pending such further appeal and without prejudice to proceeding in appeal. I see no objection to the order dismissing the appeal so providing.

Appeal dismissed.

Jan. 29, 1912. J. S. CARTWRIGHT, Master in Chambers:—In these four actions on primissory notes, the plaintiff moved under Con. Rule 603 for summary judgments. The notes were all dated the 20th December, 1907, and were payable on demand. They were protested for non-payment on the 6th March, 1908. The Master said that the plaintiff, who only alleged title at the earliest on the 5th May, 1911, took them subject to all their equities. The Master referred to the remarks of Middleton, J., in the similar cases of *Stavert* v. *Barton and Stavert* v. *Macdonald*, 3 O.W.N. 348, 349: "The defendants have all along contended that they have a right of indemnity against the Sovereign Bank, if they are liable on the notes; and they now seek to contend that Clarkson has in truth become a mere trustee for the Sovereign Bank and its shareholders, and is for this reason not entitled to recover against them. This defence they must be at liberty to set up, and it is proper that it should be dealt with at the hearing." The same contention was made in the present cases; and the motions must, therefore, fail, unless the plaintiff could succeed in the ground that a certain document given on the 13th January, 1909, to Mr. Stavert by Mr. Arnoldi, "on behalf of" the defendants, was equivalent to a consent to entry of judgment, whenever action should be taken by Mr. Stavert on those notes. In any case, even if that was the legal effect of this document (which is found at p. 20 of the joint appendix of exhibits and statutes to the appeal book in *Stavert* v. *McMillan**), the decision in *Pirung* v. *Dawson*, 9 O.L.R. 248, shewed that application must be made to a Judge in Court to have that agreement carried out. This rendered it unnecessary to consider two preliminary points, which were by no means clear. The first was, whether such an agreement is assignable, as it was made only with Stavert. Then, if that were properly answered in the affirmative, it would still have to be

**Stavert* v. *McMillan*, 24 O.L.R. 456.

determined if the indenture of the 5th May, 1911, by which Stavert purported to assign to Clarkson all the trust estate, etc., carried with it the right to enforce the agreement of the 13th January, 1909. The words used did not contain any express mention of this document; and it certainly formed no part of the trust estate conveyed to Stavert, as it was not at that time in existence. Whether it was included in the words, "all books of account, papers, and other documents of the Sovereign Bank of Canada," was a question on which opinions might well differ. Probably the existence of this document was not present to the mind of the draftsman; and, even if the other two difficulties were got rid of, this might still prevent the success of the plaintiff's motions. The Master still adhered to what he said in the Stavert cases, 3 O.W.N. 265, that the change from Stavert to Clarkson constituted for some purposes a new action; and he was of opinion that this change in the situation thereby created might give the defendants the right to recede from the agreement with Stavert, even if otherwise binding on them. In view of all these considerations, he held that he could not give summary judgment without acting in disregard of the judgment of the Divisional Court in *Farmers Bank* v. *Big Cities Realty and Agency Co.*, 1 O.W.N. 397. The Master dismissed the motion with costs to the defendants in the cause (3 O.W.N. 638).

CLARKSON v. McNAUGHT et al.

(Decision No. 2.)

Ontario High Court, Middleton, J., in Chambers. February 21, 1912.

1. JUDGMENT (§ I F—46)—SUMMARY JUDGMENT FOR LIQUIDATED DEMAND.

Summary judgment should not be granted under Ont. Rule 603 (C. R. 1897), upon a Chambers application founded upon affidavits that there is no defence to an action upon a promissory note, where there is any real question either of law or of fact between the parties.

2. SUMMARY PROCEEDINGS (§ I—6)—ENFORCEMENT OF UNDERTAKING GIVEN IN COURT ACTION.

A motion to enforce an undertaking given by a defendant through his solicitor to submit to judgment upon a certain event or contingency is not properly enforceable upon a Chambers application although it was given in respect of a Chambers motion; a summary application for its enforcement may be made to the Court or an independent action may be brought for its enforcement.

[*Pirung* v. *Dawson*, 9 O.L.R. 248 specially referred to.]

Application by the plaintiff for leave to appeal from the order of BRITTON, J., dismissing an appeal from the order of the Master in Chambers, 3 O.W.N. 638, refusing to grant summary judgment under Con. Rule 603. [See *Clarkson* v. *McNaught* (No. 1) *ante* 2 D.L.R. p. 52.]

F. R. MacKelcan, for the plaintiff.

F. Arnoldi, K.C., for the defendants.

ONT.

H. C. J.

1912

CLARKSON v. MCNAUGHT.

Middleton, J.

MIDDLETON, J.:—I have very carefully considered this application. I do not think that leave to appeal should be granted.

I base my judgment upon the fact that the matters involved are too important and too difficult to fall within the scope of the Rule in question.

It must be borne in mind, in dealing with applications under this Rule, that the right of appeal is very limited, and that these and similar considerations have led to the Rule being so restricted in its application as to render the summary procedure thereby provided available only where there is no real question either of law or fact between the parties.

It is sought to treat this application as one to enforce an undertaking given by counsel that judgment should be entered upon these notes if the plaintiff is found entitled to recover in the action of *Stavert* v. *McMillan*, 24 O.L.R. 456.

A very serious question is suggested by counsel for the defendants as to the effect of this undertaking, in view of the transactions which took place in July and August, 1911, long after its date. By the agreements then entered into, the title to the notes in question has become vested in Clarkson; but it is alleged that Clarkson has not succeeded to all the rights of Stavert, and that in truth he has no greater right than the Sovereign Bank itself, and that neither he nor the Sovereign Bank can enforce the notes in question. These questions are not only important, but difficult, and clearly are not such as ought to be dealt with upon a mere Chambers motion, but such as should be disposed of so as to permit the most ample consideration and to give the freest and most untrammelled right of appeal.

Apart from this, I do not think a motion to enforce such an undertaking could properly be made in Chambers, either before the Master or before the Judge. The undertaking may be enforced upon a summary application to the Court—*Pirung* v. *Dawson*, 9 O.L.R. 248—or may be enforced by action. In either case, the judgment will be free from the trammels placed by our Rules upon the right to appeal from Chambers orders.

In this case the parties will be well advised if the question of the validity and effect of the undertaking is raised by the pleadings, so that it can be dealt with at the trial; because it does not appear to be a matter that can be satisfactorily dealt with upon a summary application.

The motion will be refused; costs to the defendants in any event.

A cross-application for leave to appeal from the terms of the order of Mr. Justice Britton will also be refused; costs to the plaintiff in any event.

Leave to appeal refused.

CHISHOLM v. CHISHOLM.

N.S.
S. C.
1912
Jan. 22.

Supreme Court, Nova Scotia, Sir Charles Townshend, C.J., Graham, E.J., and Russell, J. January 22, 1912.

1. CONTRACTS (§ V B—387)—TERMINATION BY DEATH.

A contract by the testator to pay a specified sum of money per annum payable quarterly in advance, so long as he was able to do so and whilst the payee was self-dependent, provided the payee would agree to place her daughter (testator's granddaughter) in a certain educational institution until she had finished her education, is not terminated by the death of the testator but continues as against his executors.

2. CONTRACTS (§ II C—140)—TIME OF CONTINUANCE.

A stipulation in a contract to pay maintenance made for valuable consideration whereby the promisor agrees to pay the maintenance money quarterly in advance "so long as I can," will not enable the promisor to terminate the contract at his own will and pleasure; the words "so long as I can" are to be considered as having reference to his financial ability, and such ability being proved the promisee is entitled to recover.

3. CONTRACTS (§ II C—140)—TIME OF CONTINUANCE.

The words "whilst the mother is self-dependent" contained in a stipulation to pay for a grandchild's maintenance are not to be restricted to the lifetime of the testator, but are equally applicable to the period after his death as to that before, during which the child's mother continues to be self-dependent.

APPEAL from the judgment of Russell, J., in favour of defendants in an action on the contract or agreement following, made by the defendants' testator to pay plaintiff a certain sum of money quarterly in advance on conditions therein specified.

The appeal was allowed and the action maintained, Russell, J., dissenting.

The action was brought to recover against the executors of the late William Chisholm the sum of $500, an instalment of the annuity payable under the following agreement of the 6th of April, 1897:—

I am in receipt of your letter of the 26th March and note contents. You do not appear to have changed your views in regard to the right of guardianship I should have over your child, neither have I changed mine. You appear to think the claims are entirely on one side, whereas I claim that the one that has to act as parent towards the child, filling as far as possible the father's place, has his claims as well.

I now propose to make you the following offer, which I will carry out, if it meets your approval, but not otherwise. I will allow you at the rate of $500 per annum payable quarterly in advance for the support of yourself and Ruth, if you agree and promise to place her in the Convent of the Sacred Heart in Halifax, or in the Convent of the Sacred Heart in Montreal, and allow her to remain there in either Convent until she has finished her education. And after you place her in either Convent, I will allow yourself $500.00 per annum paid quarterly in advance so long as I can do so, whilst you are self-dependent. If you think Ruth is too young to be placed in a Convent now, you can keep her where she is a while, but I require

N.S.

S. C.
1912

CHISHOLM
v.
CHISHOLM

Statement

that she will be placed in either Convent not later than the first of September, 1898, where she is to remain until her education is finished. I will pay all her necessary bills for her education at either Convent until she has finished her education, and after she has finished her education, I will allow her a sum yearly to keep her respectably until she is of age, and then I will make a suitable provision for her, but for all this I require to be appointed her guardian as a guarantee that her education shall be continued in the Convent until she has finished it, you see I have no desire to part you from your child, as you can live in either place with her, or in any other place you may wish. I merely wish to do what I consider is for her welfare; she will be taken care of in a Convent, as well as you can take care of her. When you were sick some one else had to take care of her, and if you go to Boston you will have to leave her behind you for some one else to take care of her. With regard to those persons of whom you have asked advice about your claim to your child, I can only say if they have any better terms to offer you and your child than I make you, then their advice is worth considering, but if they have only advice to offer you, we all know advice is cheap, possibly that is why it is so freely given. We are all well, and I trust you and Ruth and your family are well. With love to yourself and Ruth, I am,

(Signed) WILLIAM CHISHOLM.

The defence was that the executors are not liable, that the liability ceased with the death of William Chisholm.

T. S. Rogers, in support of appeal. The letter on which this action is based discloses a family arrangement providing for the support of testator's daughter-in-law. The consideration on which the obligation to pay rests became fully executed upon the appointment of the testator as guardian: Eversley on Domestic Relations, 3rd ed., 656, 658; *Hall* v. *Hall*, 3 Atk. 721, *Tremain's Case*, 1 Str. 168. The words of the letter point to continued support so long as such support is required: *Richardson* v. *Bricker*, 49 Am. Reps. 344; *Work* v. *Beach*, 12 N.Y. Sup. Ct. 12; Stroud's Jud. Dict., word "able." The general principle is the executors represent the testator with respect to his rights and liabilities upon every contract: *Wills* v. *Murray*, 4 Ex. 843; 19 L.J. Ex. 209, at p. 216 (Parke, B.). They are responsible on all the contracts of the testator broken in his lifetime and for those broken after his death except where personal skill or taste is required; *Siboni* v. *Kirkman*, M. & W. 418, at p. 423; Broom's Legal Maxims, 7th ed., 684; *Nield* v. *Smith*, 14 Ves. Jr. 491; *Wentworth* v. *Cock*, 10 A. & E. 42; *Drummond* v. *Crane*, 159 Mass. 577. So far as the whole arrangement goes testator's death only resulted in the loss of a collateral guarantee that the grandchild would be educated as he desired, and notwithstanding his death the Courts would, at the instance of his executors, see that the arrangement was carried to completion: *Llanelly* v. *L. and N.W. Ry.*, L.R. 8 Ch. App. 942, at p. 949.

W. E. Roscoe, K.C., contra. The judgment appealed from can be supported on three grounds; (1) The promise to pay was determined by the testator's death and is not enforceable against his executors; (2) The terms of the promise and the surrounding circumstances are such as shew that the obligation to pay was not intended to extend beyond the lifetime of the promissor; (3) There is an element of a personal character in the contract which under the rules of law applicable in such cases prevents the contract from surviving.

In construing an instrument in writing it must be considered with reference to its object and the whole of its terms: *Walker* v. *Tucker*, 70 Ill. 532. All contracts must be construed with reference to their subject-matter and a contract defining an existing relation can have no operation when that relationship ceases for its foundation is gone: *Blakely* v. *Sousa* (No. 1), 197 Pa. 305; *Bland's Administrators* v. *Umstead*, 23 Pa. 316; *Billing's Appeal*, 106 Pa. 558; *Dickinson* v. *Calahan*, 7 Harris 232. The testator's death at any time before the expiration of the guardianship as intended by which the foundation of the whole contract is destroyed, would excuse further performance of the contract: *James* v. *Morgan*, [1909] 1 K.B. 564; *Walker* v. *Tucker*, 70 Ill. 543. The parties contracted on the basis of the existence of conditions permitting of the discharge of the duties of guardian by the testator personally, which ceased on his death and further performance of the promise to pay is excused: *Chicago M. and St. P. Ry. Co.* v. *Hoyt*, 149 U.S. 1, at p. 15; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Baily* v. *De Crespigny*, L.R. 4 Q.B. 180, at p. 185; Chitty on Contracts 15th ed., 709; *Jackson* v. *Union Marine Ins. Co.*, L.R. 10 C.P. 125, at p. 141. There is no difference between cases where a certain status exists at the time of the contract and a case where a status is called into existence by the terms of the contract but which nevertheless forms its basis: *Butterfield* v. *Byron*, 153 Mass. 517, at p. 520; *Howell* v. *Coupland*, 1 Q.B.D. 258; *Miller* v. *Woodward*, 2 Beav. 271; *Stinson* v. *Prescott*, 15 Gray 335. The death of the guarantor in some cases does not relieve his estate from liability for amounts which have become payable under it by reason of occurrences since the death of the guarantor. This doctrine is developed by the case of *Lloyd's* v. *Harper*, 16 Ch. D. 290; and *In re Crace, Balfour* v. *Crace*, [1902] 1 Ch. 733; *Harriss* v. *Fawcett*, L.R. 15 Eq. 311, at p. 313; *Coulthart* v. *Clementson*, 5 Q.B.D. 42. The cases, however, are not analogous. The view that the testator's death should have been anticipated and provided against cannot be urged: *Boast* v. *Firth*, L.R. 4 C.P. 1, at p. 8; *Robinson* v. *Davison*, L.R. 6 Ex. 269, at p. 277; *Krell* v. *Henry*, [1903] 2 K.B. 740, at p. 752. Plaintiff did not understand that the

N.S.
S. C.
1912
CHISHOLM
v.
CHISHOLM
Argument

contract was to extend beyond the testator's lifetime. Her construction is of importance in respect to any matter as to which there is doubt: *Straus* v. *Wanamaker*, 175 Pa. St. 213. There is nothing in the letter to lend support to the view that testator had any intention of charging his estate with an annuity for the lifetime of plaintiff: *Quain's Appeal*, 22 Pa. St. 510; *Stinson* v. *Prescott*, 15 Gray 335, at p. 338; *Bland's Administrators*, 23 Pa. St. 316. In the word "allow" there is a personal feature inconsistent with the idea that the payment was to be made by the executors: *Henry* v. *Antrim Union* (1), [1900] 2 I.R. Ir. 547, at p. 555; *Harmon* v. *James*, 7 Ind. 264; *Mangam* v. *Brooklyn*, 98 N.Y. 585, at p. 596.

The question whether a contract survives to the personal representatives depends upon the contract and the intention of all the parties and the surrounding circumstances: *Dickson* v. *Calahan*, 19 Pa. 231; *Billings' Appeal*, 106 Pa. 558; *Tasker* v. *Shepherd*, 6 H. & N. 575.

When personal considerations are of the foundation of the contract the death of either party puts an end to the relation: *Farrow* v. *Wilson*, L.R. 4 C.P. 744; Walker & Elgood on Executors 136; Chitty on Contracts, 15th ed., 709; American Law of Administration, vol. 2, 2nd ed., 687. Where articles of apprenticeship are entered into and the master dies the parties stand for all purposes *in statu quo*: *Boast* v. *Firth*, L.R. 4 C.P. 1, at p. 8. No rights of either party were left outstanding at the testator's death: *Butterfield* v. *Byron*, 153 Mass. 517, at p. 522; *Blakeley* v. *Muller*, 88 L.T. 92; Chitty on Contracts, 15th ed., 710; Williams on Executors, 10th ed., 626.

Rogers, K.C., replied.

SIR CHARLES TOWNSHEND, C.J.:—It is quite unnecessary to cite cases and multiply authorities for the proposition that executors and administrators are legally bound to perform all contracts of the deceased except in certain well defined cases. Sufficient at any rate to shew the rule of law have been given in the opinion of my brother Graham. The excepted cases are those in which there is some personal element present which the deceased alone was capable of performing, and therefore was necessarily in the contemplation of the parties when the contract was entered into, such for instance as demanded personal skill and knowledge in teaching some trade or occupation: *Siboni* v. *Kirkman*, 1 M. & W. 418, at p 423; *Wentworth* v. *Cock*, 10 A. & E. 42.

It is quite clear that the contract or agreement in this case does not come within this class of exceptions as there was no personal office or duty to be performed—nothing in fact to be done by the deceased which could not be equally well carried out by his executors.

In brief the deceased contracted or agreed with the plaintiff that in consideration of her placing her child—his grandchild—in certain institutions named by him to be brought up and educated, he would not only pay all expenses, and provide for her in his will, but would also, in his own words, "and after you place her in either convent I will allow yourself $500 per annum and payable quarterly in advance so long as I can do so whilst you are self-dependent." And he further says, "But for all this I require to be appointed her guardian as a guarantee that her education shall be continued in the convent until she has finished it."

It is undisputed that the plaintiff accepted these terms and complied with the condition. It is further proved that the deceased's estate is well able to pay the annuity and that plaintiff is self-dependent.

Two things are alleged by the executors against paying this annuity, (1) that when in consequence of the death of deceased his guardianship ceased, he or his estate was no longer bound, contending that the filling of the office of guardian was the essence or motive of the contract, which was discharged by the impossibility of performance, and (2) that he and now his executors were and are the sole judges of his ability to pay the $500.

As to the first objection, it seems to me the requirement that he was to be guardian was merely incidental to the agreement and, as he says himself, "a guarantee that her education shall be continued in the convent until she has finished it."

Looking at the whole circumstances and the correspondence between them it is abundantly plain that the basis of the agreement, the consideration which led up to it, and induced him to make it, was his desire to have his grandchild properly educated according to his ideas of what that education should be, and not for the purpose of becoming her guardian. Had he lived, and for some reason of his own apart from the agreement renounced the guardianship, could he thereby have freed himself from the terms of the agreement? I think he could not have done so, nor can the accident of his death causing the guardianship to cease, relieve his estate from the obligation.

Then as to the contention that he was to be the judge of his ability to make the allowance, I think that to be a question of fact to be determined, as it has been, by evidence, and not to be left to his own caprice. He must be judged by his own words as to what was intended, and there are none which indicate in my opinion that he had any such idea. The plaintiff was granting and did grant valuable rights and gave up expectations which she might legitimately have entertained and it is not reasonable to suppose that she would have done so, if the deceased were at liberty at any time he thought fit to withdraw from the agreement. Indeed it would seem from a paragraph

N.S.

S. C.
1912

CHISHOLM
v.
CHISHOLM

Townshend, C.J.

in her letter that this matter must have been discussed and settled to her satisfaction before she complied with his proposal. She must have been satisfied that the interpretation now claimed by his executors was not correct, as she made the very objection now set up. I think the language of the document is clear enough and does not justify any such limitations as are now attempted to be set up. It was a reasonable arrangement and such as in the light of all the correspondence and the relative situations of the parties one would expect to see made.

It will be found by reference to my brother Russell's judgment below that he takes the same view as I have endeavoured to express here as to the enforceability of the contract and differing altogether from the argument of defendant's counsel on that part of the case. He says:—

> The contract here is simply "make me guardian, let me control the education of the child, and I will pay you $500 a year." That is a contract capable on the testator's side of being performed by his executors. If it was meant that it should be binding upon his executors there is no reason that I can see why they are not liable.

He then proceeds to argue that it was not intended and adds:—

> The intention must be gathered from a close inspection of the terms of the letter in the light of all the surrounding circumstances.

And his conclusion is that it will not bear the construction I have placed upon it. With all due deference I am wholly unable to accept his view, and as already pointed out, adopting the same method of interpretation, I come to the conclusion that this is an agreement which the executors are bound to carry out, that the plaintiff should succeed, and this appeal should be allowed with costs here and below.

GRAHAM, E.J.:—I refer to a few of the facts although they are stated in the case of *Chisholm* v. *Chisholm*, 40 Can. S.C.R. 115, at p. 120, an action brought for one of the instalments. Ruth Chisholm was born on the 8th of November, 1892, the date of this agreement is the 6th of April, 1897, and the date of the order of the Court appointing the late William Chisholm guardian is the 3rd of December, 1897, Ruth being then 5 years old. Ruth attended the convent first at Montreal, then at Halifax, and finished her education. On the 20th of May, 1909, William Chisholm died at the age of 77 years. Ruth was then 16 years old.

It is proved that the estate of the late William Chisholm is sufficient to meet this annuity, and also that the plaintiff is self-dependent. I think the burden lies on the defendants, it being a condition subsequent. I think it has to be conceded that the effect of this agreement is, in the circumstances, either to pay the plaintiff the sum of $500 for life or as is contended by

the defendants, for the life of William Chisholm, that is, that it ceased with his life. There is a great stream of cases to this effect, that in judging of the lifetime of a contract or promise, the termination of the life of the promissor marks no limit, unless it is a promise which shews that it was to be performed in person by him. For, as is pointed out by the Judges, the executors represent the person of their testator. This principle was probably borrowed from the civil law. But at any rate, as far back as the time of Queen Elizabeth, we find it stated thus. In *Hyde* v. *The Dean of Windsor*, Croke's Elizabeth 552, at p. 553:—

> And a covenant lies against an executor in every case, although he be not named unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform.

The rule has been observed ever since. In *Phillips* v. *Alhambra Palace Company*, [1901] 1 K.B. 59, at p. 63, Lord Alverstone said:—

> If in any particular case the contract is one which has relation to the personal conduct of the contracting party, then the death of that party puts an end to the contract; if, on the other hand, it has no such relation, the death of the contracting party has not that effect.

Of course the reason is very obvious. The executors cannot perform that which the contract by its terms admitted only of being performed by the deceased. But in all other cases the contract goes on as if the promissor had not died. In *Wills and Murray*, 4 Ex. 843, at p. 865, Parke, B., says:—

> No proposition in law is clearer than that as a general rule the executor represents the person of the testator with respect to all his rights and liabilities upon all his contracts.

He then refers to two cases in one of which Lord Chancellor Macclesfield said:—

> The executors of every person are implied in himself and bound without naming, etc.

Parke, B., at p. 866 continues:—

> The executors are in truth contained in the person of the testator with respect to all his contracts, except indeed in the case of a personal contract, that is, a contract depending on personal skill in which is the condition that the person is not prevented by the act of God from completing the work. That condition is peculiar to personal contracts.

In *Siboni* v. *Kirkman*, 1 M. & W. 418, at p. 423, the same learned Judge during the argument said:—

> Executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death, that is, they are not liable in those cases where personal skill or taste is required.

N. S.

S. C.
1912

CHISHOLM
v.
CHISHOLM

Graham, E.J.

In 2 Bacon's Abridgment, title, "Executors and Administrators," p. 1 and p. 2 it is said:—

> Also it hath been resolved that there is no difference between a promise to pay a debt certain and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise by the testator to give such a portion with his daughter, to deliver up such a bond, etc., and that whenever in those cases the testator himself is liable to an action, his executors shall be liable also.

I refer to *Berisford* v. *Woodroff*, Croke, James, 404. In *Nield and Smith*, 14 Ves. 491:—

> It appeared that by virtue of an agreement it was provided that Norris should grant an annuity to Scott for his own and two other lives. Norris died not having granted the annuity. In the creditors administration action Scott claimed the execution of that agreement from the executors of Norris. It was held that he was entitled to the execution of the agreement against the executors.

This law extends to cases where the liability accrues after the death of the deceased.

I refer to *Wentworth* v. *Cock*, 10 A. & E. 42, a leading case which I cannot quote at length. It is approved of by a great Judge in *Cooper* v. *Jarman*, L.R. 3 Eq. 98.

The surety cases are instructive because if death is to be a limit to any promise in respect to liabilities accruing after the death of the promissor it ought to be, one would think, in the case of a surety but the promise is continued beyond that death.

In De Colyar on Guarantees, 3rd ed., p. 392, it is said:—

> The death of the surety does not of course affect the liability in respect of past transactions. Whatever liability had actually attached to the surety at the time of his death may be enforced against his representatives. With respect to subsequent transactions and liabilities whether a guarantee is revoked by the death of the surety depends it would seems upon the nature of the guarantee given. If it be a guarantee which the surety could himself have determined by notice then it appears that notice of his death will operate as a revocation. But if on the other hand the surety could not himself have put an end to the guarantee by notice, then his death does not revoke the instrument nor does it extinguish his liability thereunder.

I refer to *Lloyd's* v. *Harper*, 16 Ch. D. 290; *In re Crace* (*Balfour* v. *Crace*), [1902] 1 Ch. 733; *Kernochan* v. *Murray*, 111 N.Y. 306.

In *Drummond* v. *Crane*, 159 Mass. 578, Holmes, J., said:—

> The question is not whether the administrators are bound by their intestate's contract. They are bound by it of course whether named or not because they represent his person (citing cases). A sufficient proof is that they would unquestionably be liable for a breach by their intestate in his lifetime. The true question is whether the contract properly construed requires a continuance of the promised action beyond the lifetime of the promisor. It is the same question and is to be answered in the same way as if the promisor himself were alive for purposes of being sued, but dead for the purposes of performance.

The following passage from the judgment of James, L.J., in *Llanelly* v. *North Western Railway*, L.R. 8 Ch. 742, at p. 749, is very useful. Owing to the recent development of a principle in cases arising out of the postponement of the coronation of the late King, it may be that it ought to be added to the list given by that eminent Judge but for most purposes his definition is complete. He says:—

> I start with the proposition that, *primâ facie*, every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to shew either some expression in the contract itself or something in the nature of the contract from which it is reasonable to be implied that it was not intended to be permanent and perpetual but was to be in some way or other subject to determination—no doubt there are a great many contracts of that kind—a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which from the nature of the case we are obliged to consider that they are intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relation between the parties.

If there is one promise more than another, which will survive the lifetime of the promisor and lacks the element of personality, it is a promise to pay money.

In Langdell's Summary of the Law of Contracts (1880), section 42, this is said:—

> For example, the law supposes that a covenant or promise to pay money may be performed notwithstanding any event that can possibly happen, while the performance of a covenant or promise to render personal service will be made impossible by the death of the covenantor or promissor before performance, and may be made impossible or impracticable by his illness.

I refer to *White* v. *Commonwealth*, 39 Penn. St. 167, at p. 175, and *Kernochan* v. *Murray*, 111 New York 306.

Coming to the peculiar words of this contract, "so long as I can do so whilst you are self-dependent," with deference, I think that those words do not point to such a limit as the death of the promisor. They really constitute limits imposed by the deceased and were as applicable, in my opinion, to a period after death as before. Indeed, I think that their existence in the agreement tends to extend the liability beyond the lifetime of the promisor. Whilst you are self-dependent is a strong expression. I am not forgetting that the letter must be considered as a whole. It is quite plain, I think, when the deceased said he would pay this $500 per annum "so long as I can do so" and she accepted the offer, that these parties were not entering into a child's bargain, to pay it as long as he chose, that it was

N.S.
S. C.
1912
CHISHOLM v. CHISHOLM
Graham, E.J.

to be at his will or pleasure. If it had been that, the former action of *Chisholm* v. *Chisholm*, 40 Can. S.C.R. 115, at p. 122, would never have survived in the Appeal Court or in any Court. It is not very material to suggest that the plaintiff at first, before accepting the offer, as appears in the letter to Dr. Foley thought it was but a child's bargain she was asked to enter into. She, no doubt, learned better before accepting it. The expression is not "so long as I can do so, of which I am to be the judge," that would be but a child's bargain. It surely has reference to his means, his financial ability. One can hardly expect to find cases in point. But there are cases which indicate that words like these would constitute a good conditional promise and would be effective when that condition is proved to have been fulfilled. They are cases in which the ability to pay is a condition precedent. For instance, there are cases under the Statute of Limitations, many of them English and American, where there is a promise to pay "when I can," or "when able." The leading case is *Tanner* v. *Smart*, 6 B. & C. 603, and there is one in our own Court: *Murdoch* v. *Pitts*, 2 N.S.R. 258, at p. 261. There are cases, too, of infants after full age promising to pay when able, something they had promised during infancy: *Cole* v. *Saxby*, 3 Esp. 159; *Everson* v. *Carpenter*, 17 Wend. 421; *Thompson* v. *Lay*, 4 Pick. 48. Also cases of discharged bankrupts promising to pay when able an old liability under former statutes: *Besford* v. *Saunders*, 2 H. Bl. 116; *Scouton* v. *Eislord*, 7 Johns 37; *Patten* v. *Ellingwood*, 32 Maine 163. All are binding conditional promises and all that need be proved is that the promisor is financially able to pay in order to recover. I think there is no peculiarity about them because they happen to be promises to pay an old debt that is barred. That, I think, merely results because the promisee then has to take the best kind of a promise he can get, whereas if a bill of exchange was accepted in that way, or a promise made when the promisee could help himself it would likely not be taken. I have failed to see any reason for construing the letter in this case as indicating any intention that the deceased was to be a participant in judging of his ability to make the payment that would not exist in the conditional promises to pay "when able" in connection with the statute of limitations, or in the other instances, and how readily they would have been seized upon there. And if that implication is not justified the payment of this sum yearly loses the element of personal performance by the deceased, sought to be attached to it to take it out of the cases first cited. In the case of *Nelson* v. *Von Bonnhorst*, 29 Penn. St. 353, the words were "to pay whenever in my opinion my circumstances will be such as to enable me so to do," and of course that was held to be an unenforceable promise. The Court said:—

> The express contract of the parties is that the debtor is to pay when he shall be able and that he shall be the judge of his ability.

Once it is conceded that this was not a child's bargain, but a binding enforceable promise in law, positive although subject to a subsequent condition, what limit is to be imposed to its life, short of that indicated in the cases first cited, there being no payment in person required? There is no intermediate stage. Moreover the question of a person's financial ability to pay is a question of fact to be determined by the jury.

I refer to *Waters* v. *Thanet*, 2 Q.B. 757, and *Meyerhoff* v. *Froehlich*, 3 C.P.D. 333, at p. 338. In *Richardson* v. *Briker*, 49 Am. R. 344, Helm, J., says:—

> Of course the expression "when able," must be construed as referring to financial ability. This is not a matter left to the debtor's discretion and judgment. His ability to pay is a question of fact for the jury and that body might find that he was able to do so at the very time he made the conditional promise.

I think with deference that here the expressed meaning governs as to what the parties intended and that expressed meaning excludes the idea that the deceased was to be the judge of his ability to pay.

In *Shore* v. *Attorney-General* on the relation of Thomas Wilson, 9 Cl. & F. 355, at 525, Coleridge, J., said:—

> It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention. And I believe the authorities to be numerous and clear (too numerous and clear to make it convenient or necessary to cite them), that when language is used in a deed which in its primary meaning is unambiguous and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken conclusively to be that in which the writer used it. Such meaning in that case conclusively states the writers intention, and no evidence is receivable to shew that in fact the writer used it in any other sense or had any other intention.

And page 526:—

> The answer is that interpreters have to deal with the written expression of the writer's intention, and Courts of law to carry into effect what he has written, not what it may be surmised, on whatever probable grounds, that he intended only to have written.

It is said that the words "whilst you are self-dependent" mean "whilst you are self-dependent during the period of my life." Why not during the period of her life? That was the reasonable limit, the thing to be expected. As Mr. Justice Davies said in the first case: *Chisholm* v. *Chisholm*, 40 Can. S.C.R. 115, at p. 121:—

> Mixed with that was the parental pride which moved him to provide for his daughter-in-law's support and avoid the possible scandal

N.S.

S. C.
1912

CHISHOLM
v.
CHISHOLM

Graham, E.J.

of the widow of the only son of a rich man being compelled to resort possibly to some menial employment for her support, which would entail separation from the child.

Parental pride extends liability beyond a man's lifetime as many a will shews. He was rich and had made no settlement on Mrs. Chisholm. When she married the son, the son had nothing, and this was after his death, when the deceased was relieved of providing for him and when she had a child and was left nothing by him. The marriage service and the laws relating to the descent of property indicate that a widow ought to have some property from her husband. What had she got by marrying? The deceased displayed anxiety to change the nationality of the child and necessarily that of the mother. He thought the convent schools of Canada better than the common schools of the United States and his anxiety extended to the bringing up and the faith of the child, and this could, he thought, be accomplished in one way, through the mother. The argument would seem to be that William Chisholm cared nothing for what would happen to the plaintiff, the mother of his grandchild, after the event of his death.

The plaintiff could not re-marry, for that is what this "self-dependent" clause really means, without forfeiting the allowance, and after passing marriageable age the allowance was to be cut off in another way by the settlor's death. He has expressed himself, he is to pay this allowance, "as long as he can" and, "as long as she is self-dependent," and now we are asked to read into it another limit, "as long as I live."

The learned counsel for the defendant puts the case from another standpoint, I think it safe to copy his contention from the factum:—

> The promise to pay was determined by the death of William Chisholm. The status of guardianship with its attendant rights and duties was the basis or substratum on which the promise to pay rested, which was made on the faith of the continued existence of the relation during the full term over which the guardianship was to extend. The status ceased to exist by the death of William Chisholm without default of either party. The promise to pay fell with it, and is not enforceable against Chisholm's executors.

The contention is founded on such cases as *Taylor* v. *Caldwell*, 3 B. & S. 826, and *Krell* v. *Henry*, [1903] 2 K.B. 740, the latter being an extension of the former. In that latter case, which was an action to recover the price of the hire of a flat for June 26 and 27, 1902, from which to view the procession in connection with the proposed coronation of the late King, which, owing to his illness, was postponed, the action failed. In it Vaughan Williams, L.J., at p. 748, says:—

> Whatever may have been the limits of the Roman Law the case of *Nickoll* v. *Ashton*, [1901] 2 K.B. 126, makes it plain that the English law applies the principle not only to cases when the performance

becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases when the event which renders the contract incapable of performance is the cessation of or non-existence of an expressed condition or state of things going to the root of the contract and essential to the performance. . . .

I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words and in such case if the contract become impossible of performance by reason of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. . . .

Each case must be judged by its own circumstances. In each case one must ask oneself first what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract. If all these questions are answered in the affirmative (as I think they should be in this case) I think both parties are discharged from further performance of the contract.

The learned counsel's contention appears to be that here there is more than the mere death of a party to a contract—there is the cessation of the guardianship that is the foundation of the contract, and that brings him within the principle of the cases just cited, also borrowed from the civil law. It would probably be easier to answer the different tests or questions just put by Vaughan Williams, L.J., in the negatives in this case, as they could be so answered and pass on. But I think the contention is this:—

It may be that death has not rendered impossible the payment of the annuity, that has been dealt with, but the consideration (the guardianship having ceased) has failed and that is a substantial part of the contract and is now rendered practically impossible to perform the promise to pay the annuity. It seems to me that the answer is that the consideration has been executed, the plaintiff has performed everything on her part to be performed. There is no promise on her part that the deceased should continue to be guardian until Ruth was 21 years of age. He obtained everything he stipulated for by his appointment. But certainly there has been no failure of the contract on that side going to the root of the matter. It has only been partial. He was guardian for the greater part of the time. These promises would be independent promises, and the non-performance on her part could not be set up to defeat an action for the instalments.

N.S.
S. C.
1912
CHISHOLM
v.
CHISHOLM
Graham, E.J.

This is more like one of the other cases, arising out of the same event, the Royal Naval Review at Spithead to follow the coronation. I refer to *Herne Bay Steamboat Company* v. *Hutton*, [1903] 2 K.B. 683. That was a contract for the hiring of a steamship for the 28th of June, 1902, to take passengers from Herne Bay for the purpose of viewing the Naval Review and for a day's cruise around the fleet, also for June 29th for similar purposes. Owing to the illness of the King the review was officially cancelled on the 25th. The fleet was there, but there was no Royal Naval Review and none of its incidents, of course. It was held that there was no total failure of consideration, nor a total destruction of the subject matter of the contract.

I also refer to *Bettini* v. *Gye*, 1 Q.B.D. 183, at page 188, *Boone* v. *Eyre*, 1 H. Bl. 273, and *Carpenter* v. *Cresswell*, 4 Bing. 409.

Take the circumstances in this case. What had the deceased stipulated for in his letter? That the plaintiff should agree and promise to place Ruth in a specified convent in Halifax or Montreal and to allow her to remain there until she has finished her education, and, "as a guarantee that her education shall be continued in the convent until she has finished it," he required to be appointed her guardian. After she was placed in the convent the annuity was to commence. Now that is what he says. She did agree. He was appointed guardian, "while Ruth was a minor or until further order," and the child was placed in the convent. He got what he stipulated for. The consideration became fully executed. He did not wish, he said, to part her from her child and he made provision that she could live in either place with her, and the child living in the convent would not be living with Mr. Chisholm himself. With this consent application was made to the Supreme Court, having clearly the necessary jurisdiction—the jurisdiction in 1884 of the High Court of Chancery in England—to appoint a guardian. I think the Courts of Probate for the different counties probably had not jurisdiction, and that the statutes of guardian and ward, so far as they relate to that Court, did not apply. At the time the application was made it was provided, 1894, ch. 20, sec. 1, that on an application to the Court of Probate the mother was entitled to be appointed guardian. It reads a little differently now in the Revised Statutes of Nova Scotia, 1900, ch. 115, sec. 4, but probably means that still. But that provision did not apply to an application to the Supreme Court and the rights of the mother to be appointed stood as they were in England in 1884. In making such an appointment in England, the father being dead, the Court was not tied down to appointing the mother. Of course she had precedence, her wishes would be regarded, but she had no exclusive title to be appointed and the grand-

father could be considered. The child had no property and the guardianship was really in respect to the person, although the order covered both person and estate. That was, probably, to get rid of a doubt in England, afterwards cleared up. No directions were given in the order, but the usual practice in England is to give the directions later as they become necessary, and if it had become necessary in this case, the most usual one would have been a direction as to the school for the child and the Judge with this consent would have the direction in that regard at his hand.

Mr. Justice Davies, in *Chisholm* v. *Chisholm*, 40 Can. S.C.R., at p. 118, says:—

> I fully agree with the judgment of Mr. Justice Russell, speaking for the full Court, that the guardianship of the child which was insisted upon by the grandfather was desired merely as a guarantee that the child would finish her education at the convent.

That is all the agreement contemplated in reality. That the Court of Chancery would appoint a guardian for a special and temporary purpose I cite the case of *Ex parte Woolscombe*, 1 Madd. 213.

During the period of the child's education, if there were holidays, it was not stipulated that the child should not live with the mother and the Judge could have given directions as to that: Anon, 2 Ves. Sr. 374. And when the child finished her education at the convent there was nothing in the agreement or in the law which would prevent the Judge from discharging the order or appointing another guardian. It is true the order goes beyond all this, but as far as Mr. Chisholm is concerned, and as against him the agreement contains the stipulations which are to be regarded. At the date we are considering, when the guardianship actually ceased, Ruth was 16 years of age. I think that this case is not within those cases of impossibility of performance relied upon by the defendant's counsel. It is suggested that there is a similarity between the duties of Mr. Chisholm as a guardian to Ruth and the duties of master and apprentice, and of course the duties as guardian were personal and could not be performed by executors. But there is no provision on his part that he was to perform or to continue those duties. He was guardian under an order of the Court and the relation was not created by this agreement. His duties were to Ruth and their performance was not enforceable by the plaintiff.

But it is irrelevant when the action is brought on the promise to pay the instalments of the annuity to invoke another promise (if there is one) to perform the duties of guardian. There are other promises in this letter which are clearly not personal and which clearly extend beyond the lifetime of the deceased. I think that neither those nor the supposed promise with which we are dealing affect this promise to pay the instalments.

N.S.
S.C.
1912
CHISHOLM v. CHISHOLM
Graham, E.J.

I refer to the case of *Wentworth* v. *Cock*, 10 A. & E. 42, where Lord Denman concedes that part of the agreement might require the personal choice of the deceased in respect to the state.

For the foregoing reasons I have come to the conclusion that the appeal should be allowed and that the plaintiff should have judgment for the instalments sued for with costs.

RUSSELL, J. (dissenting):—I think there is no difference of opinion as to the principles that must govern the decision of this case. But for the elaborateness with which they have been stated and buttressed in the opinion first read, I should have supposed we were all agreed that the executors of a deceased person are bound to the extent of the assets that come into their hands to carry out all the contracts of the testator with the well-known suggestions referred to by my learned brother. The question presented in the case before us now is not as to the obligation of the executors to perform the testator's contract, but as to the true construction of the contract itself. If the testator had contracted to pay the plaintiff an annuity for any definite term of years or for any uncertain but ascertainable term such as the term of her natural life. I do not imagine that any one would question the obligation of the executors to pay the annuity for such term. All the cases cited in the opinion of my learned brother are of that character. I shall deal with them in their order.

In the Massachusetts case of *Drummond* v. *Crane*, 159 Mass. 577, the contract was to take $750 worth of water per annum "for the period of ten years." The executors were of course bound to carry out the contract. In *Nield* v. *Smith*, 14 Vesey 491, Norris agreed to grant an annuity to Scott for his own and two other lives. There could be no question as to the meaning of the contract and no difficulty in requiring the executors to perform it.

Cases are cited that have arisen under the statute of limitations which also seem to me in so far as they are not inapplicable to have a misleading tendency. Sir Frederick Pollock says as to this class of cases:—

> The only theory tenable on principle seems to be that the statute is a law merely of procedure, giving the debtor a defence which he may waive if he thinks fit. Nevertheless it is held that the acknowledgment operates as evidence of a new promise.

It is obviously dangerous to cite cases applicable to the conditions of an existing debt to which there is a defence which may be waived if the debtor thinks fit, as if they were applicable to the question whether there is or is not in fact any debt at all. The most that any of the cases cited establishes is that the question of a debtor's financial ability is a question of fact, and it is

significant that not even any of these cases that have been cited raise the question whether the executor would be bound by proof that the estate was able to pay. We shall have a case a little in point when a debt bound by the Statute of Limitations is revived by a promise of the debtor to pay when he can do so and proof that his estate was found after his death to be financially equal to the strain. Even then the cases would not be analogous because in that case there is the antecedent and continuing debt, whereas in the present case it is the existence of the debt which is the very question that we are to determine.

Cases had arisen under the Statute of Limitations where the promise was conditional, such as to pay when the debtor was able, and in respect to such a promise it has been held that the question of his ability was a question of fact to be determined by the jury if the ability were disputed. "Only that and nothing more." I am sure I should never have doubted that it was such a question and if a question had been raised in this case as to the financial ability of Mr. Chisholm to pay $500 a year to the plaintiff for such period as he contracted to pay it, I should agree that it also was a question of fact to be decided by a jury if disputed. But that does not seem to me to throw any light whatever on the question, whether he intended to pay it himself so long as he was able to pay it or was contracting that it should be paid after he was dead. The citation from the opinion of Lord Justice James in *Llanelly* v. *North Western Railway*, L.R. 8 Ch. 949, does not seem to me to have any bearing on the question. It merely enunciates principles upon which everybody is agreed. If the deceased in this case has promised to pay the plaintiff $500 a year for the term of her natural life, of course it is a contract which his executors must carry out. The only question that is arguable in this connection is whether he has made such a promise, and that question is one of intention to be collected from the words used in the light of the circumstances in which they were used. Inasmuch as some of those circumstances have been referred to it may perhaps be irrelevant to remark that the testator evidently felt a strong interest in his son's child and was to a great degree indifferent as to the mother if not distinctly unfriendly to her. He was anxious to secure the control of the child's education and it would have been a great advantage to the mother in many ways to have the child provided for even if she had been able to make no terms whatever as to her own support. She was not selling her child for an annuity, and in the circumstances in which she found herself it would not have been strange in the least if she had been willing to part with the immediate control of the child for the sake of the latter's welfare even if nothing had ever been stipulated on her own behalf. It is not creditable to her to assume that she would be willing to allow the child to be dealt with in

N.S.
S. C.
1912
CHISHOLM
v.
CHISHOLM
Russell, J.

a different manner if she could secure an annuity for herself from that to which she would have submitted for the sake of the child's own welfare in the absence of such a consideration, and the correspondence does not fairly import any such selfish views on her part. The decision of the learned trial Judge in the first case of *Chisholm* v. *Chisholm*, 40 Can. S.C.R. 115, to the effect that there had been a sale of the child was reversed on appeal, but the fact of some transaction seems nevertheless to be assumed as the basis of the opinions just read.

The question remains, however, what did the defendant mean by the words used. They are few and simple and the question lies in a very narrow compass. They are in effect that he will allow the widow $500 a year for herself and her child so long as they are together. After the child goes into the convent, he says, "I will allow yourself $500 per annum paid quarterly so long as I can do so, whilst you are self-dependent."

Let us imagine a case that would be in every respect analogous to the one before us. A chair is about to be endowed in Dalhousie College. It is provided for in the testament of a wealthy friend of the university who cannot live in all human probability more than ten or twenty years. The president is anxious to have the chair established at once and he writes to a number of persons soliciting subscriptions. He receives a reply from one of them, a wealthy person, let us suppose,—as wealthy as the defendant in the present case. It is in these terms: "I will pay $500 per year payable quarterly so long as I can, while the chair is dependent upon subscriptions." I think that the case so supposed is precisely similar to the promise here to pay the plaintiff $500 a year "so long as I can while you are self-dependent." Of course the promise has reference to his financial ability as in the present case. But does he not also have it in mind that he will himself have something to say as to his ability to continue the subscriptions? Will he not be assumed to have intended from time to time to look over his affairs, to consider his obligations to his family and his creditors and to determine for himself whether he can continue the annual subscription. And would he not be immensely surprised to learn that he had no such discretion left, not even a reviewable discretion, that he had made a binding obligation to pay $500 a year, not only during his own lifetime, but one which his executors would be bound to carry out so long as they could find assets out of which the amount could be provided until relieved by the falling in of the endowment? I am quite certain that in the case supposed no Court would thus interpret the writing. They would say that he was incurring an obligation of the extent of which he himself meant in the first instance to be the judge and if so he was not intending to assume an obligation that would devolve upon his

estate. And when he undertook to pay towards the support of the chair so long as he could do so and only while it was unendowed, he would, I am sure, be greatly surprised to learn that he was expected to continue the subscriptions after he was dead. I am not suggesting as the learned Chief Justice seems to understand that the payment is left to the caprice of the defendant although there would be something to be said for that view and the case of *Clark* v. *Pearson*, 53 Ill. App. 310, is entirely in point to support it and is the only case that I have been able to find that throws any light upon the question. It was a promise to pay $4.10 a hundred for hogs and more if the promisor could afford it. This was held to be a promise to pay $4.10 the additional amount resting on the doubtful contingency of the promisor's personal judgment. But I am not so interpreting the promise of the defendant. I am conceding, at least for the purposes of the argument that if the defendant was able to pay he was bound to pay and that if he had disputed his ability to pay it would have been a question that a jury must decide. But what I suggest, nevertheless, is that we are seeking to discover his intention and asking whether he meant to bind his estate it is an important and controlling consideration that he evidently meant to have something to say, and to pass a judgment of some kind whether final or otherwise upon the question of his ability.

I have searched diligently, but without success for cases that would support the views of the majority of the Court. No case has been found and I shall probably change my opinion whenever a case can be found to support the proposition that a man who agrees to pay money or to do any other act weekly, monthly, quarterly, yearly or otherwise so long as he can do so, has been held bound to continue doing it after he is dead. On the contrary there is a Massachusetts case decided by a Court presided over by Chief Justice Shaw, in which it would not have surprised me to find a decision that there was a contract binding on the administrator. It was a contract by the husband of an insane person to pay for her keep in the lunatic asylum, not as in the present case so long as he could do so, but absolutely and without any such qualification as there is here to import the notion of a personal judgment in the matter. Moreover, he was to provide or pay for all requisite clothing and other things necessary, and among other things "to reimburse funeral expenses in case of death." Surely if the defendant in the present case has contracted for his estate, the defendant in *Stinson* v. *Prescott*, 81 Mass. 335, must have done so. But Shaw, C.J., held otherwise. The obligation ceased with his death. "Many cases were cited to shew that a man may by his contracts bind his personal representatives to pay money or perform other duties, warrant titles and the like. Undoubtedly such obliga-

N.S.

S.C.
1912

CHISHOLM
v.
CHISHOLM

Russell, J.

tions will be binding, but it is where such is the apparent intent and of course the legal effect of the contract." If the intent to bind the estate was not apparent in the case cited it is surely less apparent in the present case.

The decision arrived at seems to me to be alarming and dangerous. It works out very well in the present case. But let us imagine a slightly different set of circumstances:—One of my learned brothers in the course of a correspondence, such as we have in this case, makes a similar proposal to allow to a widowed daughter-in-law an annuity of $500 so long as he can do so. Is it to be supposed that he would not be greatly surprised and alarmed when nearing his end to discover that he had made an arrangement which would oblige his wife and children to forego their expectations from his estate and have their various legacies abated in order to supply the amounts necessary to provide the annuity to his daughter-in-law? This result must inevitably follow if the words used are sufficient to create a debt binding upon his estate. His executors must be just before they are generous. The estate may be and probably would be ample for the payment of the annuity provided the wife and children are allowed to shift for themselves and this they must do under the decision of the Court because the testator has made a contract by which the assets are bound in the hands of his executors and that contract has priority over the claims of his children. Is it fair to reply that the executor must put himself in the place of the testator and judge of the circumstances as he would have done if he had been alive? Be it so. That seems to me the *reductio ad absurdum* of the proposition in question. That is the very reason why in my opinion the engagement was one which was never intended to bind the estate. The suggestion brings in the personal element which prevents the engagement from passing over to the executors.

After the best consideration that I can give to the matter I must adhere to my decision at the trial on both the points discussed on appeal.

Appeal allowed and action maintained,
RUSSELL, J., *dissenting.*

Re JONES and CUMMING.

ONT.

Ontario High Court, Middleton, J. February 14, 1912.

H. C. J.
1912
Feb. 14.

1. SPECIFIC PERFORMANCE (§ I E—30)—OBJECTION TO TITLE TO LANDS—SUMMARY PROCEDURE.

A summary application under the Vendors and Purchasers Act, 10 Edw. VII. (Ont.) ch. 58, is substituted for an action for specific performance of a contract to sell lands when the contract is admitted and the only question is as to title.

[See also Armour on Titles, 3rd ed., 39.]

2. COSTS (§ I—10)—DISCRETION OF COURT TO ALLOW OR REFUSE—VENDOR AND PURCHASER—APPLICATION.

Costs will be awarded against the purchaser on a summary application as to title under the Vendors and Purchasers Act, 10 Edw. VII. (Ont.) ch. 58, if the title is such as in an action by the vendor for specific performance the purchaser would have been forced to accept.

PETITION by the vendor under the Vendors and Purchasers Act for an order declaring that the vendor had shewn a good title and that the purchaser's objections had been answered.

Grayson Smith, for the vendor.

J. J. Drew, K.C., for the purchaser.

MIDDLETON, J., made an order as asked; and reserved the question of costs.

Subsequently, he gave judgment as follows:—

The procedure under the Vendors and Purchasers Act is substituted for an action for specific performance, when the contract is admitted, and the only question is as to the title.

Had this title been referred, the Master would have reported that a good title was shewn and was shewn before action. In such a case the vendor was always awarded costs on the motion upon further directions.

I, therefore, give the petitioner his costs, which I fix at $50, unless the purchaser desires a taxation, when he must pay the amount taxed. See *Dame* v. *Slater*, 21 O.R. 375.

Judgment for vendor.

UNITED SHOE MACHINERY CO. OF CANADA v. LAURENDEAU et al. and DROUIN et al (mis-en-cause).

QUE.

K.B.
1912
April 29.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. Montreal, April 29, 1912.

1. JUDGMENT (§ II C—93)—SPECIAL TRIBUNALS—COLLATERAL ATTACK.

The rule that the judgment of a Court which has jurisdiction cannot be called in question by collateral attack applies to the decisions of special tribunals and to proceedings that are directed by statute.

2. PROHIBITION (§ IV—20)—INVESTIGATING TRIBUNAL—REGULARITY.

Where a board of investigation has been appointed by the Minister of Labour on a Judge's order directing an investigation into an alleged combine in virtue of the Combines Investigation Act (Can.), prohibition will not lie to prevent the board from carrying on its enquiry on the ground that the applicants for such investigation were not persons competent under the Act to make such application; the procedure leading up to the order directing an investigation being sharply distinguished from the procedure of the investigation proper and not forming part thereof.

QUE.

K.B.

1912

UNITED SHOE MACHINERY CO. v. LAURENDEAU AND DROUIN.

Statement

3. MONOPOLY AND COMBINATIONS (§ III—51)—COMBINES INVESTIGATION ACT.

It is for the Judge to whom application is made for an order under the Combines Investigation Act (Can.) to decide whether the applicants have shewn *prima facie* cause, and his discretion as to whether there is "reasonable ground" for considering the applicants as "consumers" or "producers" cannot be revised by prohibition, especially after the Board itself has been constituted.

4. MONOPOLY AND COMBINATIONS (§ I—2)—"COMBINE."

A "combine" within the meaning of the Combines Investigation Act is any compact about the making or selling of one article which would fix the price not only of that one article, but of any other article, to the detriment of consumers or producers of the last-mentioned article.

THIS was an appeal from a judgment of the Superior Court, Saint-Pierre, J. (October 5th, 1911), quashing a writ of prohibition to prevent the respondents, a board of investigation appointed under the Combines Investigation Act, from proceeding with their investigation into the affairs of petitioners-appellants.

The appeal was dismissed with costs.

T. Chase-Casgrain, K.C., for appellants. Appellants are manufacturers of boot and shoe machinery and the applicants for the order of investigation did not shew that the alleged combine operated to their detriment as consumers or producers of the article manufactured, seven of the ten applicants not being manufacturers of boots and shoes at all. In order to qualify the six persons mentioned in section 5 of the Act should be consumers or producers of the article of commerce which is the product or the result of the alleged combine. The applicants must shew their direct pecuniary interest and not an indirect or problematical interest. Moreover, the order of investigation is so wide in its terms as to enable the board of investigation to make an inquiry concerning events which have happened outside of Canada, and over which the board, according to all rules, would have no jurisdiction.

Aimé Geoffrion, K.C., appearing for the respondents, and *A. Falconer*, K.C., for the *mis-en-cause*:—The law does not require that there be six applicants who are producers or consumers of the particular object respecting which there is a combine, it does not state that they must be producers or consumers of the particular objects dealt in by the combine. The Act calls for a statutory declaration and nothing else; when the proper declarations have been filed the Judge should issue the order, all the more so as the Judge is not supposed to enquire into the correctness of the statutory declaration. The Judge's duty is limited to an investigation as to whether there is reasonable ground for believing that a combine exists which is injurious to trade or which has operated to the detriment of consumers or producers, and that it is in the public interest that an investigation be held.

The Judge's decision on this question of fact is final and not open to review before any court. All this is part of the administrative law of the country and has no judicial aspect.

The following opinion was handed down on the dismissal of the appeal.

CROSS, J.:—This is an application for prohibition directed against the members of a board of investigation appointed in virtue of section 9 of the Combines Investigation Act (9-10 Ed. VII. ch. 9).

It is provided in the section referred to that upon receipt of a Judge's order directing an investigation, the Minister of Labour shall appoint a board. It is not denied that the three gentlemen sought to be stopped by prohibition were in fact appointed as a board by the Minister. Neither is it disputed that, before such appointment was made, an order had been made by a Judge under section 7 of the Act, directing that an investigation should be held.

In the petition for issue of a writ of prohibition numerous grounds were set forth and certain evidence was submitted to the Superior Court on behalf of the petitioner. After considering the matter, the Superior Court gave judgment dismissing the petition. It is from that judgment that the plaintiff has brought up the present appeal.

Practically the only ground relied upon by the appellant in support of the application for prohibition is that the persons who applied for the investigation were not persons competent under the Act to make the application.

The respondents contend that such a ground is not open to the appellant, and say in substance that the regularity or irregularity of the proceedings which took place before the Judge who directed the investigation to be made cannot now be inquired into.

Counsel for the appellant reply that their client at first proceeded by appeal from the order for investigation; that it has been decided that there was no recourse by appeal open to it; that where there is a wrong there must be a remedy, and that the question whether or not the order directing the investigation is void because of lack of competency of the applicants can be tested upon a petition for prohibition. Upon such a question the first step towards a decision should be to look at the sections of the Act, and to consider them in furtherance of the object of it. It is an "Act to provide for the investigation of Combines, Monopolies, Trusts and Mergers." It provides that such an investigation is to be made by a board of three members to be named by the Minister of Labour.

By section 18 it is enacted that:—

> The board shall expeditiously, fully and carefully enquire into the matters referred to it and all matters affecting the merits thereof, including the question of whether or not the price or rental of any

QUE.

K. B. 1912

UNITED SHOE MACHINERY CO. v. LAURENDEAU AND DROUIN.

Cross, J.

article concerned has been unreasonably enhanced, or competition in the supply thereof unduly restricted in consequence of a combine, and shall make a full and detailed report thereon to the minister, etc.

Provision is made of certain forfeitures and penal consequences which may be made to result from a report establishing the existence of detrimental conditions.

It is provided in section 29 that:—

> Any party to an investigation may appear before the board in person or may be represented by any other person or persons, or, with the consent of the board, may be represented by counsel.

Such, shortly stated, is the nature of the investigation to provide for which this Act was passed. But the investigation is to be entered upon only if a Judge shall direct it to be held.

Accordingly, there is a preliminary part of the Act, wherein provision is made for this "order for investigation." For this order, there has to be an application in writing to a Judge, and the making of this application is provided for, in section 5, as follows:—

> Where six or more persons, British subjects resident in Canada and of full age, are of opinion that a combine exists, and that prices have been enhanced or competition restricted by reason of such combine, to the detriment of consumers or producers, such persons may make an application to a Judge for an order directing an investigation into such alleged combine

Provision is made for hearing the applicants upon the application, but none for hearing other persons.

The application is to be accompanied by a statement setting forth the nature of the alleged "combine," the persons believed to be concerned therein, the manner in which it affects prices or restricts competition, and the extent of detriment caused by its operation. It is also required by the same section (5) that the application shall be accompanied by a statutory declaration of each applicant "declaring that the alleged combine operates to the detriment of the declarant as a consumer or producer, and that, to the best of his knowledge and belief, the combine alleged in the statement exists and that such combine is injurious to trade or has operated to the detriment of consumers or producers in the manner and to the extent described, and that it is in the public interest that an investigation should be had into such combine."

If an order directing an investigation is made, the order, the application, the statement, a certified copy of the evidence, and the statutory declarations are to be transmitted, by the Judge, by registered mail, to the registrar of boards of investigation appointed under the Act. The "general administration" of the Act is declared to be vested in the Minister of Labour.

In view of these statutory provisions, it is apparent that the procedure which leads up to the order directing an investigation

is not made part of the procedure of the investigation proper, but, on the contrary, is sharply distinguished from it.

The entire action of the Judge in the matter of the order is preliminary and *ex parte*, and it ends with the making and transmission of the order.

The Judge, who has made that order, does not act in the investigation. The investigation is conducted before a board composed of other persons. As pointed out by the learned Judge of the Superior Court, the order for investigation has much of analogy to the act of a grand jury in returning an indictment. The actual trial takes place before another body. That being so, I consider that the question, whether the ten persons who applied for the order for investigation were persons competent under the Act to apply for investigation, is not susceptible of being raised after an order, such as the statute provides for, has been transmitted by the Judge to the registrar. The application and statement contained averments of the matter required by the Act to be set forth in them. That being so, it became a question simply of proof whether the applicants possessed the requisite qualifications or not, and the Judge was the proper authority to decide as to the sufficiency of the proof tendered to him. The Act leaves it to him to decide whether he will act upon such proof only as is made by the statutory declarations, or adjourn the hearing until further proof is made, or dismiss the application.

Where, as in the matter before us, an Act makes provision for the taking of specified action by the head of a department of government upon receipt by such department of the certificate or finding or order of a public officer, such as the Judge who made this order, I consider that persons affected by the action of government are not entitled to have the action stopped on the ground that the preliminary order or certificate was irregularly made.

To hold otherwise would in great measure put it in the power of such a party to defeat the main object of the Act by preventing the members of the board from "expeditiously, fully and carefully" carrying out the enquiry committed to them, and would unduly hamper the operations of executive government.

By the application of the rule of articles 1350 and 1351 of the Code Napoleon (which correspond to article 1241 C. C.), it is recognized in France that the authority of "*res judicata*" attaches to decisions of administrative government given in contentious matters: Fuzier-Herman, art. 1351 C. N., Nos. 1, 523, 526, 527. The rule that the judgment of a Court which has jurisdiction cannot be called in question by collateral attack, applies to the decisions of special tribunals and to proceedings that are directed by statute: Am. and Eng. Enc. of Law (2nd ed.), vol. 1, "Jurisdiction," p. 1056.

QUE.
K. B.
1912
UNITED SHOE MACHINERY CO. v. LAUREN-DEAU AND DROUIN.
CROSS, J.

While the conclusion just announced would suffice for the decision of the appeal, it is opportune, in view of the principal argument which has been made before us, that we should consider the merits of the appellant's contention to the effect that the order which directed the investigation and all the proceedings before the Judge who made that order are illegal and void because of there not having been six or more competent applicants for the investigation. The qualification required of the applicants is that they shall be "British subjects resident in Canada, and of full age." It is not alleged that the respondents were not resident British subjects or that they were under age. The appellant, however, relies upon clause 4 of section 5, which requires that each applicant shall declare that the alleged combine operates to his detriment "as a consumer or producer."

The appellant is a manufacturer and seller of shoe-making machinery. The majority of the applicants neither manufacture, sell nor use such machinery, though it is true that in their declarations they set forth that the "combine" operated to their detriment as producers or consumers. Anything which could be called a specific interest on their parts consists in the fact that they have to buy boots for themselves. The argument is, firstly, that that is not an interest in shoe-making machinery, and, secondly, that the mere fact that the applicants buy boots for themselves does not make them interested parties.

The Act gives no information as to what persons can be considered "producers" or "consumers." We are left to give these words the meanings which they have in ordinary, everyday language, always bearing in mind that the Act is to be so interpreted as to give it its proper effect.

Counsel for the appellant have argued that the definition of a "combine," given in clause (c) of the interpreting section, justifies the conclusion for which they contend. That clause is as follows:—

"'Combine' means any contract, agreement, arrangement or combination which has, or is designed to have, the effect of increasing or fixing the price or rental of any article of trade or commerce, or the cost of the storage or transportation thereof, or of the restricting competition in, or of controlling the production, manufacture, transportation, sale or supply thereof, to the detriment of consumers or producers of such articles of trade or commerce, and includes the acquisition or otherwise taking over, or obtaining by any person to the end aforesaid of any control over or interest in the business, or any portion of the business, of any other person, and also includes what is known as a trust, monopoly or merger."

It is contended that the "combine" thus defined is an arrangement designed to fix the price of an article or restrict the production or supply thereof to the detriment of "consum-

ers or producers of such articles," and that the applicants, not being consumers or producers of shoe-making machinery, had no standing to complain.

We consider that the language of the Act does not warrant such an inference. Having regard to the object of the Act, it seems clear that a "combine" in the nature of a compact about the making or selling of one article which would fix the price of another article to the detriment of consumers or producers of the last-mentioned article would be a "combine" within both the language and the spirit of the definition.

If the contrary view were to prevail, it would have to be conceded that a company or association, which had so thoroughly succeeded in establishing control over a particular article of trade as to have choked off all competitors except five or a less number, would secure immunity against the application of the Act on the ground that there were not six persons who had sufficient interest to complain. The more successful and universal the "combine," the less would be the possibility of its operation being investigated. Besides, it is clear from the language of clause "c" itself that the objectionable combination may bear not upon any particular article of commerce but only upon some process of production or of transport whereby the price of an article may be raised.

It follows that the definition does not support the contention that the words "consumer" and "producer" are to be read as having the limited or specialized meaning sought to be given to them. We are, in fact, left completely at large as to what persons are to be considered consumers or producers. To make out a case for prohibition, it is clear that the appellant must shew that the order directing the investigation was an out and out nullity. We think that that has not been shewn.

We consider that the Judge had before him evidence upon which he could find that six or more of the applicants were "consumers" within the meaning of the Act, and evidence upon which he could find that there was that "reasonable ground" for belief contemplated by the Act as being the ground upon which the order could be made.

Unlike the function of a law-court giving judgment, which has to proceed upon proof of facts, the Judge, under the Act merely had to have "reasonable ground" for belief. The appellant, in its factum, has made an objection, in general terms, to the effect that the specification of the matters to be investigated, as set out in the order, is too wide and authorizes an inquiry into facts which may have taken place outside of Canada. We do not think that that is a ground which ought to prevail in support of an application for prohibition. It has not been shewn that evidence would be inadmissible because it disclosed or might disclose facts which happened in a foreign country.

QUE.
K. B.
1912
UNITED SHOE MACHINERY CO. v. LAURENDEAU AND DROUIN.
Cross, J.

It might perhaps be said that, instead of actually finding that the use made by the appellant of a particular form of lease-contract constituted a "combine," it would have been advisable that the order should not have gone beyond a finding of reasonable ground for belief, but that is not the ground of objection which has been taken and, in any event, it would resolve itself into a criticism of a matter which does not affect the legal validity of the act of the Minister in appointing the board.

My conclusion is that the appellant has not shewn that the members of the board are usurping or overstepping jurisdiction in proceeding with the investigation, and that the appeal should, therefore, be dismissed.

Appeal dismissed.

ONT.
D. C.
1912
Feb. 9.

SWALE v. CANADIAN PACIFIC R. CO.

(Decision No. 2.)

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. February 9, 1912.

1. PARTIES (§ III—124)—ACTION BY OWNER OF GOODS AGAINST WAREHOUSEMEN—CARRIER STORING GOODS AT DESTINATION—SALE FOR UNPAID CHARGES—THIRD PARTY NOTICE.

A carrier sued for conversion of goods by the consignor in respect of an alleged neglect of duty on the part of the auctioneer employed by the carrier to sell the goods for unpaid charges, and for alleged failure to account for all of the goods sold, may properly bring in the auctioneer as a third party and claim indemnity and relief over against him under Ont. Rule 209 (C.R. 1897).

[*Swale* v. *Can. Pacific R. Co.*, 1 D.L.R. 501, 3 O.W.N. 601, 20 O.W.R. 997, reversed.]

2. BAILMENT (§ III—24)—SALE IMPROPERLY CONDUCTED BY AUCTIONEER.

An auctioneer to whom goods in bulk are entrusted by a carrier to sell for unpaid charges against them impliedly contracts with the warehousemen employing him, that he will exercise reasonable care in selling the goods.

[*Gagné* v. *Rainy River Lumber Co.*, 20 O.L.R. 433, specially referred to.]

3. PARTIES (§ III—124)—THIRD PARTY PROCEDURE—RIGHT "TO INDEMNITY OR RELIEF OVER."

The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff.

[Rule 209, Ontario Consolidated Rules of Practice (1897), construed; *Pettigrew* v. *Grand Trunk Ry. Co.*, 22 O.L.R. 23, referred to.]

AN appeal by third parties, on special leave, from the judgment of Riddell, J., of February 1st, 1912, on an appeal from the order of the Master in Chambers, 1 D.L.R. 501, setting aside an *ex parte* order allowing the defendants to serve a third party notice. Riddell, J., allowed the appeal and allowed the serving of the third party notice.

The appeal was dismissed.

ONT.

D. C.
1912

SWALE
v.
CANADIAN
PACIFIC
R. CO.

Riddell, J.

W. Laidlaw, K.C., for the third parties.
Shirley Denison, K.C., for the defendants.
W. M. Hall, for the plaintiff.

The decision of Riddell, J., appealed from is as follows:—

February 1. RIDDELL, J.:—The plaintiff alleges that she, in 1908, delivered to the defendants, in Liverpool, England, 97 cases of settlers' effects for Toronto; that they arrived at Toronto in June, 1908, and she was duly notified of such arrival by the defendants; that, by delay occasioned by an interpleader, she was prevented from taking delivery till March, 1909, when an order was made putting an end to the interpleader proceedings; that thereafter the defendants retained the goods till the 21st October, when they proceeded to advertise 90 of them; and that a portion of these was sold, realising $1,700. She further alleges that no proper account was kept of the sale, and in many instances the amounts accounted for are too small—also, that, while the goods were in the custody of the defendants, they were opened and unpacked and a large quantity converted by the defendants to their own use—and the statement concludes: "11. . . . By reason of the conversion by the defendant company of a large portion of the said goods and effects, and its improper and wrongful accounting in regard to the sale of such portion of them as were sold as aforesaid, the plaintiff has suffered damages to a large amount, to wit, to the sum of about $1,500;" and the plaintiff claims: "1. That she is entitled to a proper account of the goods sold by the defendant company. 2. That she is entitled to be paid the full value of the said goods converted by the defendant company, its servants, workmen, and agents. 3. Or for damages for the conversion of the said goods referred to in the said statement of claim. 4. The costs of this action."

Upon the material and statements and admissions before me, it appears that the goods reached Toronto in July, 1908; that notice was given to the plaintiff of their arrival, but that she neglected to remove them; that it was in October that the claim was made resulting in interpleader proceedings, and that the claim adverse to the plaintiff was disposed of in her favour by Mr. Justice Anglin in February, 1909. Then, in October, the defendants put the goods into the hands of Suckling & Co., auctioneers, to sell, to pay the charges they had against the goods. The auctioneers received all the goods the shipping bill called for, and they sold, on the 21st October, what they did sell for less than enough to pay the charges of the defendants. Some of the goods, however, the auctioneers delivered, both before and after the sale, to the husband of the plaintiff, her agent. The auctioneers so delivered some goods before the sale "at the solicitation of an intimate friend," and, it is said, upon an undertaking that the goods would be accounted for—and, after they had sold what they thought was sufficient to cover the defendants' claim, they delivered the remainder to the husband.

ONT.

D. C.
1912

SWALE
v.
CANADIAN
PACIFIC
R. Co.

Riddell, J.

The action was brought on the 1st February, 1910; the statement of claim was delivered on the 21st March, 1910; and the statement of defence and counterclaim, on the 8th April, 1910. This pleading sets up the arrival and notice; neglect of the plaintiff to remove the goods; interpleader and termination thereof; further neglect by the plaintiff to remove; sale by the defendants on the 21st October, 1909, realising $1,480.63—the charges against the goods being $1,657.79; notification to the plaintiff of time and place of sale and attendance thereat by the plaintiff or her agent without objection, and purchase by the plaintiff or her agent of some of the goods; account furnished in detail, and balance still due of $177.16. The defendants claimed a dismissal of the action and judgment for $177.16 and interest, &c. No further pleading was filed except a formal joinder by the plaintiff on the 21st April, 1910.

The record was passed on the 8th February, 1911; on the 10th March, a notice of motion for a commission to examine witnesses in England was served by the defendants; and on the 13th March, Mr. Justice Britton, upon application of the defendants in the trial Court, made an order for a commission to England, and ordered the case to be put at the foot of the list, but to be expedited, the defendants to pay the costs of the plaintiff for the two days she attended. The order was not taken out, but in May the defendants moved for particulars. The case came on again for trial, when Mr. Justice Middleton, on the 16th September, 1911, directed it to stand off the list, but to be entered again when ready for trial. On the 12th September, the solicitor for the defendants made an affidavit that he had but a short time before learned that the plaintiff or her agent had removed some of the goods, and served notice of motion for leave to amend his pleadings, for better particulars of claim, and further examination of the plaintiff and her husband. This was opposed, but the Master in Chambers, on the 25th September, made an order for amending pleadings and examination of the plaintiff's husband, enlarging the motion in respect of the other matter.

On the 4th December, 1911, the defendants obtained an *ex parte* order to serve a third party notice on the auctioneers. Some correspondence took place between the solicitors for the defendants and for the auctioneers; and at length these moved to discharge the order last-mentioned. On the 19th January, 1912, the Master in Chambers set aside the third party order; and the defendants now appeal. The order for commission has been taken out and conduct thereof assumed by the plaintiff—and the commission has not been executed. The plaintiff has not objected and does not object to the third party proceeding.

In support of the order appealed from, it was urged that the contract of the defendants was that of insurers, and consequently entirely different from any contract, express or implied, between

the defendants and the auctioneers. Supposing that such a difference would prevent the proper service of a third party notice (which I do not at all think), it is plain, from all the material and from what took place before me, that the claim of the plaintiff is not against the defendants as common carriers, and consequently insurers, but as warehousemen. The plaintiff says in effect to the defendants: "You had my goods, you had the right to sell them, but it was your duty to keep the goods safe, to open the boxes, etc., with care, to advertise properly, to sell prudently, to keep and render an accurate account of your sales, and to pay to me the balance of the proceeds over and above your claim. You did not do that. Your servants took some of the goods; you unpacked the goods; you made no proper inventory so that a proper sale could be had; you did not keep and render a proper account of the sale." The defendants say: "We think we did all we were called upon to do"—and now they desire to say further: "But, if we are in default, it is because the persons whom we trusted to act for us, the auctioneers, have not done as they should; they owed us the same duty which we owed to you—it was they who opened the goods, they who sold, they who kept what account was kept; and, if we are liable to you, it was entirely their fault, and they are liable to us for precisely that sum."

It seems to me impossible to conceive of a case in which our Con. Rule 209 is more to the point—and I do not think the cases prevent its application.

In *Smith* v. *Matthews* (1907), 9 O.W.R. 62, I held that, where agents by buying had rendered the principal liable to the plaintiff, there was a contract on their part to indemnify the principal against what he had to pay, the agents not delivering the goods. See this case before the Master in Chambers in (1906), 7 O.W.R. 598. I can see no difference between an agent buying and one selling.

Nor are the other cases adverse to this view.

Payne v. *Coughell* (1895), 17 P.R. 39, was under the old Rule 1313, which did not contain the words "or any other relief."

In 1881, the Judicature Act Rule, O. XII., R. 19 (Marginal Rule 107), was substantially as it is now; this was the same in the revision of 1888, Rule 328; but Con. Rule 1313 (23rd June, 1894) amended the Rule by leaving out "or any other remedy or relief;" and the present Rule, reinstating these words, came in force on the 1st September, 1897.

In *Payne* v. *Coughell*, the Rule was as in England; and it was held, following the English cases, that the claim of the defendants, if it be but a claim for damages arising from breach of contract, is not a "claim to indemnity." But, after the change in 1897 of the Rule, in *Confederation Life Association* v. *Labatt* (No. 2) (1898), 18 P.R. 266, it was held that a claim based upon the implied warranty of title on the sale of goods was a claim which

ONT.

D. C.
1912

SWALE
v.
CANADIAN
PACIFIC
R. Co.

Riddell, J.

could come under the words "any other relief over" in Rule 209. Both Meredith, J., and the Divisional Court point out that the Rule has been changed.

In *Wilson* v. *Boulter* (1898), 18 P.R. 107, the Chancellor pointed out that "the object of the enactments is to prevent the same questions common as between all three (plaintiff and defendant and third party) from being tried on different occasions and in different forums:" p. 109. And, where an action in tort had been brought against the defendants for damages occasioned by a defective piece of apparatus, he set aside a third party notice served upon the makers of the apparatus, who had given no warranty. The learned Judge points out that the damages for the plaintiff against the defendants and those of the defendants against the third parties would be awarded on quite different principles.

In *Windsor Fair Grounds and Driving Park Association* v. *Highland Park Club* (1900), 19 P.R. 130, the plaintiffs claimed for rent of a race-track—the defendants alleged that a ferry company had agreed with the plaintiffs to pay and contribute so much per day toward this rent, and that the defendants thereby were induced to enter into the agreement with the plaintiffs; and they served the ferry company with a third party notice. In the Divisional Court it was pointed out that this could not be "indemnity," as there was no contract, express or implied, between the defendants and the third parties—nor was it "contribution," which arises when two or more persons are subject to a common liability other than fraud or a wilful tort; and that no "other relief over" could exist, as the defendants had and could have no cause of action against the third parties, having no contract with them. Leave to appeal was refused.

In the much-canvassed case of *Parent* v. *Cook* (1901-2), 2 O.L.R. 709, 3 O.L.R. 350, the plaintiff sued the defendants for trespass to land and cutting down and removing timber, and the defendants served a third party notice on those who had sold them the timber. This was set aside as being too late. Meredith, C.J. (2 O.L.R. at p. 712), considered it unnecessary to express an opinion whether the case came within the Rule, though the inclination of his mind was against it, "for, assuming that it is, in my opinion nothing would be gained by bringing in the appellants as third parties. . . . The measures of damages in the one case might be . . . very different from that in the other . . ." In the Divisional Court (3 O.L.R. 350), Street J., said that "there was no common question to be tried; and the damages here are not merely the same damages that might be proved in another action;" while Britton, J., expressed no opinion on the agreement.

In *Langley* v. *Law Society of Upper Canada* (1902), 3 O.L.R. 245, the plaintiff sued for the amount of a book-debt assigned to

him, and added the assignor as a defendant. The assignor, claiming that he was merely the agent of a bank, was allowed to serve a third party notice on the bank, following *Confederation Life Association* v. *Labatt* (No. 2), 18 P.R. 266. This is the converse of *Smith* v. *Matthews*, and in another manner the converse of this case.

In *Miller* v. *Sarnia Gas Co.* (1900), 2 O.L.R. 546, the plaintiff sued the gas company for damages for escape of gas from their pipes; and the company alleged that the escape was caused by the negligence of the town corporation in constructing a sewer. The Court, Street, J., said, p. 548: "The third party procedure is only applicable where the defendant is, if liable to the plaintiff, entitled to recover against the third party the very damages which the plaintiff seeks to recover against him. Here . . . the damages which may be recovered by the plaintiff against the defendants are not the measure of the damages, if any, which may be recovered by the defendants against the third parties for the alleged tort of the third parties."

Gagne v. *Rainy River Lumber Co.* (1910), 20 O.L.R. 433, is much such another case. The plaintiff sued for damages because his ferry business was interfered with by the defendants' logs—the defendants alleged that the third party had built a dam in such a way as to impede their drive. Mr. Justice Teetzel thought that the third party notice could not stand, on two grounds: (1) that Con. Rule 209 applies only to a right to relief given by law in consequence of a breach of contract, express or implied, between the defendant and the third party, or is a right given by statute; and (2) that the damages recoverable by the plaintiff was not the measure of damages the defendants could recover from the third party. See also *Wade* v. *Pakenham* (1903), 2 O.W.R. 1183.

I am convinced that the Con. Rule has been given quite too narrow an application, and hope that the matter may receive full consideration in an appellate Court. But, taking the tests laid down by my brother Teetzel—in the present case there is the implied contract of the auctioneers with the defendants; and the damages recovered by the plaintiff, if any, from the railway company are the measure of damages recoverable by the railway company from the auctioneers, their agents. See also *London and Western Trusts Co.* v. *Loscombe* (1906), 13 O.L.R. 34; *Budd* v. *Dixon* (1907), 9 O.W.R. 371.

Applying the test in *Wilson* v. *Boulter*, 18 P.R. 107, it would be unfortunate if the damages on the two contracts should be assessed by two tribunals. See *Benecke* v. *Frost* (1876), 1 Q.B. D. 419, 422; *Ex p. Smith, In re Collie* (1876), 2 Ch.D. 51.

I have not considered the English cases as binding (being upon a Rule differently worded), though I have read those cited and several others.

ONT.
D. C.
1912
SWALE
v.
CANADIAN
PACIFIC
R. CO.
Riddell, J.

Then, as to time, the notice should have been served (Con. Rule 209) "within the time limited for the delivery of . . . defence." Power exists in the Court to extend this time (Con. Rule 353); and the time should be extended, if a proper case is made out for such extension.

The reason advanced for such extension is, that it was only recently that the defendants were aware that the auctioneers had had dealings with the plaintiff behind their back. This is to me no reason whatever. The statement is, that the auctioneers, without the knowledge of the railway company, allowed the plaintiff to take away certain of the goods intrusted to them to sell. This conduct, if it resulted in loss to the railway company, *e.g.*, if it prevented the full amount of the charges being obtained, no doubt gives a cause of action to the railway company—no doubt the railway company could sue both the auctioneers and the plaintiff for taking these goods, and could have counterclaimed in this action. But the liability on the implied contract to sell with care, &c., &c., was thoroughly known to the defendants from the beginning of the action. This conduct of the agents, said to be recently discovered, in no way increases the liability of the railway company to the plaintiff, but rather the reverse, for the plaintiff cannot make any valid complaint against the railway company in respect of the goods she herself took from the custody of their agent. I think, then, that I must consider the case as though no such discovery had been alleged.

I agree, however, *sub modo*, with what is said by the learned Master in *Ontario Sugar Co.* v. *McKinnon* (1904), 3 O.W.R. 64: "The limitation imposed by Rule 209 was not intended for any other purpose than to prevent unreasonable delay to the prejudice of the plaintiff." The case must be rare where any one but the plaintiff can be injured by the delay; and most of the cases have been cases in which he moved to set aside the third party notice—sometimes, indeed, the third party joining.

In *Associated Home Co.* v. *Whichcord* (1878), 8 Ch.D. 457, 38 L.T.R. 602, and *Birmingham and District Land Co.* v. *London and North Western R.W. Co.* (No. 2), 56 L.T.R. 702, it was the plaintiff who moved; and in *Molsons Bank* v. *Sawyer* (not reported) (referred to in *Ontario Sugar Co.* v. *McKinnon*), Mr. Winchester, Master in Chambers, would not give effect to an objection by the third party; nor did Mr. Cartwright, Master in Chambers, in *Stuart* v. *Hamilton Jockey Club* (1910), 2 O.W.N. 254.

It is true that it was the third party who objected in *Parent* v. *Cook*, 2 O.L.R. 709, but the time was not enlarged in that case, because, as the learned Chief Justice said (2 O.L.R. at pp. 711, 712): "The case is not, in my opinion, one in which I should, in the exercise of my discretion, enlarge the time allowed by the Rule for serving the notice . . . It is probable that the only question which would be determined at the trial, as well between the respondents

and the appellants, as between the former and the plaintiff, would be, whether or not the acts complained of were unlawful or were lawfully done under the authority which the respondents plead as their justification for doing them. The measure of damages in the one case might be . . . very different from that in the other." In the Divisional Court, as we have seen, one of the learned Judges thought that it was not a case for a third party notice at all. This is no authority for saying that, where the plaintiff does not object, and the case is clearly one for a claim over, the time is not to be extended for serving the notice in a proper case.

In the present case, as I have said, it seems to me that it would be unfortunate if there were to be two trials by different tribunals of the same questions; and, as no possible harm can accrue to any one from allowing the third party notice to be served, such service should be allowed.

The defendants might also, if so advised, have counterclaimed from the auctioneers along with the plaintiff damages for the unauthorised interference with the goods, the property of the defendants; but, as such an amendment is not asked, I do not make an order in that sense.

The defendants will pay the costs of the motion before the Master in any event, as they should have moved long before, and are now obtaining an indulgence; and there will be no costs of this appeal.

February 6. Leave to appeal to a Divisional Court was granted to the third parties by MEREDITH, C.J.C.P.

W. Laidlaw, K.C., for the third parties. The issue is, whether the third party procedure under Con. Rule 209 is applicable in this case. The rules established by the cases are, that there must be a common question in issue between the plaintiff and the defendant and between the defendant and the third party, and that the measure of damages as between the plaintiff and the defendant must be the same measure of damages as between the defendant and the third party: *Wilson* v. *Boulter*, 18 P.R. 107; *Campbell* v. *Farley* (1898), 18 P.R. 97; *Windsor Fair Grounds and Driving Park Association* v. *Highland Park Club*, 19 P.R. 130; *Miller* v. *Sarnia Gas Co.*, 2 O.L.R. 546; *London and Western Trusts Co.* v. *Loscombe*, 13 O.L.R. 34; *Budd* v. *Dixon*, 9 O.W.R. 371; *Parent* v. *Cook*, 2 O.L.R. 709, 3 O.L.R. 350. I submit that the claim of the defendants against Suckling & Co. is an independent claim, which might have been proceeded upon, and which might now be proceeded upon, against Suckling & Co.; and, therefore, the claim of the defendants against Suckling & Co. is neither a claim to indemnity or a claim to relief over, within the proper construction of the Rule: *Wynne* v. *Tempest*, [1897] 1 Ch. 110; *Birmingham and District Land Co.* v. *London and North Western R.W. Co.* (1886), 34 Ch.D. 261; *Moore* v. *Death* (1894), 16 P.R. 296.

ONT.

D. C.
1912

SWALE
v.
CANADIAN
PACIFIC
R. CO.

Argument

Shirley Denison, K.C., for the defendants. The bulk of the defendants' claim against Suckling & Co. is the same as that of the plaintiff against the defendants. As to the third party procedure, Suckling & Co., being auctioneers, were both agents and bailees; and, while every bailee may not be an agent, an auctioneer is always an agent, and there is, as in any similar relationship, an implied contract of indemnity within Rule 209. If Suckling & Co. so dealt with the goods as to make the defendants liable, the defendants should be indemnified by Suckling & Co.: *Mainwaring* v. *Brandon* (1818), 2 Moore (C.P.) 125. See also Annual Practice (1912), vol. 1, under the heading "Agency," at p. 268, where a number of cases are cited in which a principal has been sued by an agent for indemnity. This is the converse of my proposition that indemnity is owing by an agent to a principal, but I find no cases on this particular point. *Confederation Life Association* v. *Labatt*, 18 P.R. 266, may be cited in favour of third party procedure being proper here. On the other point, I submit that the claims for damages between the plaintiff and the defendants and the defendants and Suckling & Co. are identical: *Benecke* v. *Frost*, 1 Q.B.D. 419; *Swansea Shipping Co.* v. *Duncan* (1876), 1 Q.B.D. 644; *Pettigrew* v. *Grand Trunk R.W. Co.* (1910), 22 O.L.R. 23.

W. M. Hall, for the plaintiff.

Laidlaw, in reply.

February 12. BOYD, C.:—The more important part of this case (if not the whole of it) will turn upon what was done with the goods after they reached the hands of the Canadian Pacific Railway Company at the end of their carriage to this country. The goods remained in the hands of the company till turned over to be sold by the auctioneers, Suckling & Co., to whose custody and sale rooms the goods were transferred in bulk. The packages or cases were then opened, and the goods disposed of in a manner which is challenged by the plaintiff. As to this part of the controversy, which appears to be the substantial part, the Canadian Pacific Railway Company claim to be indemnified by or to have relief over against the proposed third parties, Suckling & Co. The wrongdoing of Suckling & Co., if any, would be charged upon the railway company by the plaintiff; and the company should clearly have the right of resort to the wrongdoer. This may well be accomplished in one and the same action in which the plaintiff's claim is being prosecuted against the company. The same evidence that establishes the claim against the company will establish it against the auctioneers, on this part of the case; no delay or inconvenience can arise in dealing with the whole case so presented with the addition of the third parties; and the plaintiff makes no objection to the application. The liberal provisions of Con. Rule 209 should be construed with a view to practical

efficiency rather than to scientific accuracy; and I see no reason to disagree with the carefully considered judgment of my brother Riddell.

This to be affirmed with costs in the cause to the plaintiff and defendants the company as against the third parties.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—The right to invoke the third party procedure exists whenever the plaintiff's claim against the defendant, if successful, will result in the defendant having a claim against the third party to recover from him the damages which he has been compelled to pay to the plaintiff.

It is not enough for the defendant to shew that, if the plaintiff establishes his case, he, the defendant, will, on the facts so established, have some cause of action against the third party. He must do more than this—he must shew that he has a right "to indemnity or relief over" in respect of the plaintiff's recovery against him.

At one time we had a Rule (328 of the revision of 1888) empowering the addition of a person as party where it appeared that any question in the action ought to be determined so as to bind such party. This has now been repealed, and this principle cannot be applied; but the Rules as they remain are remedial, and should be freely applied to cases falling fairly within them.

There is no foundation for the suggestion sometimes made, that the right of indemnity must be for the whole of the plaintiff's claim—it is enough if that right exists for any separate or separable part of the plaintiff's claim. Nor need this measure the full extent of the defendant's claim against the third party—it is enough if he can claim, *inter alia*, indemnity in respect of the plaintiff's recovery.

I adhere to what I said in *Pettigrew* v. *Grand Trunk R.W. Co.*, 22 O.L.R. 23, as to the way in which applications to set aside third party notices should be dealt with. The real question should be left to the trial; and such applications should form no exception to the general rule that the rights of the parties should not be disposed of on summary applications.

I would dismiss the appeal with costs to be paid by the appellants to the plaintiff and the defendants in any event of the cause.

Appeal dismissed.

MAN.

C. A.
1912

April 8.

CONLEY v. PATERSON et al.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. April 8, 1912.

1. CONTRACT (§ I E 5—106)—STATUTE OF FRAUDS—DESCRIPTION OF PARTIES.

A contract for the sale of land which is signed by persons "as agents for owner" sufficiently satisfies the requirements of the Statute of Frauds in that regard.

[*Rossiter* v. *Miller*, 3 A.C. 1124, applied. See also Annotation to this case.]

2. CONTRACT (§ I E 5—97)—SUFFICIENCY OF WRITING — REFERENCE TO FUTURE FORMAL CONTRACT.

A receipt given a purchaser of land for his first payment, which stated all the terms of the contract of sale and was sufficiently executed to satisfy the Statute of Frauds, is a binding agreement of itself, and the fact that it contained a provision making a specified sum payable "on the execution of the necessary agreement of sale," does not make it merely a contract for a contract.

[*Von Halzfeldt Wildenburg* v. *Alexander*, [1912] 1 Ch. 284, specially referred to.]

ACTION by the purchaser for specific performance of an agreement of a sale of land.

The case was heard by Macdonald, J., who entered a verdict for the plaintiff. Defendants appealed.

Messrs. *A. C. Galt*, K.C., and *C. S. Tupper*, for defendants.
Messrs. *J. E. O'Connor* and *A. K. Dysart*, for plaintiff.

PERDUE, J.A.:—This is an action by the purchaser for specific performance of an agreement for the sale of a piece of land in the city of Winnipeg. The action is brought against Herbert Paterson, Messrs. Heubach, Finkelstein & Heubach, and Messrs. Black, Young and Jameson. The defendants Black, Young and Jameson are the executors and trustees under the will of the deceased father of the defendant Paterson, and the last-named defendant is the beneficial owner of the land.

On the 18th of January, 1911, the other defendant, Heubach, Finkelstein & Heubach, real estate agents, gave to the plaintiff a document of which the following is a copy:—

January 18th, 1911.

Received from George H. Conley, "commercial traveller," Winnipeg, the sum of five hundred ($500.00) dollars, being deposit and part payment on the purchase of Lot One (1), D.G.S., One (1) Saint John, Plan 790, with house erected thereon, and known as Number One (1) Saint Mary's Place, which Mr. Conley agrees to purchase on the following terms:—

The consideration to be ($8,500.00) eight thousand five hundred dollars, fifteen hundred ($1,500.00) dollars, including the above deposit, to be paid in cash on execution of the necessary agreement of sale, three thousand ($3,000.00) dollars by the purchaser assuming and agreeing to pay mortgage for that amount to be placed upon the property forthwith by the vendor, such mortgage to bear interest at the rate of seven (7%) per cent. per annum. The whole of said principal to be repayable at the end of five (5) years from date hereof, interest

half yearly on the first (1st) of July and the first (1st) of January in each year. ($4,000.00) four thousand dollars to be paid in consecutive half yearly payments of not less than three hundred and thirty ($330.00 dollars. The first of such payments to become due and payable on the first (1st) day of July, 1911, together with interest at the rate of six (6%) per cent. per annum.

The purchaser to have the privilege of paying the whole or any additional amount on account of this sum of four thousand ($4,000.00) without notice or bonus. Taxes and rent to be adjusted to date of sale hereon. The sale is made subject to the approval of the owner.

HEUBACH, FINKELSTEIN & HEUBACH,
Agents for owner.
Per T. D. WHITING.

At the same time they obtained from the plaintiff an agreement in writing to purchase on these terms.

At the trial the action was dismissed as against Heubach, Finkelstein & Heubach.

From what was proved in the evidence or admitted in the pleadings the following facts are established:—

1. On 18th January, 1911, Messrs. Heubach, Finkelstein & Heubach, as agents of Paterson, agreed to sell the land to the plaintiff at a price named and on terms and conditions set forth, subject to the approval of the owner, meaning by "owner" the defendant Paterson.

2. The plaintiff paid at the time $500 and was given a receipt in writing by Heubach, Finkelstein & Heubach which set out the terms of the sale and was signed by them as "agents for owner."

3. The title to the land stood in the names of the defendants Black, Young and Jameson, who resided in Scotland and who held the land as trustees for Paterson subject to a claim of about $3,000, on payment of which they were willing to convey the land to Paterson.

4. Heubach, Finkelstein & Heubach, as admitted in the statement of defence, "duly submitted the said offer to the defendant Paterson."

5. Paterson approved of the sale and requested the Winnipeg solicitor of the trustees to procure a transfer from the trustees.

6. The solicitor for the trustees prepared and forwarded to them an agreement of sale to be executed by them. This, although embodying the terms mentioned in the receipt, contained a number of provisions not referred to in the receipt.

7. The agreement so forwarded contained, by an error, a provision that the trustees should sign a mortgage for $3,000. This was contrary to the terms contained in the receipt, which clearly intended that Paterson should sign such mortgage, the object being to raise money to pay off the trustees.

8. By reason of the term providing that they should sign a mortgage, the trustees refused to execute the agreement.

9. The trustees were willing to convey the land to Paterson on being paid the amount due to them, and they proposed that

MAN.
C. A.
1912
CONLEY
v.
PATERSON.
Perdue, J.A.

he should carry out the sale himself, raising money to pay them off.

10. While matters were in this position, circumstances arose which caused a great advance in the value of land. Finkelstein, one of the partners in the firm of Heubach, Finkelstein & Heubach, thereupon wrote to Paterson as follows:—

> Regarding house No. 1, St. Mary's Place, I find that somebody is buying up the property around your house, and I think that in all probability, if I am not tied up to the man with whom I was previously dealing, that is, the man who made us the offer which we sent to you, that I will be able to get a great deal more for the property. I am therefore refusing on your behalf to carry out the transaction as outlined in our previous letters, as I feel that the people who are now buying the property will need it badly enough to pay many thousands more; in fact, I think we could get nearly twice as much as we formerly expected to get.

11. The defendant Paterson then refused to carry out the sale.

I think there was an agreement sufficient to satisfy the requirements of the Statute of Frauds. The signing by Heubach, Finkelstein & Heubach as agents for the owner was sufficient: *Rossiter* v. *Miller*, 3 A.C. 1124, at p. 1140.

The only question of real importance that arises in the case is in reference to the provision: "$1,500, including the above deposit to be paid in cash on execution of the necessary agreement of sale." It is urged that this provision shewed that the receipt signed by Paterson's agents was only intended to indicate terms which might form the basis of a contract, but that the real contract was still to be settled and agreed upon.

The receipt which was given by Paterson's agents to the plaintiff contained all the terms of the contract. The writing contained sufficient, and was sufficiently executed, to satisfy the Statute of Frauds. The reference in the writing to "the necessary agreement of sale" can be explained by the fact that Paterson was still to approve of the terms, and on his doing so, it may have been contemplated that some document more formal in its nature, but containing the same terms, might be signed by both the parties. There is no suggestion that any new term was to be introduced. It is true that the payment of $1,500 is to be made "in cash on the execution of the necessary agreement of sale," but upon Paterson giving this assent to the terms contained in the writing, the necessary agreement of sale was complete and could be enforced. It is to be observed that the mortgage to be put on the property is payable at the end of five years from the date of the receipt. I would take it that the term "the necessary agreement of sale" referred to Paterson's approval and acceptance of the sale made by his agents in the absence of a more formal agreement taking its place.

The law upon this point is summarized by Jessel, M.R., as follows:—

> 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 contract 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 agreement, the terms of which are not expressed in detail: *Winn* v. *Bull*, 7 Ch.D. 29, at p. 32.

In *Rossiter* v. *Miller*, 3 A.C. 1124, at p. 1152, Lord Blackburn says:—

> I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.

See also *North* v. *Percival* (1898), 2 Ch. 128.

I think there was a concluded agreement in the present case which both vendor and purchaser had accepted. There was no term or condition remaining to be settled. Everything had been agreed to and put in writing. The agents may have thought a formal agreement necessary, but it was not necessary if every term and condition of the sale was already in the writing signed by the parties, as was the case here. The only thing that disturbed the harmony of the transaction was the sudden increase in the value of the land. Then the vendor, at the instigation of his agents, sought to repudiate the sale in the expectation of getting a higher price.

I think the appeal should be dismissed with costs.

CAMERON, J.A.:—In my opinion there is a good deal to be said for the appellant's contention that the offer made by the plaintiff to Heubach & Company was not the offer which Heubach & Company transmitted to Paterson for his acceptance in their letter of January 20th, 1911. The following points of difference (of varying degrees of importance) appear: (1) The letter says $1,500 is to be paid in cash "as soon as the sale has been accepted by you." The receipt, however, says it is to be paid "on execution of the necessary agreement of sale." (2) The letter says the purchaser is to pay a mortgage to be placed on the property "by you." The receipt says "by the vendor." (3) The receipt says "the whole of said principal to be repayable at the end of five (5) years from date hereof, interest half-yearly on the first (1st) of July and first (1st) of January in each year." This is not to be found in the letter at all. (4) The word "consecutive" is found before the word "semi-annual" in the receipt, but not in the letter. (5) The receipt says that the first of the half-yearly payments is "to become due and payable on the first (1st) day of July, 1911." This is not expressly stated in the

MAN.
C. A.
1912
CONLEY
v.
PATERSON.
Cameron, J.A.

letter. (6) The receipt gives the purchaser the privilege of prepaying principal "without notice or bonus," but this ("without notice or bonus") is not stated in the letter. (7) According to the receipt, "The sale is made subject to the approval of the owner." But the letter says, "The sale being made already, subject to your approval."

These variations might be considered sufficient to support the argument that the offer submitted to Paterson was not the offer made to, and conditionally accepted by, Heubach & Company, that the minds of the parties never came together and that, therefore, there was no contract. But the defence has not made it a point to insist upon this view, as the admissions made in the statement of defence, in paragraphs 3 and 5 (in which it is stated that the agents duly submitted the said offer) apparently preclude this contention. It is further to be noted that paragraph 9 of the statement of claim (which is admitted by the defence) states that Paterson is the beneficial owner of the land in question and that the land (of which a full description is given) was agreed to be sold to the plaintiff.

The first objection taken to the judgment, that the vendor is not named in the offer, and that the contract is therefore insufficient under *Jarrett* v. *Hunter*, 34 Ch.D. 182, must fail in view of the fact that Heubach & Company sign as "agents for owner" and the sale is expressly made subject to the owner's approval.

The second objection taken was that the contract upon which the action was brought was merely a contract for a contract, and therefore not actionable. Counsel for the defendants rely upon the provision in the contract making the $1,500 payable "on the execution of the necessary agreement of sale." But all the terms are set forth in the offer of January 18th, and the expression of them in a more formal document was not intended as a condition or term of the bargain to be performed before the bargain came into existence. That I think is plain. That being so, there is a binding contract and the reference to a more formal instrument may be ignored: *Von Halzfeldt Wildenburg* v. *Alexander*, [1912] 1 Ch. 284.

It was urged in the next place that the offer was not accurately quoted to Paterson, but this objection must be overruled for reasons I have already pointed out.

It was further urged that the acceptance by Paterson was an acceptance conditional only upon the trustees' approval. But it is admitted in the pleadings and in the evidence that Paterson was the beneficial owner and that the trustees were in fact and substance merely mortgagees, who could be called upon to implement the contract made by the beneficial owner. So that there is nothing here on which to base a difference of opinion from that of the trial Judge.

Objection was also taken to the description of the lands as

being inadequate. But the decisions on this branch of the Statute of Frauds have been of the most liberal character. I think the evidence before us, and that tendered to amplify it, sufficient. In fact, this objection, as I understand it, was not seriously insisted upon.

In my opinion, the judgment appealed from should be affirmed.

HOWELL, C.J.M., and RICHARDS, J.A., concurred with CAMERON, J.A.

Appeal dismissed.

Annotation

Land Sale Contract—Signature by Agent.

Annotation—Contract (§ E 5—106)—Statute of Frauds—Signature of a party, when followed by words shewing him to be an agent.

English and Canadian authority support the proposition that a contract for the sale of land signed by one as a party thereto as for the owners is sufficient under the Statute of Frauds. Thus, in *Rogers* v. *Hower* (Alta.), 1 D.L.R. 747, it was held that where the instrument relied upon as shewing a contract of sale of land consisted of a receipt signed by a real estate agent which contained a stipulation that the sale was "subject to confirmation by owner," such reference was a sufficient description of the joint owners as the vendors to satisfy the Statute of Frauds on proof of the agent's authority.

And in *Harris* v. *Darroch*, 1 Sask. 116, an agreement for the sale of land was held to be valid where the receipt for the payment thereon was signed with the name of the agent for the owner, giving the latter's name. But it is to be noted that the receipt stated the payment to be to the owner, giving his name.

And a memorandum of a sale of land at auction signed by the auctioneer as agents "for the vendors" is valid: *Hood* v. *Barrington*, L.R. 6 Eq. 218, at p. 221.

In *Rossiter* v. *Miller*, 3 Appeal Cases 1124, cited in *Conley* v. *Paterson* above reported, the specific holding of the Court was that the term "proprietors" used in the correspondence between the vendor's agent and the purchaser in negotiating for the sale of land was a sufficient description of the vendors, but there was no memorandum following the signature of the agent.

There seems to be some conflict in authority in the United States upon the question here offered for discussion. It was held in one case that the signature to a receipt given for payment on a contract for the sale of land was sufficient where it was followed by the word "agent": *Tobin* v. *Larkin*, 183 Mass. 389.

And the signature of a bank cashier, followed by his official title, to a letter with the bank's name at the head, is sufficient to charge the bank under an Oregon statute providing against liability for representations as to the credit of another, in the absence of a memorandum to that effect in writing signed by the person to be charged: *Nevada Bank* v. *Portland National Bank*, 59 Fed. 338.

On the other hand, in *Clampet* v. *Bells*, 39 Minn. 272, it was held that in order to satisfy the requirement of the Statute of Frauds that a contract for the sale of land must be signed by the vendor or his agent,

MAN.

Annotation

Land Sale Contract—Signature by Agent.

Annotation (*Continued*)—Contract (§ E 5—106)—Statute of Frauds—Signature of a party, when followed by words shewing him to be an agent.

the vendor must be so designated that he can be identified without parol proof, and therefore specific performance of a contract was refused to the purchaser where it was signed by the other party as "agent" and nowhere shewed who the vendor was. To the same effect is *Ward* v. *Hasbrouck*, 169 N.Y. 409, 11 L.R.A. 97, 19 Am. St. Rep. 514.

ONT.

D. C. 1912

Feb. 9.

DE STRUVE v. McGUIRE.

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. February 9, 1912.

1. INTOXICATING LIQUORS (§ IV B—102)—DEATH CAUSED BY INTOXICATION—CIVIL LIABILITY.

The civil liability imposed under the Ontario Liquor License Act upon a hotelkeeper for the death of a person caused by intoxication from drinking in the hotel is not avoided by shewing that the deceased resumed drinking elsewhere while still intoxicated as a result of his drinking in the hotel, if such intoxication was the proximate cause of death and if the subsequent drinking was alone insufficient to lead to the cause of death apart from his intoxicated condition at the time when the subsequent drinking began.

[See also *Trice* v. *Robinson*, 16 O.R. 433; *McCurdy* v. *Swift*, 17 U.C.C.P. 126; *Bobier* v. *Clay*, 27 U.C.Q.B. 438.]

APPEAL by the defendants from the judgment of TEETZEL, J., *De Struve* v. *McGuire*, 25 O.L.R. 87, 3 O.W.N. 251, 20 O.W.R. 374, in favour of plaintiff in an action by the administrator of one Pundzius against a hotelkeeper for damages for the death of Pundzius, who perished from cold while intoxicated. The plaintiff claimed that the intoxication was due to drinking in defendant's hotel.

The defendant's appeal was dismissed.

The findings of TEETZEL, J., on the trial were as follows:—

TEETZEL, J.:—Under the statute, in order to render the defendants liable, the deceased must not only have come to his death while so intoxicated from such drinking, but the perishing from cold or other accident must have been "caused by such intoxication."

Now the question is: What is the proper interpretation to be placed upon the words "perishing from cold or other accident caused by such intoxication?" Do they mean, "caused directly and solely by such intoxication," and do they exclude the idea of liability if such intoxication was only one of two or more concurring causes of death? Or do they mean only that the proximate cause of death, and not necessarily the immediate cause, must be traced to such intoxication?

It was held by the learned Chancellor in *Trice* v. *Robinson* (1888), 16 O.R. 433, that the section in question is to be viewed

as a remedial measure; and, therefore, should receive a liberal construction.

The statute gives a right of action, if the facts set forth in it are established in evidence, "as for personal wrong;" and, therefore, I think the principles applicable to actions of that nature apply to an action under the statute.

In an action for a personal wrong, whether the wrong complained of is intentional or is the result of negligence, the liability of the defendant in damages depends upon whether his act was the proximate cause of the injury, and it is immaterial whether the act of some other person conduced or contributed to the injury, or for that matter may have been the immediate cause of the injury. This principle is generally illustrated by reference to *Scott* v. *Shepherd* (1773), 2 W. Bl. 892, and 1 Sm. L.C., 11th ed., p. 454, the celebrated squib case, and has been applied in many subsequent well-known cases.

If I am right in applying this principle in this action, can it be properly held, upon the facts here, that the intoxication of the deceased, caused by his drinking to excess in the hotel, was the proximate cause of his death?

As already stated, I am of opinion that the deceased never recovered from such intoxication, and that to the very end it continued to operate as a weakening and debilitating influence upon the mind and body of the deceased.

While, as conjectured by the doctor, it may be that, if he had not taken further drinks from the bottles, he might have survived, yet the fact that he was so drunk in the defendant's hotel that he was unable to take his dinner, and continued to take further drinks until he left, satisfies me that his ability to withstand the cold and to accomplish his journey home had not only been seriously impaired by that intoxication, but it had produced such a condition of weakness that indulgence in further drinks from bottles would probably result in physical collapse. Or, to put it in another way, I think that, if he had not been already intoxicated when he took the drinks from the bottle, there would probably have been no disaster, not only because he would have had his normal physical strength and endurance, but he could have exercised his sober judgment upon the quantity, if any, to be taken from the bottles.

I am, therefore, of opinion that the proper conclusion is, that the intoxication of the deceased, from the drinks furnished to and drunk by him to excess in the defendant McGuire's hotel, was, within the principle of *Scott* v. *Shepherd* (1773), W. Bl. 892 and 1 Sm. L.C., 11th ed., p. 454, the proximate cause of the death.

James Haverson, K.C., for the defendants, argued that the plaintiff's perishing from cold was not the result of any intoxication from drinking in the hotel. That intoxication ceased

ONT.
D. C.
1912
DE STRUVE v. MCGUIRE.
Argument

through the effects of the walk of five or six miles which the plaintiff took in the cold before a bottle of spirits was opened at the roadside. The fatality was due to the new state of intoxication induced by the subsequent indulgence. For this the defendants could not rightly be held liable under the provisions of sec. 122 of the Liquor License Act, R.S.O. 1897, ch. 245.*

G. H. Watson, K.C., for the plaintiff, contended that the judgment appealed from was right. The plaintiff continued to be intoxicated from his excessive drinking in the hotel from the time he left it until his death. It was "while in a state of intoxication from such drinking" that he came to his death by perishing from cold, and, therefore, the defendants were liable under sec. 122 of the Act.

The judgment of the Court was delivered at the close of the argument by BOYD, C.:—We cannot disturb the findings of the trial Judge. The question was entirely a matter of fact. The Judge came to a reasonable conclusion; and I do not see that he is wrong. The judgment will be affirmed.

Defendant's appeal dismissed.

*Sec. 122 of the License Act, R.S.O. 1897, ch. 245, provides:—

122. Where in any inn, tavern, or other house or place of public entertainment wherein refreshments are sold, or in any place wherein intoxicating liquor of any kind is sold, whether legally or illegally, any person has drunk to excess of intoxicating liquor of any kind, therein furnished to him, and while in a state of intoxication from such drinking has come to his death by suicide, or drowning, or perishing from cold or other accident caused by such intoxication, the keeper of such inn, tavern, or other house or place of public entertainment, or wherein refreshments are sold, or of such place wherein intoxicating liquor is sold, and also any other person or persons who for him or in his employ delivered to such person the liquor whereby such intoxication was caused, shall be jointly and severally liable to an action as for personal wrong (if brought within three months thereafter, but not otherwise), by the legal representatives of the deceased person; and such legal representatives may bring either a joint and several action against them or a separate action against either or any of them, and by such action or actions, may recover such sum not less than $100 nor more than $1,000 in the aggregate, of any such actions, as may therein be assessed by the Court or jury as damages.

Re CROWE.

ONT.

H. C. J.
1912
Mar. 25.

Ontario High Court, Sutherland, J. March 25, 1912.

1. WILLS (§ III G—2)—LIFE ESTATE AND REVERSION—LIFE TENANT HEIR OF REMAINDERMAN.

Where property is devised to the widow for life, with remainder to the only son of the testator, subject to the condition that in the event of the widow re-marrying the property shall go absolutely to the son on his attaining the age of twenty-one years, and with a further proviso that should the son die during his minority the property should go over as directed by the will, and where the widow never re-marries and the son predeceased her without having made a will but after attaining the age of twenty-one, then on the death intestate of the widow who became the sole heir of the son her heirs and not the heirs of the testator are entitled to the property.

[*Cusack* v. *Rodd*, 24 W.R. 391; *Re Branton*, 20 O.L.R. 642, referred to.]

MOTION by the executors of the will of Thomas Crowe, deceased, for an order, under Con. Rule 938, determining questions as to the construction of the will.

T. A. O'Rourke, for the executors.

A. Abbott, for the heirs at law and next of kin of Thomas Crowe, the testator.

D. C. Ross, for the heirs and next of kin of his widow.

SUTHERLAND, J.:—The will of Thomas Crowe is dated the 9th December, 1876. He died on the 6th February, 1877; and letters probate of his will issued on the 12th March, 1877.

At the testator's death, he left him surviving his widow and one child only, viz., a son, also named Thomas, then aged about seven years. The latter died on the 27th July, 1903, unmarried and intestate. The widow did not re-marry, and died intestate on the 18th October, 1911. At her death, there were living one brother of the testator, George Crowe, and two sisters, viz., Edna Arnott and Sarah Ray. Two other brothers had previously died, leaving children who were all of age. Another sister of the testator, Anna Sanson, is also dead, leaving children, all of whom are of age. Anna Sanson is a witness to the testator's will; and, in any event, she and those who might take an interest through her would probably, under the Wills Act, be cut out.

The widow, at her death, left her surviving one brother and three sisters all of age; also three half-sisters and three nephews, the children of a deceased brother, Charles.

The important portions of the will are as follows:—

That the rest of property interest of mortgages and money invested together with the enjoyment of my homestead and all the furniture therein I leave to my dear wife in sole use for her support and for the support and education of my son Thomas my only child to have and to hold the use and enjoyment of the same *for the term of her natural life, save and except* that if my *widow should ever be married* again that the use and enjoyment of *all my property afore-*

ONT.

H. C. J.
1912

RE
CROWE.

Sutherland, J.

mentioned shall then be given to my son Thomas aforementioned to have and to hold absolutely and for ever on the day that he shall be of the full age of twenty-one years. I further will and direct that all or any moneys that may be invested at the time of my decease shall be then invested by my executors and the interest thereof applied as above to the sole use and enjoyment of my widow so long as she shall remain such and that she shall also bear the expense of keeping my house or any other property governed by these presents in proper repair. I further will and devise that in case my son Thomas should die a minor then my property as before mentioned shall on the decease of my wife or if she shall be married again be divided into three equal parts and be given one part each to my brother George and my sisters Anna and Edna or their heirs. Provided always that all my plate shall be included in the portion to be given to my brother George being desirous that it should always remain if possible in the possession of a male heir of the name of Crowe.

Executors were named in the will, and it is at their instance that this application is made. They suggest that there has been an intestacy, and ask the opinion of the Court as to the proper construction of the will.

The heirs of the testator as at the date of the death of the widow contend that they should take the property as on an intestacy at that time. The heirs of the widow also contend that there was an intestacy, but that it must be dealt with as at the time of the testator's death, in consequence of which the son Thomas, who was then the testator's heir, was entitled to the fee in remainder after the life interest of the widow. On his death during her lifetime, his mother became his heir, and her heirs are now entitled.

I think this latter view is the correct one. The widow was to have the income and enjoyment of the property for the term of her natural life, unless she re-married, "for her support and for the support and education" of the son Thomas. There was a further provision that if she re-married then the use and enjoyment of the property should be given to the son to be held "absolutely and for ever" on the day that he should be of the full age of twenty-one years. She did not re-marry, and there is no direct provision in the will devising the property to him at her death. There is a provision that if he should die a minor then at her death or re-marriage the property should be otherwise disposed of.

There will be a declaration that, apart from the provision in the will for the life estate of the widow, there was an intestacy. One has then to apply the rule that the "heirs and next of kin are to be ascertained as at the death of the ancestor," a rule which has application to "realty, personalty, and to a mixed fund." See *Cusack* v. *Rood*, 24 W.R. 391. The testator's heir at his death was his son Thomas; and, he having died unmarried and intestate during the lifetime of his mother, she became his

heir. On her death, intestate, her heirs became and are entitled to the property in question.

It was also argued on behalf of her heirs that there was a residuary devise by implication to the son. There is perhaps much to be said in favour of this view. See *Re Branton*, 20 O.L.R. 642. The result would in the end be the same.

The cost of all parties to the application will be paid out of the fund, those of the executors as between solicitor and client.

Order accordingly.

ONT.
H. C. J.
1912
RE CROWE.
Sutherland, J.

THE KING v. LAWLESS.

Ontario High Court, Middleton, J., in Chambers. February 14, 1912.

ONT.
H. C. J.
1912
Feb. 14.

1. INTOXICATING LIQUORS (§ III—55)—UNLAWFUL SALES—EVIDENCE ONLY OF PURCHASE AND RE-IMBURSEMENT.

A summary conviction for selling intoxicating liquor without a license will be quashed for want of jurisdiction in the magistrate, if the only evidence before him was that the defendant purchased the liquor for the use of himself and others upon a hunting expedition and received from the treasurer of the common fund re-imbursement only for the purchase made by the defendant at the treasurer's request, and where there is nothing to discredit the evidence so given.

[See also, *R.* v. *Howarth*, 33 U.C.Q.B. 537; *R.* v. *Coulson*, 27 O.R. 59; *R.* v. *Beagan* (No. 1), 6 Can. Cr. Cas. 54.]

MOTION by the defendant to quash a conviction made against him by a magistrate for selling intoxicating liquor without a license.

The conviction was quashed.

J. Haverson, K.C., for the defendant.

J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J.:—I have read the evidence. The transaction seems simple, and there is nothing to discredit the evidence given.

A voluntary association, the Turtle Lake Hunt Club, contemplated a trip to the woods. Manning and Lawless were members of the association. Manning arranged with Lawless to purchase the whisky deemed necessary for this outing, and Lawless sent to Peterborough and bought the whisky there. He contemplated delivery to Manning, but it was taken, while in transit, by the police.

The conviction is based on the theory that all this is untrue, and that Lawless sold to Manning, instead of merely acting as purchasing agent for the club.

The only thing looking that way is the receipt—"Received from Sid Manning $18.75 for three cases rye whisky." This receipt is colourless. It is consistent with a sale; it is also consistent with the statement of Manning that he took it as a

ONT.

H. C. J. 1912

THE KING v. LAWLESS.

Middleton, J.

voucher. The whisky at Peterborough cost $18.75, and Lawless paid the livery-man who went for it $1.50, so that he was out of pocket. It is said that this would be taken into account when the expense of the trip came to be adjusted.

I do not think there was any evidence to warrant a conviction; and I have in mind the fact that all evidence upon an inquiry of this kind must be regarded with suspicion, and that the magistrate is the one to judge, and that this jurisdiction is not appellate, and that I must find that there was no evidence upon which a conviction can be based.

I quash the conviction, with costs against the informant, and with a protection order so far as the magistrate is concerned.

In this view of the case, I have not to consider the difficult question raised by Mr. Haverson, whether an executory contract —so long as it remains executory—is within the Liquor License Act.

Conviction quashed.

SASK.

S. C. 1912

April 4.

MARIE MEIVRE, Administratrix of Joseph Percher, deceased (plaintiff, respondent) v. M. B. STEINE (defendant, appellant).

Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Johnstone, and Lamont, JJ. April 4, 1912.

1. CONTRACTS (§ I D 4—63)—VARIATION OF OFFER—REFERENCE TO LATER QUOTATION AS "PRACTICALLY A CONFIRMATION OF FORMER PRICE.

Where the owner telegraphed to a real estate agent who was not only seeking to procure a purchaser for him but who was also acting as agent of a proposed purchaser for the purpose of completing the deal, that he would "accept $2,400, $400 cash, purchaser paying costs, commission," and then wrote him referring to his previously quoted price as $15. per acre (which in fact amounted to less than $2,400) saying that his telegram is "practically a confirmation of" the price previously quoted of $15 per acre, the word "practically" in such case means no more than "very nearly" and the letter does not constitute a renewed offer to take $15 per acre.

APPEAL by the defendant from the judgment at the trial of an action for the specific performance of an alleged agreement of sale of the south-east quarter of section 7, township 43, range 24, west of the 3rd meridian. The defence was a denial of the alleged agreement.

The appeal was allowed and the action dismissed.

The trial Judge found that the letters of June 23, 1909 and June 29, 1909, between the defendant M. B. Steine and A.B. Dirks, a real estate agent at Rosthern, constituted a contract. The letters were as follows:—

Montreal, June 23rd, 1909.

A. B. Dirks, Esq.,
Rosthern, Sask.

Dear Sir,—I have your favour enclosing cheque for $100 which I herewith return to you. You have evidently read my telegram wrong, you wired me on June 12th, "Sold your land at Rosthern

$15 per acre, $400 cash, six equal annual payments 8 per cent. privilege to pay all second year, subject to 50 cts. per acre cash commission, wire acceptance." When your wire reached Montreal, the writer was out of town but answered on the 15th, reading: "Will accept $2,400, $400 cash, purchaser paying costs commission." The last price that I gave you on the land was given you in my letter from Vancouver, which was $15 net, and my telegram is practically a confirmation of that price, this is the lowest figure that I will sell the land at just now. If this is satisfactory to your client I would want to receive an answer of his acceptance by return mail. This price is subject to change without notice.

Yours very truly,

M. B. STEINE.

Rosthern, Sask., June 29th, 1909.

Mr. M. B. Steine,
86 Grey Nun Street,
Montreal, Canada.

Dear Sir,—Re S.E. 7-43-2-West 3rd. Your letter of the 23rd reached me yesterday, and I note what you say. I am quite sure that I interpreted your telegram right, that you would allow me 50 cts. an acre commission out of $15 per acre if I got that much more cash, but to get the matter to a close, we are willing to close out the deal at $15 per acre net to you, with a cash payment of $550 —balance in six equal annual payments. I got my client to pay $15 per acre, which means 50 cents an acre commission for me. Now there is a second man in the deal that takes half the commission which will only leave a small amount for me. I think it is only fair of you to make the commission $100 in this case, as I am getting you more cash than you asked, and have had so much trouble and correspondence in this matter for over two years now, looked after the hay part for you and never got anything for it, and got you such a high rate of interest on this deal, I think it is only fair to ask that you make the commission $100 as I have to give half of it to another man. I am preparing contracts and as soon as they are signed by the purchaser I will send them to you for signature so that you can sign and return one copy together with draft attached. I find that there are one year's taxes in arrears which I will pay and deduct from the cash payment together with my commission. Enclosed please find my cheque for $100 as earnest money that the deal is closed as stated in this letter. I will ascertain the amount that is still coming to you less commission and taxes and will send contracts to you for signature together with a statement and you can make draft accordingly. I trust that this will be satisfactory.

I am, yours truly,

A. B. DIRKS.

P. E. Mackenzie, for appellant.

Messrs. *H. Y. MacDonald* and *J. D. Brown*, for respondent.

The judgment of the Court was delivered by NEWLANDS, J.:—To come to the conclusion that these letters constituted a contract, the learned trial Judge must have found that Dirks was the agent of the purchasers. As a matter of fact he was

SASK.

H. C. J. 1912

MEIVRE v. STEINE.

Newlands, J.

to a certain extent acting for both parties. He was the agent of the defendant for the purpose of procuring a purchaser, and the agent of the plaintiff to complete the contract.

The price put upon this land in the letter of June 23rd is $2,400. The price which the vendor is to receive by the letter of June 29th is $15 per acre. Now, as there are only 153.42 acres in this quarter section, a fact known to both Dirks and Steine, this price amounts to only $2,301.30, and is not, therefore, an acceptance of the offer to sell for $2,400. The learned trial Judge evidently construed the letter of June 23rd, where the defendant said, "The last price that I gave you on the land was given you in my letter from Vancouver, which was $15 net, and my telegram is practically a confirmation of that price: this is the lowest figure I will sell the land at just now," to mean that the offer of $2,400 was the same as an offer of $15 per acre. But the defendant does not say that. He does not say the offers are actually the same, but practically the same, meaning almost or very nearly the same price. Now, the letter of June 23rd, mentioning one price, and that of June 29th another, the latter letter cannot be considered an acceptance of the first, but rather a new proposal which must be accepted by the defendant before a contract can be arrived at. From this time on the parties got no nearer together. When a price was finally agreed on, viz., $2,375, the defendant's terms as to the payment down were not complied with, nor could they come to an agreement as to the subsequent payments.

Taking all the correspondence together, I am of opinion that the parties never at any time got together so that there was a binding contract between them.

The defendant's counterclaim for mesne profits was abandoned on the argument.

Action dismissed.

QUE.

K. B. 1912

Mar. 30.

VALADE v. LEROUX.

Quebec King's Bench, Archambeault, Trenholme, Lavergne, Cross, and Gervais, JJ. March 30, 1912.

APPEAL (§ VI B—287)—IRREGULARITIES AS TO NOTICE OF INSCRIPTION—WAIVER—C.P. (QUE.) 1213.

Although article 1213 C.P. (Que.) provides that, after the inscription of appeal to the King's Bench, notice thereof must be served on the attorney for the opposite party, an objection to an appeal duly inscribed on the ground of want of notice is waived if the same objection might have been taken at the filing and allowance of security on the appeal and the party now objecting was there represented and did not object.

[*Gross* v. *Racicot*, 11 Que. P.R. 124, distinguished.]

THIS is a motion by respondent to quash the present appeal.

G. St. Pierre, for petitioner.
A. Berthiaume, contra.

The opinion of the Court was delivered by

ARCHAMBEAULT, C.J.:—On January 13th, 1912, appellant served on respondent's attorneys an inscription in appeal and a notice that he would furnish the security required by law on January 16th. The inscription in appeal was filed on January 16th, the day on which security was given and no notice thereof has since been given to respondent.

The latter now invokes such want of notice of inscription as justifying his motion to quash. Respondent relies on art. 1213 C.P., which says that the appeal is moved by means of an inscription filed in the prothonotary's office and that notice thereof must be served on the other party or his attorney.

This Court has already decided, and more than once, that the inscription in appeal must be filed in the prothonotary's office before service of the notice of appeal and of security on the other side: *Evans* v. *Francis* (1896), 5 Que. Q.B. 417; *Inkiel* v. *Laforest* (1897), 7 Que. Q.B. 454; *Garon* v. *Noel* (1898), 2 Que. P.R. 26.

But in all these cases respondent had availed himself of appellant's irregular procedure to object to the security and had therefore not acquiesced in the moving in appeal. And it was precisely on account of this non-acquiescence that the Court decided to quash the appeal.

In 1909, we decided the question in a case of *Gross* v. *Racicot*, 11 Que. P.R. 124, and one of our considerants is based precisely on this fact, that respondent objected to the security being received and therefore did not acquiesce in the appeal.

In the present case it is established by the affidavit of Mr. Albert Berthiaume, the attorney who represented appellant when the security was furnished, that Mr. St. Pierre, one of respondent's attorneys, was then and there present representing respondent and did not object to the putting in of security. Respondent, therefore, acquiesced in the appeal and cannot now complain of the irregularity he alleges. The motion is dismissed, with costs.

Motion to quash dismissed.

MAN.

C. A.
1912

Mar. 4.

WOLFSON v. OLDFIELD.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. March 4, 1912.

APPEAL (§ VII L 3—491)—FINDINGS OF TRIAL JUDGE—FRAUD—JUDGMENT COMPLIED WITH.

Where the purchaser and the real estate agent by whom the sale transaction was put through were joined as defendants in an action by the vendor to set aside the sale and a judgment was given setting aside the sale with costs against both defendants, and the defendant purchaser reconveyed in pursuance of the judgment and paid the costs, an appeal on the part of the agent will not be sustained where the real subject of the litigation is at an end by the compliance of the co-defendant with the decree and no substantial variance is asked, except as to the *considerants* of the written opinion as to fraud which were not embodied in the formal decree.

[*Wolfson* v. *Oldfield*, 18 W.L.R. 450, affirmed on appeal.]

AN appeal from the judgment of Robson, J., *Wolfson* v. *Oldfield*, 71 W.L.R. 450, by the defendant firm, Oldfield, Kirby and Gardner.

The appeal was dismissed.

Messrs. C. P. Wilson, K.C., and *J. B. Coyne*, for appellants.

Messrs. H. Phillipps and *H. W. Whitla*, for respondent.

PERDUE, J.A.:—This action was brought against Oldfield, Kirby and Gardner, who are a firm of real estate agents, and the Real Estate Investment Company, to set aside a sale by the plaintiff to the company made through the intervention of the first named defendants. The facts of the case are fully set out in the judgment appealed from. The substance of the plaintiff's contention was that Oldfield, Kirby and Gardner were his agents and employed by him to find a purchaser of the land in question at the best price available; that the plaintiff relied upon them to act in his best interests; that they, concealing from him the fact that they were acting for the purchaser and in the purchaser's interests, induced him to make the sale.

The learned trial Judge, Robson, J., found in favour of the plaintiff. The sale was set aside and the Real Estate Company was ordered to transfer the land to the plaintiff upon the latter repaying the purchase-money received by him. Both Oldfield, Kirby & Gardner and the Real Estate Company appealed from this judgment. Before the hearing in this Court the Company abandoned its appeal and complied with the terms of the judgment. The Company transferred the land to the plaintiff and paid his costs as ordered, and he refunded the purchase money. The company was not represented on the argument of this appeal, or made a party to the appeal.

The matter now comes before the Court of Appeal in this anomalous position; the subject of the litigation is at an end and all parties submit to the terms of the judgment, yet Oldfield, Kirby and Gardner object that the trial Judge, in his reasons for judgment, or in the process of arriving at his con-

clusion, found that the action of Mr. Gardner was a fraud upon the plaintiff, and they desire to appeal against this finding.

The appellants object to no portion of the judgment as drawn up and entered. The judgment, as entered, only affects them in that they and the company are ordered to pay the plaintiff's costs, and these costs have already been paid by the company. All things ordered by the judgment to be done, have been done and no party to the suit desires to disturb this state of things.

Affidavit evidence was offered on this appeal to shew that there was no intentional fraud committed and that Mr. Gardner intended to disclose to the plaintiff that he was acting for the purchaser, but, through an error in his office, a message he directed to be sent was not sent in the form he intended. It is not necessary to consider whether the affidavit evidence is material, or whether, if it had been received by the trial Judge, it would have affected his judgment in any important respect. If the evidence is not material it need not be considered further. If it is material and, as the appealing defendants contend, rebuts the alleged fraudulent intent, then the trial Judge's whole conclusion as to the plaintiff's right to recover would have to be considered on this appeal, a course which could not be taken in the absence of the Real Estate Company, and, in view of the fact that the company has accepted and complied with the trial Judge's finding, so that the principals to the litigation, the vendor and the purchaser, are now concluded by the judgment.

There is no mention of fraud in the judgment as drawn up and entered. The finding of fraud could only be reviewed by this Court on an appeal from the whole judgment, and then only as an essential element found by the Judge in arriving at his conclusion. Where the real litigants have accepted that conclusion and are now bound by it, a consideration by this Court of the finding of fraud would be purely academic.

Oldfield, Kirby and Gardner's counsel contends that they were not proper parties to the suit. This exception, even if well taken, can have no effect upon the finding complained of. If they had not been made parties, the trial Judge might, in their absence, have made that finding if it was warranted by the evidence. In that case they, not being parties to the suit, would have had no status to bring an appeal.

I think the appeal must be dismissed.

CAMERON, J.A.:—This action was brought by the plaintiff to set aside the conveyance by him to the defendant, the Real Estate Investment Company, of certain lands sold the company by the defendants Oldfield, Kirby and Gardner, his agents. Relief was asked on various grounds; but the learned trial

MAN.
C.A.
1912
WOLFSON
v.
OLDFIELD.
Cameron, J.A.

Judge based his judgment in favour of the plaintiff on the single ground that the defendants Oldfield, Kirby and Gardner did not, at the time of effecting the sale, disclose to the plaintiff that they were simultaneously acting for and advising the company in the purchase and held that this was fraud on the plaintiff. Formal judgment was accordingly entered ordering that upon payment by the plaintiff of the purchase-money received by him, that the sale of the lands in question be rescinded, that the company thereupon convey the lands to the plaintiff and account for any interim rents and profits, and that the company and Oldfield, Kirby and Gardner pay the costs of the action.

From this judgment the company appealed, asking to have the judgment set aside or varied and a judgment entered dismissing the plaintiff's action with costs. Oldfield, Kirby and Gardner, also appealed asking for the same relief or for a new trial. When the appeal came before us it was stated by counsel for the plaintiff that the terms of the judgment had been complied with, that the company had re-conveyed the lands in question to the plaintiff, who had been paid his costs; and that he was no further interested in the matter. He, therefore, took no part in the argument. We have thus been without the advantage of having the evidence analyzed and discussed and the points of law brought before us examined from the plaintiff's standpoint.

Counsel for Oldfield, Kirby and Gardner, therefore, restricted their appeal, making it in fact an application to the Court to revise the written reasons for judgment of the trial Judge. He urged that upon the evidence at the trial and upon the further evidence submitted on the hearing of the appeal it appears that the defendant Gardner intended and attempted to disclose to the plaintiff his relation to the Investment Company. In this he relied more particularly upon a letter from the defendants Oldfield, Kirby and Gardner to the plaintiff's solicitors, which was in evidence, and also upon the wording of the cable message sent by Oldfield, Kirby and Gardner to the plaintiff on January 23, 1911, as originally drafted. He further pointed out that there was no allegation in the statement of claim that the non-disclosure complained of was with fraudulent intent, and insisted that such must be not only alleged, but proved to hold these individual defendants liable. In other words these defendants to be held liable must be brought within the rule laid down in *Derry* v. *Peek*, 14 A.C. 337, at p. 358.

All these and other arguments were strongly urged upon us, and these individual defendants are certainly entitled to have them taken into consideration. But we are not asked to set aside or modify the judgment or send back the case for a new trial. We are really asked to write opinions or criticisms point-

ing out that the reasons assigned by the trial Judge for his judgment or the reasons by which he arrived at his conclusions are insufficient and erroneous and this after the judgment has been accepted and acted upon by the purchasers. It is not an appeal at all, but an application of the kind I have stated, viz.: to revise the written reasons for judgment of the trial Judge, a proceeding for which no precedent has been cited.

I have read the judgment in this matter prepared by Mr. Justice Perdue and agree with him that the motion must be refused.

HOWELL, C.J.M., and RICHARDS, J.A., concurred.

Appeal dismissed.

THE KING v. MURRAY.

Ontario High Court. Motion before Middleton, J., in Chambers. February 10, 1912.

1. DEPOSITIONS (§ I—2)—FOREIGN COMMISSION—CRIMINAL CASE—CR. CODE (1906), SEC. 716.

The same particularity is not required as to the proof to be adduced on an application for a foreign commission in a criminal case under Cr. Code (1906), sec. 716, which authorizes the making of the order in aid of a preliminary enquiry to take the deposition of a witness out of Canada who is "stated to be" able to give material information relating to the offence as would be required upon an application under Code, sec. 997, to take evidence for use at the trial, in which case it must be "made to appear" that the evidence of the absent witness is material.

APPLICATION by the Crown, under section 716 of the Criminal Code, for the issue of a commission to take evidence in Great Britain.

W. G. Thurston, K.C., for the Crown.
Grayson Smith, for the accused.

MIDDLETON, J.:—The accused is charged with an offence which is triable under Part XV. of the Criminal Code, relating to summary convictions. The issue of the commission is resisted upon the ground that, upon the material, the evidence to be given by the proposed witness is not sufficiently disclosed, nor is it made to appear that the evidence is sufficiently material, to warrant the granting of the commission. The case of *Regina* v. *Verral*, 16 P.R. 444, is relied upon in support of this objection.

The application, in that case, was under section 683 of the Code of 1892, corresponding with section 997 of the present Code. That section relates to the taking of evidence where the accused is charged with an indictable offence, and differs materially from the section under which the present application is made.

ONT.

H. C. J. 1912

THE KING v. MURRAY

Middleton, J.

Under the section in question, a commission is to issue to take the evidence of any person who is "stated to be able to give material information." Under the section considered by Mr. Justice MacMahon in the *Verral case*, a commission is to issue "whenever it is made to appear . . . that any person who resides out of Canada is able to give material information."

I quite agree with Mr. Justice MacMahon that, where the statute requires that "it shall be made to appear," the discretion of the Judge is to be exercised upon evidence making it to appear to him that the witness is able to prove some fact which is material; but I think the rule is quite different when all that the statute requires is, that it shall be "stated" that the witness is able to give this material evidence.

Apart from this, I am satisfied that the witnesses in question are witnesses whom it is proper for the Crown to examine, and that from what is disclosed a case has been made out within section 997, had this application been made under that section.

I, therefore, make the order sought.

The statute does not warrant the imposition of any terms such as suggested by Mr. Smith.

Order for commission.

ONT.

D. C. 1912

Feb. 6.

HELLER v. GRAND TRUNK R.W. CO.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. February 6, 1912.

1. CARRIERS (§ III F—439)—CARRYING LIVE STOCK—LIABILITY TO CARETAKER.

Where the general form of a shipping contract has been approved by the Board of Railway Commissioners of Canada and it provides for exemption of the railway from liability for personal injuries through negligence of the railway of a shipper of live stock under a ticket issued by the railway at half fare, permitting him to ride on the train on which the live stock was being carried for the purpose of looking after the same while in transit, such exemption will apply notwithstanding that the shipper signed the contract without reading the same over or knowing its contents.

2. CARRIERS (§ II M 6—317)—EXEMPTION FROM LIABILITY—SPECIAL CONTRACT—"CARRIAGE OF ANY TRAFFIC"—RAILWAY ACT (CAN.)

A contract exempting entirely a railway company from liability in respect of the death or injury of a passenger who is the holder of a ticket issued by the railway company, which ticket was sold at a reduced rate good for passage on a train conveying live stock belonging to the passenger, does not destroy all the liability of the railway company in "respect of the carriage of any traffic" and is therefore not a contravention of sec. 340, sub-sec. 1 of the Railway Act (Can.), where the exemption contracted for is restricted to the transportation of the passenger and not to the transportation of the live stock.

[The Railway Act, R.S.C. 1906, ch. 37, secs. 2 (31) and 340, considered.]

3. CARRIERS (§ IV E—561)—RAILWAY COMMISSION—MEANING OF "IMPAIRING" AS TO LIABILITY—RAILWAY ACT, R.S.C. 1906, CH. 37, SEC. 340.

The power of the Dominion Railway Commission under sec. 340 of the Railway Act to sanction a form of shipping contract impairing

restricting or limiting the liability of the railway company, includes the power to sanction a contract whereby the liability which would otherwise arise would be entirely destroyed or abrogated. *Per* Riddell, J.

[The Railway Act, R.S.C. 1906, ch. 37, sec. 340, considered.]

APPEAL by the plaintiff from the judgment of MULOCK, C.J. Ex.D., 25 O.L.R. 117, dismissing the action.

The appeal was dismissed.

W. S. Brewster, K.C., for the plaintiff. On the findings of the jury, judgment should have been entered for the plaintiff for $500 damages. The defendants had no power to enter into a contract exempting themselves from total liability, as was attempted to be done in this case, and the contract, if entered into by the plaintiff, was null and void. See the Railway Act, R.S.C. 1906, ch. 37, sec. 284 (*c*), and sub-sec. 7; *Sutherland* v. *Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139; MacMurchy and Denison's Railway Law of Canada, 2nd ed., pp. 473, 474, 475, and 476. The Railway Board has no power or authority to approve of a contract exempting the defendants from total liability where negligence is clearly established, as in this case. The case of *Harris* v. *Perry & Company*, (1903), 2 K.B. 219, shews that, if the plaintiff here was a mere licensee and the defendants were negligent, they are liable. According to the findings of the jury, the learned trial Judge should have held that the plaintiff had no opportunity of reading the contract and was not aware of its conditions.

I. F. Hellmuth, K.C., for the defendants. The plaintiff must be taken to have known all that was in the contract of carriage, and at any rate his signature was not obtained by fraud: *Goldstein* v. *Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536, at p. 539, with the authorities there cited. The defendants had power to contract themselves out of all liability, with the sanction of the Board of Railway Commissioners, under sec. 340, sub-secs. 2 and 3, of the Railway Act, and the Board had full power to give such permission: *Bicknell* v. *Grand Trunk R.W. Co.* (1899), 26 A.R. 431. The word "impairing" in sec. 340 covers the case of total exemption from liability.

Brewster, in reply.

FALCONBRIDGE, C.J.:—I find myself constrained to hold that the judgment ought to be affirmed on the short ground that there is some liability left under the original contract, and it is destroyed only as to the carriage of passengers. By sec. 2, sub-sec. (31), of the Railway Act, "traffic" means the traffic of passengers, goods and rolling stock.

I do not wish to be understood as in other respects not agreeing with the reasoning of the Chief Justice of the Exchequer Division.

ONT.

D. C.
1912

HELLER
v.
GRAND
TRUNK
R.W. Co.

Falconbridge, C.J.

There is an interesting discussion of the meaning of the word "impair," as used in the constitution of the United States, in *Blair* v. *Williams* (1823), 4 Littell (Ky.) 35, at p. 69.

BRITTON, J.:—I agree in the result.

February 6. RIDDELL, J.:—This is an appeal from the judgment of the Chief Justice of the Exchequer Division, whereby he dismissed the action. The facts are set out with sufficient elaboration in the report of the case below, 25 O.L.R. 117.

I am wholly in accord with the judgment, and think it cannot be set aside. Even were the conclusions of the learned trial Judge erroneous in respect of the meaning of the word "impairing" in the statute—and I am of opinion that they are not—the clause in the contract is not, in my view, such as that it destroys the "liability in respect of the carriage of any traffic." "Traffic" means the traffic of passengers, goods and rolling stock, without discrimination: Railway Act, sec. 2 (31). Both the plaintiff and his horse were traffic and were carried under the one contract—the provision that the company should not be liable for injury to him is not a destruction of all liability under the contract of carriage, but a limitation of liability to the goods carried. This, I think, comes within sec. 340 (2) of the Act.*

As to the ground upon which the trial Judge proceeded, I think a remark by my Lord during the argument illuminates the whole question. Counsel admitted, in answer to the Chief Justice, that a destruction of the liability was an "impairing" of it (of course the converse is not universally true, the sentence is not convertible, an impairment is not necessarily a destruction). But the "impairing" is a genus, including destruction as a species—the word "impairing" is a generic term including "destruction." And there is nothing which indicates that "impairing" is used in the statute in a more narrow sense.

I agree also in the reasoning of the learned trial Judge.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

*Section 340 of the Railway Act, R.S.C. 1906, ch. 37, is as follows:—

340. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

2. The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

McCUTCHEON LUMBER CO., Limited v. MINITONAS.

MAN.

K. B.

1912

April 8.

Manitoba King's Bench, Prendergast J. April 8, 1912.

1. Taxes (§ III E—142)—Recovery by distraint.

The word "taxes" in section 129 of the Municipal Assessment Act, R.S.M. 1902, ch. 117, giving a municipality the right to a distress of the goods and chattels of one neglecting "to pay his taxes," includes taxes on personal property as well as those on real estate.

2. Taxes (§ III E—142)—Distraint for arrears hypothecated.

A loan made under by-laws passed for the purpose of enabling a municipality to borrow money and providing that it may "hypothecate" all arrears of taxes, does not pass all proprietary interest of the municipality to the lender so as to deprive it of its right to distrain for taxes in arrears.

3. Taxes (§ III E—143)—Tax notice—Demand.

The necessity for any demand for arrears of taxes is met by following the requirement of section 129 of the Manitoba Municipal Assessment Act, R.S.M., ch. 117, which provides that if a person neglects to pay his taxes for thirty days after the mailing to such person or his agent of the notice required by section 123 of such Act, the municipality shall have a right to a distress and sale of his goods.

4. Taxes—(§ III B 1—119)—Notice of assessment and taxation—Sufficiency.

The omission of the word "limited" from the name of a company to whom a tax notice is mailed will not invalidate the notice where the notice conformed to the rolls in that respect and the officers of the company knew that the company was meant to be designated and they acted on that assumption.

This action arose out of a distress of the plaintiffs' chattels by the municipality of Minitonas for alleged arrears of taxes, in the course of which distress proceedings the municipality was restrained from selling by injunction issued in this suit.

The plaintiffs claimed that the seizure was illegal and wrongful, chiefly because the statutory provisions in regard to assessment and the requirements in distress proceedings generally were not complied with, and they prayed for a declaration that there were no taxes in arrears for which distress could be made, for an injunction and for damages and costs.

The defence of the municipality was to the effect that at the time of seizure there were taxes due by the plaintiffs for the years 1905, 1906, 1907 and 1908, and that the provisions of the Assessment Act were observed in assessing and levying the said taxes as well as in making the said distress.

The defence of Campbell, who was alleged to have taken part in the distress proceedings, was that he so acted as agent for the municipality, and was not a proper party to the action.

The action was dismissed and the injunction dissolved.

Messrs. *J. B. Coyne* and *A. C. Campbell*, for plaintiffs.

Messrs. *C. P. Wilson*, K.C., and *W. C. Hamilton*, for defendants.

Prendergast, J.:—The question of onus having arisen at the opening of the trial, I decided that it rested on the defendants.

MAN.

K. B.
1912

McCUTCHEON LUMBER CO., LIMITED v. MINITONAS.

Prendergast, J.

The only evidence tendered by the defendants was that of the secretary-treasurer of the municipality. The plaintiffs produced no witness.

I will first deal with that of the plaintiffs' objections which is of widest scope, and that is, that distress cannot be levied for taxes due on personal property. Of course, as remarked by Strong, J., in *O'Brien* v. *Cogswell* (1870), 17 Can. S.C.R. 420, at p. 424, it is well settled that enactments imposing and regulating the enforcement of taxes for general and municipal purposes should be construed strictly, and that in all cases of ambiguity that construction should be adopted which is most favourable to the subject. But I see no ambiguity in section 129 of the Municipal Assessment Act which provides for this matter. Plaintiffs' counsel would have the word "taxes" in the first line of the section read as "real property taxes"; but there is no ground to warrant this construction, the less so as the word "taxes" as used throughout the Act is made clearly to apply to rates on both real and personal property. To adopt the view urged would lead to this strange, if not anomalous, distinction: that goods could be sold for taxes due on real property, but not for taxes due on the goods themselves, and there would be, moreover, no method in the latter case whereby payment could be enforced except by action. I am of opinion that in the words of the section, distress is in order "in case a person neglects to pay his taxes" and not only in case a person neglects to pay his real property taxes.

It is also contended for the plaintiffs that the municipality had no property in the taxes in question by reason of by-laws 90 and 93, and that it consequently had no right to distrain for the same. These by-laws were passed for the purpose of enabling the municipality to borrow money on its promissory note from the Bank of Toronto, and contain provisions, the effect of which, in my opinion, is simply that all arrears of taxes are made security for repayment. The by-laws use the word "hypothecate," which suggests a lien only and not a transfer or assignment under which all proprietary interest would pass at once from the municipality to the bank. In fact, a straight and complete assignment would have defeated its object at least in part, as the municipality could not then, as urged by the plaintiffs themselves, have been able to levy the taxes compulsorily.

There are also a great many objections to the effect that the statutory requirements were not complied with in the matter of assessment revision, levying of taxes, etc. Some of the irregularities shewn are of the gravest nature indeed.

I believe, however, that these are sufficiently answered by 10 Edw. VII. (Man.) ch. 38, being "An Act respecting the Municipality of Minitonas," by section 1 of which, notwithstanding any defect or irregularity, the assessments, by-laws, levies and

taxes of the municipality for the years 1901 to 1909 are declared to have been and to be sufficient, valid, effectual and binding as if all proceedings had been fully and completely carried out according to all the provisions of the Municipal Act and the Assessment Act. The section also sets forth that "the validity and legality of the 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," etc. The object of the Act is declaratory as to the taxes for the years named, and, being declaratory, the rule is that it should be construed retrospectively. Maxwell on Statutes, p. 333; *Attorney-General* v. *Hertford*, 3 Ex. 670. As to this statute not being pleaded in defence, it is a public Act.

The grave nature of the irregularities and the extent to which the statutory provisions were disregarded, were strongly urged. In fact, I am free to say that the municipality was in that position where it could probably not enforce payment of any portion of the taxes for some of the years mentioned. But I think that it may fairly be assumed that it was just such an unfortunate state of affairs that moved the Legislature, in order that the more astute or unwilling ratepayers, who had the benefit of municipal expenditures as well as the others, should not escape their fair share of taxation.

With respect to the objections to the seizure, I think it was sufficient to follow the requirements of section 129, and that was substantially complied with. This section seems to contemplate that the necessity for any demand is met by mailing the statement and demand mentioned in section 123. That the notice was addressed to "The McCutcheon Lumber Company," omitting to add the word "Limited," is a very technical objection. It is enough to say, I think, that the notice conforms in this respect with the rolls, that the plaintiffs knew that they were the parties meant to be designated by that name and that they acted on that assumption. As to the requirements with respect to posting up under section 131, the municipality was still in time, when the interim injunction issued, to supplement any omission in this respect.

I should add that the plaintiffs have not even attempted to shew any unfairness or discrimination against them, either in valuation or otherwise.

The action will be dismissed and the injunction dissolved, with costs to the defendants.

Action dismissed and injunction dissolved.

ONT.

C. A.
1912

Feb. 1.

TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. February 1, 1912.

1. STATUTES (§ III—132)—SPECIAL ACT REFERRING TO PRIOR GENERAL ACT —AMENDMENT—CONSTRUCTION.

Where a general clause of another statute is by the incorporating Act made applicable to a corporation, and its undertakings by a reference which does not specify an amendment already made to such general clause, such amendment is to be read as forming part of the company's Act of incorporation and will control the powers granted to the company.

[The Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (*b*) construed.]

2. STATUTES (§ I G 2—86)—SPECIAL LEGISLATION—PUBLIC SERVICE CORPORATION—USER OF HIGHWAY—CONTROL BY GENERAL STATUTE.

A clause in a general Act making it a condition precedent to the erection of electric light poles and wires, in a municipality, that the consent of the municipal council shall be first obtained and that the whole work incident to the erection of the poles shall be under the supervision of an appointee of the council, is not inconsistent with nor superseded by special provisions contained in the Act of incorporation of an electric light company conferring upon it the power to erect poles in a street, and to operate the business of the company and making the company responsible for damages caused in carrying on or maintaining their works.

3. HIGHWAYS (§ II B—47)—ELECTRIC LIGHT COMPANY—RIGHT TO ERECT POLES ON STREET.

Powers conferred by a special Act of Parliament incorporating an electric light and power company whose powers include the erection of poles and the doing of all things necessary for the transmission of light, heat, and power, provided that the same is done so as not to "incommode" the public use of streets are not in conflict with the provisions of an amended section of a general Act, which is made applicable to the corporation by its Act of incorporation, and which makes it a condition precedent to the erection of poles that the consent of the municipal council shall be first obtained.

APPEAL by the defendants from the judgment of BOYD, C., 24 O.L.R. 537, deciding that the plaintiffs had, under the powers given them by their Act of incorporation, the right to go upon the highway of defendants for the purposes of their undertaking without the permission of the municipal corporation having control of such highway.

The appeal was allowed.

Messrs. *G. H. Watson*, K.C., and *T. A. Gibson*, for the defendants. The Act of incorporation of the plaintiffs, being ch. 107 of 2 Edw. VII. (D.), does not empower the plaintiffs to enter upon any public highway, and thereupon construct, erect, and maintain their poles and transmission lines on or across such highway. The Act does not give power to the plaintiffs, without the leave or license of the defendants, to take possession of a street or highway for the purposes of their business. There is an absence of authority or right on the part of the plaintiffs to do the things mentioned, without the express consent of the

municipal council, and the direction and approval of such person as it appoints, and under its direction. These conditions are not inconsistent with the plaintiffs' incorporating Act. We refer to the following Dominion statutes in support of these contentions: 51 Vict. ch. 29, sec. 123, repealed by sec. 6 of 63 & 64 Vict. ch. 23, and a new section substituted therefor; 51 Vict. ch. 29, sec. 90, amended by 62 & 63 Vict. ch. 37, sec. 1; 2 Edw. VII. ch. 107, sec. 21.

D. L. McCarthy, K.C., for the plaintiffs. The only point in issue between the parties at the present time is, whether the plaintiffs require the leave or license of the defendants before proceeding with their proposed work. On this point the plaintiffs contend that the wording of secs. 12 and 13 of their incorporating Act, 2 Edw. VII. ch. 107, give them the right to do the work contemplated, without the leave or license of the defendants: *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52. The amendment made to sec. 90 of the Railway Act of 1888 was repealed in 1903 with the rest of the Act.

Watson, in reply.

February 1, 1912. Moss, C.J.O.:—Appeal by the defendants from a judgment of the Chancellor of Ontario after trial without a jury.

The plaintiffs, an incorporated company, with power to produce, sell, and distribute electric and other power and energy, and for those purposes to construct, maintain, and operate lines of wire, poles, tunnels, conduits, and other works, and to erect poles, construct trenches and conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances require, brought this action against the Municipal Corporation of North Toronto for an injunction to restrain that body from interfering with or preventing the plaintiffs in the erection of poles and lines of wire in and along Eglington avenue, a highway within the corporation limits, or in the alternative—by amendment asked for at the trial—for a declaration that they were entitled to erect their poles and wires for the transmission of electricity upon and along the public streets of the municipality, without the leave or license of the defendants.

The learned Chancellor awarded the plaintiffs the latter relief, subject to certain conditions as to depositing plans and books of reference, and obtaining the approval of the engineer of the Dominion Board of Railway Commissioners thereto.

The plaintiffs were incorporated by Act of the Dominion Parliament, 2 Edw. VII. ch. 107, which was assented to on the 15th May, 1902. Section 21 of the Act declares that sec. 90—together with certain other sections—of the Railway Act, shall apply to the plaintiffs and their undertakings, in so far as the said sections are not inconsistent with the special Act.

ONT.

C.A.

1912

TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

MOSS, C.J.O.

The Railway Act in force at that time was the Act 51 Vict. ch. 29, which was assented to on the 22nd May, 1888. But, between that date and the date of the Act incorporating the plaintiffs, a number of amendments to the earlier Act had been made, and, among others, sec. 90 was amended by adding thereto a new sub-section.

This enactment is contained in the first section of the Act 62 & 63 Vict. ch. 37, which was assented to on the 11th August, 1899. When, therefore, in 1902, sec. 90 of the Railway Act was incorporated into the plaintiffs' incorporating Act, the sub-section added by 62 & 63 Vict. ch. 37 formed part of the enactments which were made to apply to the plaintiffs and their undertakings, in so far as they were not inconsistent with the incorporating Act.

At the trial, the existence of this sub-section appears to have been overlooked, and the learned Chancellor's attention was not directed to it. We are, therefore, without the benefit of his view as to its bearing upon the rights asserted by the plaintiffs.

Its language appears to render it applicable in many respects to the case in hand. To begin with, it specifies and deals with the case of companies empowered by Parliament to construct and maintain lines for the conveyance of light, heat, power, or electricity, that is to say, some of the very objects for which the plaintiffs were incorporated. And, with regard to that subject, it enacts that "when any company has power by any Act of the Parliament of Canada to construct and maintain lines . . . for the conveyance of light, heat, power or electricity, such company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and, as often as the company thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions." One of these provisions (*f.*) is as follows:

> The opening up of any street, square, or other public place for the erection of poles, or for carrying wires under ground, shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the said council directs; the council may also designate the places where such poles shall be erected; and such street, square, or other public place shall, without any unnecessary delay, be restored, as far as possible, to its former condition, by and at the expense of the company.

These provisions were carried into the Railway Act, 1903, and are now to be found, in a somewhat modified form, in sec. 217 of the Railway Act, R.S.C. 1906, ch. 37.

If these enactments, in so far as they require that a company with the powers possessed by the plaintiffs must proceed with the consent of the municipal council, and subject to the

direction and approval of such person as it appoints and under its direction, are not inconsistent with the plaintiffs' incorporating Act, they are applicable to the plaintiffs and their undertaking; and, if so, the plaintiffs are left without support for the present action.

The plaintiffs rest the right asserted in the action upon secs. 12 and 13 of the incorporating Act.

Is there anything in them reasonably inconsistent with sec. 90 of the Railway Act, as it stood when it was imported into the plaintiffs' Act?

In other words, can it be fairly said that, having regard to the objects for which the plaintiffs were incorporated, the character of the work necessary to be done in order to carry these objects into effect, and the public ownership and user of much of the property upon, along, and over which the plaintiffs' powers were to be exercised, there is any substantial contradiction between the provisions of secs. 12 and 13 of the incorporating Act and sec. 90 of the Railway Act?

Sections 12 and 13 confer powers that are requisite and necessary as of course, in order to enable the plaintiffs to prosecute the enterprise for which they were incorporated.

They are empowered by sec. 12 to acquire, construct, maintain, and operate works for production, and works for the conduct and supply, of electricity and other power, and by means thereof produce and transmit and furnish it to, or receive it from, others, as well as to perform other acts. And sec. 13 says that they may erect poles, construct trenches or conduits, and do all other things necessary for the transmission of power, heat, or light, as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways, or public places, or to impede the access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but they shall be responsible for all damage which they cause in carrying out or maintaining any of these works.

These provisions do not expressly negative the property rights of municipalities or individuals; and the stipulation as to payment of damages found in each of these two sections does not necessarily exhaust the conditions to which the plaintiffs could reasonably be required to conform.

The enactments of the sub-section added to sec. 90 of the Railway Act are not in conflict with what is enacted in secs. 12 and 13 of the incorporating Act. They follow naturally as directions incident to the exercise of the powers given to the plaintiffs in order to the carrying out of their enterprise. Even before the date of the plaintiffs' Act, the trend of legislation had set in the direction of municipal control over the exercise of powers upon streets and highways by incorporated companies;

ONT.

C.A.

1912

TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

MOSS, C.J.O.

and that circumstance may account for the importation of sec. 90 into the incorporating Act. In any case, the question is one of construction of the Act as a whole; and the provisions are to be read together, if they may be so read without leading to an unreasonable or absurd result.

Reading them together, the meaning to be gathered seems to be, that secs. 12 and 13 confer powers to be exercised in conformity with the directions of sec. 90 of the Railway Act, in so far as they relate to the construction and maintenance of lines for the conveyance of light, heat, power, and electricity upon or along highways, squares, or other public places.

That being the case, the plaintiffs' case fails, and the action should have been dismissed.

It follows that the appeal must be allowed and the action dismissed; but, under all the circumstances, there should be no costs to either party.

GARROW, J.A.:—I agree.

MACLAREN, J.A.:—The plaintiffs, professing to act under the powers conferred upon them by the Dominion statute of 1902 incorporating them, being 2 Edw. VII. ch. 107, were proceeding with the erection of poles for the purpose of stringing electric transmission wires along Eglington avenue, in the town of North Toronto. They were stopped by the municipal authorities and their workmen arrested. They assert that the town authorities have nothing to say in the matter and no right to interfere with them, and bring the present action for an injunction restraining the town corporation from interfering, and for a declaration that they have the right to erect their poles and string their wires on the streets of the town, without asking leave so to do.

The works authorized by the company's Act of incorporation are declared to be for the general advantage of Canada.

By sec. 12:—

> The company may acquire, construct, maintain and operate works for the production, sale and distribution of electricity and power, for any purpose for which such electricity or power can be used, and may construct, maintain and operate lines of wire, poles, tunnels, conduits and other works in the manner and to the extent required for the corporate purposes of the company, and may conduct, store, sell and supply electricity and other power ,and may with such lines of wire, poles, conduits, motors or other conductors or devices, conduct, convey, furnish or receive such electricity to or from any person, at any place, through, over, along or across any public highway, bridges, viaducts, railways, watercourses, etc.
>
> 13. The company may erect poles, construct trenches or conduits and do all other things necessary for the transmission of power, heat or light as fully and effectually as the circumstances of the case may require, provided the same are so constructed as not to incommode the public use of streets, highways or public places or to impede the

access to any house or other building erected in the vicinity thereof, or to interrupt the navigation of any waters, but the company shall be responsible for all damage which it causes in carrying out or maintaining any of its said works.

The case was tried by the Chancellor, who held that under the sections of their charter above quoted and the authority of *Toronto Corporation* v. *Bell Telephone Co.*, [1905] A.C. 52, the company had the right to erect their poles and string their wires along Eglington avenue, without asking the leave of the town; but held that, before doing so, they should deposit a plan and book of reference as required by the Railway Act; and, inasmuch as the evidence shewed danger to the other wires on the streets of the town, the company should obtain the approval of their plan by the engineer of the Dominion Railway Board. We were informed by counsel for the company that they had deposited their plan and would obtain the consent of the Railway Board engineer, although they did not admit that the Board had any jurisdiction in the matter.

In my opinion, the company misconceived their rights, and I consider that the question at issue is governed by sec. 247 of the Dominion Railway Act, R.S.C. 1906, ch. 37, which does not appear to have been cited to the learned Chancellor. This section provides that "when any company is empowered by special Act of the Parliament of Canada to construct, operate and maintain lines . . . for the conveyance of light, heat power or electricity, the company may, with the consent of the municipal council or other authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said powers . . . subject, however, to the following provisions: . . . (*e*) The opening up of any street, square, or other public place for the erection of poles, or for the carrying of wires under ground, shall be subject to the supervision of such person as the municipal council may appoint," etc. Sub-section 5 provides that, if the company cannot obtain such consent, it may apply to the Railway Board, to which it shall submit a plan of the highway, square, or other public place, shewing the proposed location of such lines, wires, and poles. By sub-sec. 6, the Board may grant the application in whole or in part, and may make such changes or impose such terms as it deems expedient.

Section 21 of the company's charter provides that sec. 90 and some other sections of the Railway Act of 1888 shall apply to the company and their undertakings, except in so far as the said sections are inconsistent with the provisions of the charter. This would include the amendment to sec. 90 passed in 1899, 62 & 63 Vict. ch. 37, which provided that when any company was given power to construct and maintain lines for the conveyance of light, heat, power or electricity, the company might,

ONT.

C. A.
1912

TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.

Maclaren, J.A.

with the consent of the municipal authority having jurisdiction over any highway, square, or other public place, enter thereon for the purpose of exercising the said power.

This amendment was referred to and relied upon by the defendants' counsel before us, and he informed us that it had not been cited to the learned Chancellor. The plaintiffs' counsel's reply to this argument was, that this amendment to sec. 90 was repealed in 1903, with the rest of the Railway Act of 1888, and was no longer law.

If the defendants had to rely upon this section, it would be necessary to inquire what effect the repeal of 1903 had, and whether the provisions of the amendment of 1899 were inconsistent with the powers conferred on the plaintiffs by their charter, and particularly by secs. 12 and 13, specially relied upon by their counsel.

But, in my opinion, it is not necessary for us to look at or rely upon the amendment of 1899. The Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (*b*), provides that "whenever any Act or amendment is repealed, and other provisions are substituted by way of amendment, revision or consolidation . . any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment."

This precisely meets the present case. When the Railway Act of 1888 was repealed on its revision and consolidation in 1903, the second part of sec. 90 of the Act of 1888 was amended, and became sec. 195 of the Railway Act, 1903; and on the general revision of the statutes in 1906, this sec. 195 became sec. 247 of the Railway Act, R.S.C. ch. 37, quoted above; so that the company's charter of 1902 must now be read as if this sec. 247 had originally been embodied in and had formed a part of the company's Act of incorporation.

A reference to sec. 247 shews that it applies to any company empowered by special Act of Parliament to construct, operate, and maintain lines for the conveyance of light, heat, power, or electricity, and is not limited, like the amendment of 1899, to companies incorporated after a day named.

The company had, therefore, in my opinion, no right to proceed to erect their poles on Eglington avenue, as they claimed they had the right to do, without the consent of the Municipal Council of North Toronto, and are subject to the supervision of such person as the said council may appoint; and, if the council refuse such consent, the company should apply to the Railway Board, submitting a plan of the streets, squares, or other public

places on which they wish to exercise their powers, and the proposed location of such lines, wires, and poles.

The appeal should be allowed, and the plaintiffs' action dismissed, but without costs.

MEREDITH, J.A.:—Under the plaintiffs' Act of incorporation, 2 Edw. VII. ch. 107—assented to on the 15th May, 1902—sec. 90 of the Railway Act—with other sections of that enactment—was made applicable to the plaintiffs and to their undertaking, in so far as it was not inconsistent with the provisions of the Act of incorporation; and that section of the Railway Act, as it was when the plaintiffs were incorporated—62 & 63 Vict. ch. 37, sec. 1, assented to on the 11th August, 1899—and as it still is, required, and requires, the consent of the municipal council, or other authority, having jurisdiction over the highway, before such work as that in question could or can be done lawfully, as well as that the opening up of the highway should be subject to the direction and approval of such person as the municipal council should appoint, and should be done in such manner as such council should direct; which council might also "designate" where the poles should be erected.

These things are not inconsistent with the provisions of the Act of incorporation; and were quite in accord with the trend of legislation at that time, in that respect; a trend which, to say the least of it, has not since weakened.

The power of the plaintiffs in respect of the matters here in question, conferred by the Act of incorporation, apart from that part of the Railway Act engrafted upon it, are by no means as plainly expressed as they might be, but the Act certainly does not, in so many words, provide for the carrying of the plaintiffs' wires along the highway, as they please, against the will of the municipality; and, reading sec. 90, of the Railway Act, into the Act of incorporation, as if it had there been set out in full, one can have no reasonable doubt that the right and power of the municipality, set out in it, were intended to be applicable to the plaintiffs' undertaking; and, that being so, this appeal must be allowed, and the action dismissed, because the acts of the plaintiffs, complained of in this action, were done in disregard of such right and power; but, as, for some unaccountable reason, the provisions of sec. 90 of the Railway Act, as they were at the time of the passing of the Act of incorporation, and since have been, were not brought to the attention of the Court below, I would make no order as to costs either here or there.

MAGEE, J.A.:—The powers of conducting its lines and erecting poles along the streets of a municipality given in 1902 to the plaintiff company by their special Act of incorporation, 2 Edw. VII. ch. 107, in secs. 12 and 13, were practically the same as those conferred upon electric telegraph companies by the general Act relating to them, R.S.C. 1886, ch. 132, and upon various telephone companies.

ONT.
C. A.
1912
TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.
Magee, J.A.

In 1899, it had become frequent that railway companies would apply for and be granted in their special Acts of incorporation power to generate and dispose of electricity for light, heat, and power, and to construct telegraph and telephone lines for public messages. In the session of 1899 alone, such powers were given to various railway companies—see, among others, 62 & 63 Vict. chs. 50, 66, 70, 72, 77, 85, and 87. There were no sections of the general Railway Act specially applying to these powers, and in some of the special Acts the particular company was given the powers of the Electric Telegraph Companies Act —*e.g.*, in 62 & 63 Vict. chs. 50 and 70.

So, in 1899, sec. 90 of the general Railway Act of 1888 was amended by 62 & 63 Vict. ch. 37, sec. 1, by adding a sub-section, 2, which, however, was not to apply to companies incorporated before that year. That new sub-sec. 2 declared:—

> When any company has power by any Act of the Parliament of Canada to construct and maintain lines of telegraph or telephone, or lines for the conveyance of light, heat and power or electricity, such company may with the consent of the municipal council or other authority having jurisdiction over any highway, square or other public place, enter thereon for the purpose of exercising the said power, and, as often as the company thinks proper, may break up and open any highway, square, or other public place, subject, however, to the following provisions.

The provisions (*a*) to (*k*) which follow are all restrictions upon the company, and one of them (*f*) declares that "the opening up of any street . . . for the erection of poles . . . shall be subject to the direction and approval of such person as the municipal council appoints, and shall be done in such manner as the council directs; the council may also designate the places where such poles shall be erected."

That this amendment of sec. 90 was intended to embody the general policy to be adopted for the future with regard to all such railway companies, can, I think, hardly be doubted, expressly limited as it was to companies incorporated in that session or thereafter. And it could hardly be argued with success that those companies which in that session had inserted in their special Acts a reference to the Electric Telegraph Companies Act could thereby override the new amendment and dispense with the consent of the municipal council.

I have said that it was the policy for all such railway companies, for I think it was limited to them. Although it refers to "any company," it was only an amendment of a section in the Railway Act of 1888, and in that Act "company" means "railway company." This is the more obvious when we turn to the Railway Act of 1903, which consolidated the various statutes as to railways. There, in the corresponding section, 195, the words are, "the company," which again means "railway company." In the present Railway Act, R.S.C. 1906, ch. 37, sec. 247, the

expression "any company" is again used, but the definition of "company" is the same; and in the following section, 248, special reference is made to other telephone companies and requiring municipal consent.

Then this company was incorporated in 1902, for equally dangerous if equally useful purposes, and Parliament declared that sec. 90 of the Railway Act and sixty-two other sections of that Act should apply to it, so far as not inconsistent with the special Act. As sec. 90 was only one of sixty-three sections thus incorporated with the latter Act, there cannot be said to be any implication that Parliament considered that particular section to be inconsistent with it. Section 90 was the one of the sixty-three sections which specially related to the powers of a company as to the construction of its line—and the sub-section added in 1899 was specially applicable to such works as those of this company. As the company was not a railway company, it was necessary in the special Act to declare that, for its purposes, in those sixty-three sections of the Railway Act, the word "company" should be deemed to mean this company.

Considering the objects of the company, there was certainly no reason why they should, in relation to highways, be given greater powers than railway companies with similar subsidiary objects. There was every reason why they should not. They stand practically in the same position as regards legislation as the companies I have referred to, which were given the powers of the Electric Railway Act. Can it then be said to be inconsistent with their power to construct their lines along the highways, that they should comply with sec. 90 and obtain the consent of the municipality? Section 12 of their special Act gives power to enter upon and take private property; but it could hardly be considered that it would be inconsistent with that to require them to take the proper regular proceedings under the provisions of the Railway Act made applicable.

So, when they are given power to put up their lines and poles upon the highway, there seems no reason to consider that they should do so otherwise than as prescribed by the very section (90) which is made applicable to them, and which requires the municipality's consent and approval and directions; and I do not see any inconsistency in the two enactments, although one qualifies the other, especially as the special Act itself, in sec. 13, shews that the public use of the streets and the private access to property was not to be incommoded. The necessity for approval of the authority which is the statutory guardian of such streets, and responsible for their repair, is quite consistent with the right to put the poles and wires along them.

It is noticeable that in this singular special Act, which places no restriction on the locality of the company's operations

ONT.
C. A.
1912
TORONTO AND NIAGARA POWER CO. v. TOWN OF NORTH TORONTO.
Magee, J.A.

in Canada, and indicates locality only in its title, the objects of the company are nowhere stated, but only as its powers are in various sections declared. There is every reason to construe these sections, then, to be as much statements of the objects of the company, as specifications of the way in which those objects are to be carried out; and, therefore, still less "inconsistency" in holding the general policy of sec. 90 to be applicable.

I am, therefore, of opinion that the consent of the municipality was necessary under the amendment of 1899, which was not brought to the attention of the learned Chancellor. This necessity has not been dispensed with by subsequent legislation.

In 1903, the Railway Act was recast and consolidated in 3 Edw. VII. ch. 58, which came into force by Royal Proclamation. It repealed the Act of 1888 and the amending Act of 1899, but it does not seem to have changed the situation. In sec. 195, it re-enacted the provisions of the 1899 amendment to sec. 90, and this time without restricting it to companies incorporated in or after 1899, thus emphasising the general policy; but, in sec. 5, it declared that, unless otherwise expressly declared, "where the provisions of this Act and of any special Act . . . relate to the same subject-matter, the provisions of the special Act shall be taken to override the provisions of this Act, in so far as is necessary to give effect to such special Act;" and that if in any special Act passed theretofore the application of any provision of the Railway Act was excepted, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited, or qualified in like manner. It may be questioned whether that section, 5, relates to any companies other than such as the Act has in view, that is, "railway" companies, and whether it would apply to companies for a different purpose, as to which Parliament had, for the sake of brevity, referred to the Railway Act. But, whether that be so or not, it is evident that the powers of this company were not curtailed thereby.

The same may be said of the revised Act of 1906, R.S.C. 1906, ch. 37, secs. 247, 3, and 4.

In all these Railway Acts of 1888, 1899, 1903, and 1906, the word "company" refers, as I have said, to a railway company (sec. 248 expressly refers to a telephone company). It is only by virtue of this company's special Act, sec. 21, that the word "company" in the specified sections can be taken to mean this company.

Then what was the effect of the repeal in 1903 of the Acts of 1888 and 1899? The Interpretation Act then in force, R.S.C. 1886, ch. 1, sec. 7, in clause 51, enacted that, whenever any Act is repealed and other provisions are substituted by way of amendment, revision, or consolidation, any reference in any unrepealed Act to such repealed Act or enactment shall, as regards any sub-

sequent transaction, matter, or thing, be held and construed to be a reference to the provisions of the substituted Act relating to the same subject-matter. The same provision is to be found in the present Interpretation Act, R.S.C. 1906, ch. 1, sec. 20 (*b*). Thus, this company's special Act is to be read with sec. 247 of the present Railway Act, R.S.C. 1906, ch. 37, which governs, and is not, in my opinion, inconsistent with it.

I would, therefore, agree in allowing the appeal.

Appeal allowed.

GILROY v. CONN.

Ontario High Court, Middleton, J., in Chambers. February 19, 1912.

1. GARNISHMENT (§ I C 1—22)—LEGACY — SHARE OF RESIDUARY ESTATE—UNASCERTAINED AMOUNT.

The claim of a residuary legatee against the executors is not a debt "due or owing" from the executors attachable under Con. Rule 911 (Ont. C.R. 1897).

[*Deeks* v. *Strutt*, 5 T.R. 690; *Jones* v. *Tanner*, 7 B. & C. 542, applied.]

2. GARNISHMENT (§ III—68)—DEBT OWING OR ACCRUING.

Before an order for payment can be made in garnishment proceedings under Ont. C.R. 911 and 915, the Court must find some definite sum either as presently due, when it is to be paid forthwith, or as a debt payable at a future date.

AN appeal by the garnishees from an order of the Local Judge at Sarnia, dated the 5th December, 1911, by which, upon the return of a garnishee order nisi, he directed the garnishees to pay the judgment creditor "the debt due from them to the judgment debtor as soon as it becomes payable under and in pursuance of the last will and testament of Meredith Conn, deceased."

F. E. Hodgins, K.C., for the garnishees.

W. D. McPherson, K.C., for the judgment creditor.

No one appeared for the judgment debtor.

MIDDLETON, J.:—The alleged debt to the garnishees of the judgment debtor is his right, as one of the residuary legatees of the late Meredith Conn, to receive a share of the residue of the estate.

The estate is not yet wound up, and it is by no means certain that any sum will ever be payable to the judgment debtor. It is alleged that he was indebted to the deceased in a sum far exceeding the amount of any possible share in the residue. The judgment debtor admits this indebtedness; but the judgment creditor suggests that this admission is fraudulent and collusive and for the purpose of defeating his right, and that there was not in truth any indebtedness to the deceased.

It is not at all clear whether the Local Judge intended to pass

ONT.
H. C. J.
1912
GILROY
v.
CONN.
Middleton, J.

upon this question. It may be that, by the order, he merely intended to direct the payment by the garnishees to the judgment creditor of any balance which might ultimately be payable to the judgment debtor, as and when the same should be ascertained and become payable. But, however this may be, it is clear that the judgment creditor has entirely mistaken his remedy. Under the rule as it now stands—Con. Rule 911—the judgment creditor, by garnishee process, is enabled to reach "all debts owing or accruing" from the garnishee to his debtor.

The claim of a residuary legatee against the executors is not a debt—*Decks* v. *Strutt*, 5 T.R. 690; *Jones* v. *Tanner*, 7 B. & C. 542—though, if the executor admits to the legatee that he holds any specific sum to the debtor's use, or, as it is sometimes put, "assents to the legacy," the legatee might recover upon the common *indebitatus* count at law: *Topham* v. *Morecraft*, 8 E. & B. 972.

Reliance was placed upon the case of *McLean* v. *Bruce*, 14 P.R. 190; but that case was decided under the Rules of 1888, where, under Rule 935, the attaching creditor could by this process make exigible, not only debts, but "all claims . . . arising out of trust or contract, where such claims and demands could be made available under equitable execution"—a provision long since omitted from the Rules.

The case of *Hunsberry* v. *Kratz*, 5 O.L.R. 635, relied upon by the garnishees, is in accordance with this view, although it turned upon the provision of the Division Courts Act relating to the attachment of debts.

It is also to be pointed out that under the practice there is no authority for a vague and undefined order such as made in this case. Before an order for payment can be made, the Court must find some definite sum either as presently due, when it is to be paid forthwith, or as a debt payable at a future date: Con. Rule 915 then authorises an order for payment when the sum so ascertained becomes payable.

The appeal must be allowed and the order vacated, with costs to be paid by the judgment creditor to the garnishees, both here and below, upon taxation.

Appeal allowed.

ONT.
H. C. J.
1912
May. 9.

Re PIPER.

Ontario High Court, Middleton, J. (affirmed by the Divisional Court), March 27, 1912, and May 9, 1912.

1. EVIDENCE (§ II K—1)—WILL—INTENTION OF TESTATOR—EVIDENCE OF DRAFTSMAN.

On a motion to construe a will the Court cannot look beyond the document itself and must reject the affidavit of the party who drew the will as to the testator's intention.

[*Re Davis*, 40 N.B.R. 23, followed.]

ONT.

H. C. J. 1912

RE PIPER.

2. WILLS (§ III F—115)—GENERAL BEQUEST—LAPSED PORTION—RESIDUARY DEVISEE—PARTIAL INTESTACY.

On a motion to construe a will the Court cannot speculate on the testator's intention, and no presumption arises that the testator intended to dispose of his whole estate, therefore, where a portion of a general bequest lapses, such lapsed share does not pass as residue but is undisposed of and must be distributed as upon an intestacy and the executors hold the same as trustees for the next of kin.

[*In re Fraser*, [1904] 1 Ch. 726; and *Blight* v. *Hartnoll*, 23 Ch. D. 218, specially referred to.]

AN originating notice to determine questions upon the construction of the will of the late John Mill Piper, who died on the 7th February, 1910.

I. F. Hellmuth, K.C., for David H. Piper.

W. E. Raney, K.C., for Rebecca Piper, the widow personally, and also for the executors.

E. C. Cattanach, for the Official Guardian.

MIDDLETON, J.:—The will was made upon a printed form, admirable in itself, but which is filled up with so little skill that it gives rise to considerable difficulty.

After making provision for the payment of debts, the printed form provides, that all the testator's real and personal estate is devised and bequeathed "in the manner following." The conveyancer then inserted these words, "all to my wife Rebecca Piper excepting only $25,000 which I give as follows." Then follow five specific pecuniary legacies, amounting in the whole to $20,000, leaving $5,000 of the excepted $25,000 undealt with. Then follows another printed clause: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto"—to which the conveyancer has added "my executrix and executor for the purposes of this my will." The wife and another are then appointed executors. Indorsed upon the will is a codicil: "I direct the legacy of $5,000 to my sister Mrs. E. Sutton to be reduced to $2,500." The effect of this is to increase the undisposed of amount from $5,000 to $7,500.

The widow contends that the exception from the general devise to her of the $25,000 was for the purpose of providing for the specific legacies; and, these legacies amounting to less than the sum named, that the difference passes to her.

The applicant, on the other hand, contends that the gift to the wife is of all the testator's property except the sum of $25,000; and, the testator having failed to dispose of the whole of this $25,000, that there is an intestacy—or, more accurately, that it would fall into the residual bequest to the executrix and executor; and, it being plain that this was not intended as a gift of a beneficial interest, and no purpose being declared, the executors hold in trust for the next of kin.

ONT.

H. C. J. 1912

RE PIPER.

Middleton, J.

Before me the original will is produced, and the widow fortifies her position by pointing out that in the original draft of the will there were five legacies of $5,000 each, that two of the legacies were changed from $5,000 to $2,500 by the testator, before the execution of the will, as he has initialled the change; and that the inference ought to be that it was by an oversight only that the $25,000 was not changed to $20,000.

Upon the argument, an affidavit by the conveyancer was tendered for the purpose of shewing the intention of the testator. I rejected this evidence, as I do not think I can look beyond the document itself. See *Re Davis*, 40 N.B.R. 23. Nor do I think it is open to me to speculate as to the testator's intention. He may have intended to increase the benefit to the widow by reducing the amount of the legacies to be deducted, or it may well be that he intended to make some other disposition. More probably he had no intention whatever. This view is emphasised by the fact that, when he made the codicil, he expressed no intention. In the absence of intention, there is, of course, intestacy. This is the result, as I understand the authorities, notwithstanding some vague expression in the earlier cases. See *In re Edwards*, [1906] 1 Ch. 570.

Assuming, in favour of the widow, that the devise to her can be treated as a residuary devise, I think that, upon the authorities, her contention fails.

The case of *Blight* v. *Hartnoll*, 23 Ch.D. 218, is relied upon. There the testatrix gave to the defendant all her property, except a certain parcel, which she gave to other persons. This bequest failed, and it was held that it fell into the residue and belonged to the defendant; the principle being that the residuary gift carried every lapsed legacy and every legacy which for any reason failed to take effect.

The distinction between that case and the present is well pointed out in *In re Fraser*, [1904] 1 Ch. 726. There the testator excepted from a general residuary gift real estate and chattels real, which he otherwise disposed of by his will. By his will he gave these chattels real to his brother. His brother predeceased him. Several codicils were made to the will, one of which indicated a knowledge of the brother's death; but no disposition was made by any of the codicils of the excepted chattels real. It was held that it could not be taken that the testator had excepted these chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and consequently there was an intestacy and they did not fall into the general bequest. There Stirling, L.J., after stating the principle established by *Blight* v. *Hartnoll*, 23 Ch. D. 218, adds:—

> If, however, the testator makes no disposition by will of the excepted property, this reasoning does not apply, and the excepted

property passes as on the intestacy . . . The result in the present case is, that the testator has, on the face of the testamentary disposition existing at his death, excepted the chattels real from the general bequest, and has not really made any bequest of them.

This decision is in accord with the earlier cases. In *Green* v. *Pertwee*, 5 Hare 249, Sir James Wigram had before him a will where the testator excepted from a general bequest £10,000, which he divided into ten shares of £1,000 each. One of these shares lapsed. The Vice-Chancellor held that this lapsed share of £1,000 did not pass as residue to the nephews and nieces, but was undisposed of. The decision is based upon the construction of the words of gift:—

> The question is, whether the word "residue," as used in the second clause, must be understood to describe the general residue of the testator's estate or only the excess of the estate over the sum of £10,000. The word "residue" in its large and general sense comprehends whatever, in the events which happen, turns out to be undisposed of; but, if it appears that the word "residue" is used in a more restricted sense, in that restricted sense the Court is bound to construe it.

Applying that reasoning here, the widow has a gift of all the property excepting $25,000. Her claim must fail, because nowhere has the testator given her any part of this $25,000.

The contention against the widow is made stronger when we find that, after this general gift, which I have so far assumed to be a residuary gift, there follows what is in terms a residuary gift to the executrix and executor, under which the $7,500 may well pass.

It was admitted before me in argument that the executrix and executor could not take beneficially, but would take as trustees for the next of kin. See *Yeap Cheah Neo* v. *Ong Cheng Neo*, L.R. 6 P.C. 381.

There will, therefore, be a declaration that the $7,500 is to be distributed as upon an intestacy. The costs of all parties should be paid out of this fund.

May 9, 1912. An appeal from the above judgment was dismissed by the Divisional Court (MULOCK, C.J.Ex.D., CLUTE, and RIDDELL, JJ.).

Declaration accordingly.

ONT.

D. C.
1912

Feb. 20.

HOOEY v. TRIPP.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ.
February 20, 1912.

1. DEEDS (§ II C—33)—"WEST HALF"—LOT OF IRREGULAR SHAPE—DIVISION.

Where a deed of conveyance is made of the "west half" of a lot on a registered plan without further description thereof and the plan shews that the whole lot has a uniform width for a part only of its depth from the street on which it fronts and that the west boundary line of the lot is much longer than the east boundary and that the northerly boundary thereof runs diagonally in a south-easterly direction, the conveyance of the "west half" carries with it only one half of the superficial area of the whole lot; the rectangular area is to be first divided equally from a point in the centre of the frontage and the triangular portion in rear is to be divided by a straight line running diagonally from the termination of the division line of the rectangular portion so as to give an equal area thereof to each.

[*Skull* v. *Glenister*, 16 C.B.N.S. 81, and *Herrick* v. *Sixby*, L.R. 1 P.C. 436, applied.]

2. DEEDS (§ II C—33)—"WEST HALF" OF AN IRREGULAR LOT WITH A DOUBLE FRONTAGE—VAGUENESS OR AMBIGUITY.

Where a lot of irregular shape has its principal frontage on the north side of a street, and a conveyance is made of the "west half" thereof without further description, the grantee is entitled to the west half of the frontage on that street upon which the lot fronts but not necessarily to one half of another frontage which it has upon another street shewn on the registered plan (in this case at the north-easterly side of the lot).

AN appeal by the defendant from the judgment of the County Court of the County of Hastings, in favour of the plaintiff, in an action for trespass to land. By the judgment, the plaintiff was awarded a mandatory injunction requiring the defendant to move the fence erected by her as the division line between her half-lot and the plaintiff's, $25 damages, and the costs of the action.

The appeal was allowed, MIDDLETON, J., dissenting.

E. G. Porter, K.C., for the defendant. The conveyance to the defendant entitled her to the west half of lot 8 as laid out on Dundas street, according to Evans and Bolger's plan of Trenton, and the eastern boundary of that half lot should be a line drawn from the centre of the Dundas street boundary of the lot at right angles therewith and parallel to the western boundary of the lot to the rear thereof. The learned trial Judge was in error in dividing the lot into equal halves according to the superficial feet in the whole of the lot: *Smith* v. *Millions* (1889), 16 A.R. 140. The plan shews only the frontage.

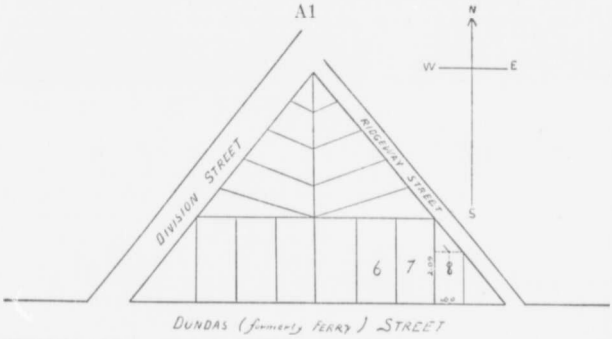
W. C. Mikel, K.C., for the plaintiff. A "half" of a lot means, in a deed, a half in quantity; not a third, or any other part. Each party should have half the superficial area. See the Surveys Act, R.S.O. 1897, ch. 181, sec. 19, which was the Act in force then. To divide by frontage would not be fair. The authorities are clear as to what is the meaning of a half lot. See *Scryver* v. *Young* (1909), 14 O.W.R. 530; *Cogan* v. *Cook* (1875),

22 Minn. 137; *Dart* v. *Barbour* (1875), 32 Mich. 267; *Au Gres Boom Co.* v. *Whitney* (1872), 26 Mich. 42. The case of *Smith* v. *Millions*, 16 A.R. 140, relied on by the defendant, does not apply in the way that counsel would have it. There the line to be established was between two lots, while here the line in question is between two halves of the same lot.

Porter, in reply. The cases cited on behalf of the plaintiff, I submit, have no application, as in all of them the land was not sold according to plan. The plan here shews only the frontage measurement. The deed refers to the registered plan; and, therefore, the registered plan becomes part of the description.

February 20. BOYD, C.:—The lot in question formed part of a triangular-shaped piece of land bounded on the south by the principal street of Trenton (Dundas, formerly Ferry street), by Division street, sloping west and north, and by a narrow and comparatively unimportant street, sloping east and north, and meeting Division street at the apex of the triangle. One row of lots faces south on Dundas street, a chain in width and about two chains deep, except two triangular lots at each end of this front row, and the lot in question, No. 8, which is not a parallelogram, but has a considerable slice taken off its north-east end by the diagonal trend of Ridgeway street. A diagram (A1) will best illustrate the peculiarities of the situation.

A1



Sheriff Proctor owned lot 8, and sold the west half of the lot to Tripp in 1909, and afterwards the east half to Hooey in 1911. The whole dispute is as to the right line of division between these two half-lots.

Once there was a building facing on the street, but it has been burned down, and the whole lot is now vacant land.

The material words of description are "the west half of lot 8

ONT.

D. C.
1912

HOOEY
v.
TRIPP

Boyd, C.

on the north side of Dundas street (formerly Ferry)—reserving the right to build upon all the remaining part of the lot . . . according to Evans and Bolger's registered plan."

The other is described as the east half of lot 8 on the north side of Dundas street . . . according to the plan mentioned.

A fence was put up by Tripp about the centre of the whole lot, running parallel with the side line to the west between 7 and 8, which would give 462 feet of total area more to Tripp than to Hooey.

The County Court Judge has given effect to a line drawn by a surveyor for the plaintiff, running approximately north and south and parallel with the side line to the west of lot 8 and at right angles with Dundas street, which gives an equal area to each half lot, but on the front gives 56 links to the plaintiff, and only 44 links to the defendant.

Both parties, I think, err in their claim: Tripp, because his line midway through the lot would not give equal superficial areas to each half; and the plaintiff's (approved by the Judge), while it gives an equal area to each, is not a fair line of division, because it deprives the defendant of some seven feet of the front on Dundas street, which is the important boundary line, by its denomination in the deed, its position, and its value for the practical use of the property as a whole.

There is no reason in law or in fact why, in a lot shaped like this, with a bias or diagonal line on one side, the line of division to separate it into half lots should be run parallel to the side line, which is straight; it may be run partly straight and partly to accommodate itself to the bias or diagonal line formed by the street at the north-east side of lot 8.

As far as the side lines of lot 8, beginning from Dundas street, are parallel, I would run the dividing line between the two half lots parallel thereto, and bisecting lot 8 so far in equal parts; and then, when this dividing line has reached the point opposite where the diagonal side of lot 8 lying to the east begins, I would deflect the line of division for the two half lots by a right line trending west from the centre of the lot to the northern boundary so as to give an equal area of land in that part of the lot to each half owner (as partly marked in dotted lines on diagram).

This secures an equal division, both as to area, as to the main and controlling frontage, and as to comparative advantages—matters which one can regard, on the principle approved in *Skull* v. *Glenister* (1864), 16 C.B.N.S. 81, that the Court may consider all material facts existing at the time of the transaction so as better to appreciate what was being done. I think the equality which the two deeds contemplate is best preserved by giving, as far as possible, an equal division of the whole lot. That is to say, the width of the lot fronting on Dundas street

is to be equally divided through the width of the whole lot, with the required result of giving each party an equal superficial area. The straight line parallel to both sides from the front on the south part of the lot, going about two-thirds of the whole length of the lot, and the deflected line starting where the parallel line of division ends, and going south for the other third part of the lot to the north, which has the diagonal slice taken off to the east, will also effect this equal division. This method of partition, by the employment of a middle line of division for two-thirds with a partial deflection for the other one-third length, is justified by the considerations taken into account by the Judges of the Privy Council in *Herrick* v. *Sixby* (1867), L.R. 1 P.C. 436, at p. 449.

The parcels to be ascertained are the east half and west half of lot 8, and these parcels must have an equal area; that is the prime requisite. Next is to be regarded equality in width in a lot situated as is this one. The equality contemplated by the deeds is best preserved by giving equality in these regards to the whole lot as far as possible. By the method now given, about two-thirds of the lot (being the southerly part fronting on Dundas street) will be divided with equal area and equal width to each party, and the remaining one-third to the north is divided into equal areas, but of unequal width. Both equalities cannot be obtained in the rear part; owing to the diagonal side of lot 8 and to the prime requirement as to equal areas, the other, as to equal width, must give way. *Herrick* v. *Sixby*, L.R. 1 P.C. 436, may be consulted as to the best way of grappling with difficulties caused by ambiguous boundaries of land.

The Ontario Surveys Act, R.S.O. 1897, ch. 181, does not apply to the manner of dividing a lot laid out on a private plan; and, if it did, it casts no light on the method of running a dividing line by which an aliquot part is to be ascertained.

Both parties claiming erroneously, I think this case should be without costs throughout, including the appeal to this Court.

LATCHFORD, J.:—I have not the slightest doubt that when the defendant's husband obtained the conveyance of the 16th February, 1909, he intended to acquire the westerly thirty-three feet from front to rear of the lot in question. His letter to Sheriff Proctor is not in evidence; but the Sheriff's reply of the 9th February offers to sell "thirty-three feet off the west side of the lot" for $1,200. The letter proceeds: "The east line, I think, would be about one hundred and thirty feet—the west line about one hundred and fifty feet. The north line, you are aware, is on the bias. I would expect to leave an alley of about twelve feet on the east side for public use and light for the building, which would practically have a thoroughfare on three streets. This lot is situate between the market, the Central Ontario Railway, and the post office, and (on) the main business thorough-

ONT.
D. C.
1912
HOOEY
v.
TRIPP
Latchford, J.

fare. For the business you suggest there is no other place available in Trenton like it. You could have a first-class restaurant in the basement, with your shop above and alley in the rear. I will be pleased to hear from you in regard to you entertaining the idea."

From this it would appear that Tripp desired the property for business purposes, and that, as indicated by his commendation, Proctor was desirous of making a sale. Tripp died in 1910; and the only evidence regarding the conveyance made one week after the Sheriff's letter was written is but such as can properly be afforded by the conveyance itself. The Sheriff, who was examined at the trial, does not suggest that he sold to Tripp any property but that mentioned in the letter. The price is different—$1,100 instead of the $1,200 first asked. There is a significant reservation in the deed of a right to the grantor "to build on all the remaining part" of the lot. This was unnecessary as a matter of conveyancing. The deed was not, however, prepared by a solicitor, but, it would appear, by the Sheriff himself. The only possible, if not indeed the obvious, reason for the insertion of the reservation is, that the Sheriff felt that he might otherwise be bound by the offer in his letter to leave an alley along the east side of the property he had offered to sell to Tripp. The description in the letter was not followed in the deed, which purported to convey "the west half of lot number 8 on the north side of Dundas (formerly Ferry) street in the town of Trenton," as shewn on a certain plan, subject to the reservation mentioned.

The plaintiff, as a subsequent purchaser from Proctor of the east half of the same lot, had notice only of the conveyance to Tripp, and asserts that he is entitled to one-half in area of lot number 8. Owing to the shape of the lot—an irregular pentagon, —one-half its area, as divided in the judgment appealed from, would unequally divide the frontage, giving to the plaintiff thirty-six and a half feet (.56 chains) and to the defendant but twenty-nine and a half feet (.44 chains).

The learned trial Judge has based his decision on sec. 19 of the Surveys Act, R.S.O. 1897, ch. 181—now sec. 18 of 1 Geo. V. ch. 42. With deference, I think the Surveys Act has no application. Section 19, in the revision of 1897, is very wide in its language, but it must not be extended beyond the ambit of the Act. It is intimately and indeed expressly connected with secs. 17 and 18. All three sections are in fact included in a single section—35—of the first consolidation of the Ordinances and Statutes respecting Surveys—(1849) 12 Vict. ch. 35—and have reference only to boundary lines of concessions, sections, etc., and all side lines and limits of lots surveyed and all trees marked in lieu of posts and all posts and monuments marked, placed, or planted at the front or rear angles of any lots or parcels of land,

under the authority of the executive for the time being. By sec. 18, in force when this transaction took place, "Every township . . . lot or parcel of land, shall embrace the whole width, contained between the front posts . . . *so* marked, placed or planted" under the authority of the Government." Section 19 has reference only to patents, grants, or instruments purporting to be for an aliquot part of any lot in any *such* township, city, town, etc., and does not apply to a lot in a subdivision of a part of a township, town, or parcel of land made at the instance of a private owner. The only reported case in which sec. 19 (then sec. 68 of the C.S.C. 1859) was considered is *Babaun* v. *Lauson* (1868), 27 U.C.R. 399. But there the subdivision of a lot, as shewn on the original survey of a township, was before the Court. Section 19 of the Revised Statute has not, I am satisfied, nor has sec. 18 of the revision of 1911, any application to such a plan as is referred to in the deed from Proctor to the plaintiff's predecessor in title. The appeal has, in my opinion, to be considered without assistance from the Surveys Act.

The lot in question fronts on the main business street, and is in the principal business centre of the town of Trenton. In such locations in all our towns and cities, frontage is the most important factor of value. It may be that, according to the strict rules of evidence, a Judge is the only person presumed not to know a fact so notorious. However, in the exceptional circumstances of this case, I should be prepared—were it necessary to go so far—to disregard such rules rather than sanction by following them an act of injustice, if not of dishonesty. But I am not driven to that extremity. That both Tripp and the plaintiff bought from Sheriff Proctor with reference to the frontage, may be inferred from the deed and plan. Dundas street, as shewn upon the plan, does not run east and west. Its bearing is N. 44 degrees 25 E. mag., or N. 41 degrees 51 E. ast. To divide the lot into east and west halves of equal area by a line on the magnetic or astronomical meridian would be absurd. Yet only thus would one party have the *east* and the other the *west* half of the lot. One would have all the front, and the other none of it—a manifestly absurd situation. It would, therefore, appear that all parties gave to the east and west halves a conventional, as distinguished from a literal, meaning. I think effect can be given to the descriptions so interpreted, and at the same time to the cases which decide that half a particular lot means half the area of that lot.

This doubly desirable result may be attained by dividing the front by a centre line extending at right angles to Dundas street for 1.30 chains (or the depth of the north-east side of the lot), and thence continued westerly in such a location as will divide the remainder of the lot into two other equal areas.

There should be judgment accordingly. Success, like the lot, being divided, there should be no costs of the appeal.

ONT.

D. C.
1912

HOOEY
v.
TRIPP

Middleton, J.

MIDDLETON, J. (dissenting):—The Surveys Act has no application to this case, nor, in my opinion, does it form any guide to the interpretation to be placed upon the description in the deed.

All the cases cited and many others agree in holding that a conveyance of a particular aliquot portion of a lot is a conveyance of an aliquot portion of the total area of the lot, quite irrespective of any question as to the value of the different parts of the lot. The purchaser of the west half of this lot acquired the west half of the total area. We must interpret the deed, which is quite free from any ambiguity, by the words used; and, in the absence of any claim for reformation, must avoid assuming any intention other than that expressed in the deed. If there has been any mistake, and the deed does not express the intention of the parties, then, in a properly constituted action, it might be reformed; but, until reformed, we, as well as the parties, are bound by its terms. I can imagine nothing more dangerous than to depart from the terms of a document in an attempt to give effect to what we imagine must have been the intention of the parties.

If the parties were tenants in common, and our task was to partition the lot, we would be bound to attempt to attain equality in value; but, where the parties have divided the land, not on the basis of equality in value, but of equality in area, and a price has been agreed upon for that which the purchaser receives, I can find no warrant for the introduction of the idea of equality in value.

The parties, no doubt, contemplated a division by a line parallel to the side lines of the lot and at right angles to the front, as the lot is said to be on the north side of Dundas street. To substitute for this a line neither party desires, and having in it an angle, it seems to me, cannot be justified as an admissible interpretation of the deed, no matter how satisfactory a partition it may be if we start with the assumption that the lot must be divided into halves having equal value and equal area.

I would, however, point out that, if the frontage on Ridgeway street has any value, there is no equality in the proposed partition.

The letter referred to by my brother Latchford is not, I venture to think, admissible in evidence; and I cannot see how anything that took place between the parties prior to the conveyance of the west half can be used against the purchaser of the east half, who had no notice, and who has duly registered his deed.

We must assume that the parties knew what was being conveyed, and fixed the price accordingly; if so, there is no hardship; if not, the remedy is not to be found by departing from the language used in the deed.

I arrive at the same conclusion as the learned County Court Judge, but by another route; and would dismiss the appeal with costs.

Appeal allowed; MIDDLETON, J., *dissenting.*

Annotation—Deeds (§ II D—37)—Construction—Meaning of "half" of a lot.

Annotation

Division of irregular lot —conveyance of "half."

In identifying a description of a parcel of land there is no reason in the nature of things why the individual parties to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense. . . . It can thus be, in theory, only a question of fact in each case, whether the parties were using a special mutual sense. But in practice two rules intervene to obstruct the simple application of this principle. One is the rule against varying the terms of a contract by setting up other terms in competition with it. This rule makes it often difficult to accept the parties understanding as a source of interpreting the written words without virtually substituting extrinsic terms. The other is the supposed rule against disturbing a "plain meaning" by any other meaning, or (as sometimes phrased) against using extrinsic evidence unless the terms are ambiguous. But assuming these two rules to be not obstructive in a particular case, the general principle has full sway. The application of the principle has long been seen in the interpretation of descriptions in deeds, because there is there always some concrete and local object fully known to the parties, but unknown to the Court, and in every such case it is obvious that "the words used must be translated into things and facts"; the parties to the deed almost always use terms of description which are peculiar to themselves: Wigmore on Evidence (Can. edition), sec. 2465.

In *Doe* v. *Burt* (1787), 1 T.R. 701, 704, Buller, J., says: "Where there is a conveyance in general terms of all that acre called Blackacre, everything which belongs to Blackacre passes with it. . . . But whether parcel or not of the thing demised is always matter of evidence."

See *Doe* v. *Pitt* (1849), 1 All. N.B. 385, "all those certain pieces of marsh land."

In *Thompson* v. *Smith* (1893), 96 Mich. 258, 267, in a mortgage of "Block B," other deeds were admitted in evidence to shew their usage as to the term "Block B."

In *Diggs* v. *Kurtz* (1896), 132 Mo. 250, "Lot No. 312," no boundaries named and no plot referred to, oral agreement as to boundaries was admitted.

The identity of the thing granted must, generally speaking, partake more or less of a latent ambiguity, explainable by testimony *dehors* the grant. It cannot be that this enquiry is restricted to the single cases of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee: *Jackson* v. *Goes* (1816), 13 John. 518, 524.

"A location on application of the description of parcels must always be made by evidence *aliunde*": *Fish* v. *Hubbard* (1839), 21 Wend. 651; Wigmore on Evidence (Canadian ed.), sec. 2465.

"The motion that a description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted": Wigmore on Evidence (Canadian ed.), sec. 2476.

One of the ordinary rules of construction of deeds is that you are entitled to look at the circumstances existing at the date of the deed.

ONT.

Annotation

Division of irregular lot —conveyance of "half."

Annotation (*continued*)—Deeds (§ II D—37)—Construction — Meaning of "half" of a lot.

Those circumstances will give very little help in the construction if the words of the deed are clear, but they will help very much if the words are ambiguous: *per* Lord Esher, M.R., in *Roe* v. *Siddons*, 22 Q.B.D. 224, 60 L.T. 345.

Each description of a single object must be conceived of as a single utterance, just as one cipher cable word may represent a message of forty words. We are doing it no violence by ignoring the non-essential terms; for neither the omission nor the insertion of non-essential terms alters its essence as a whole. By conceiving clearly the singleness of each description as a symbol of a single object, we appreciate that the imperfections of either omission or insertion do not destroy its character as a single effort at the designation of a single object. And so we come to the maxim, *Falsa demonstratio non nocet.*

The practical problem in a particular case, of course, is to ascertain which specific term is the essential one. But the important point of principle is that the process of ascertaining it, and then of ignoring the others in the application of the description, is entirely consistent with the general process of interpretation. Ever since the time of Bacon (to go no further back) this has been understood and accepted.

In applying the principle there is no inherent difficulty. The process consists in looking at all the circumstances that can throw light on the sense of the words of description and their relative essentiality; and the terms thus found to be the essential ones are applied, unless they are too uncertain and therefore void: Wigmore on Evidence (Canadian ed.), sec. 2476.

Lord Chief Justice Willes, in *Smith* v. *Parkhurst*, 3 Atk. 135 at p. 136 says: "Such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor. The words are not the principal thing in a deed, but the intent and design of the grantor. We have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor. These maxims are founded upon the highest authority, Coke, Plowden and Lord Chief Justice Hale; and the law commends the *astutia*, the cunning of Judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may shew the ingenuity of counsel, but is very ill-becoming a Judge."

In expounding a grant according to the intent, it must be done according to the intent at the time of the grant: *Alderman of Chesterfield's Case*, Cro. Eliz. 35, in the light of surrounding circumstances: *Newaggo Mfg. Co.* v. *Chicago and W.M.R. Co.*, 64 Mich. 114.

Words in grants should be construed according to a reasonable and easy sense, and not be strained to things unlikely and unusual: *London* v. *The Chapter of Southwell*, Hob. 304; see also *Gough* v. *Howarde*, 3 Bulst. 125.

Judges in their judgments have great regard to the generality of the cases and to the inconveniences which may ensue either way: *Case of Alton Woods*, 1 Coke 52.

Deeds must be construed to operate according to the intention of the parties if by law they may: *Goodlittle* and *Edwards* v. *Bailey*, Cowp. 600.

ONT.

Annotation

Division of irregular lot —conveyance of "half."

Annotation (*continued*)—Deeds (§ II D—37)—Construction — Meaning of "half" of a lot.

A Court of equity looks to the general intent of a deed, and will give it such a construction as supports that general intent, although a particular expression in the deed may be inconsistent with it: *Arundell* v. *Arundell*, 1 Myl. & K. 316.

Words of description are to be construed according to the intention clearly manifested on the face of the deed, though contrary to their correct technical sense: *Cholmondeley* (Marquis) v. *Clinton*, 2 Ja. & Walk. 81, 22 R.R. 84.

The argument of inconvenience is a very strong argument where the construction is ambiguous, where it is fairly open to two constructions, but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers: *In re Alma Spinning Co.*, 50 L.J.Ch. 167.

In *Smith* v. *Millions*, 16 A.R. 140, referred to in the argument of this case, the Court of Appeal decided that when a conveyance described the property by reference to a plan, the plan becomes incorporated with the conveyance, and just as much part of the description as if it had been drawn upon the face of the conveyance; and to determine what passes by the conveyance, the description and plan alone are to be looked at, and where the lots are laid out in rectangular and not rhomboidal shape the dividing lines between the lots were held to run at right angles to the admitted line of frontage, and the ownership of the land in dispute was determined by this test.

In *Grasett* v. *Carter*, 10 Can. S.C.R. 105, Strong, J., at p. 114, says: "Where land is described . . . by reference either expressly or by implication to a plan, the plan is considered as incorporated with the deed, and the contents and boundaries of the land conveyed, as defined by the plan, are to be taken as part of the description, just as though an extended description to that effect was in words contained in the body of the deed itself. Then the interpretation of the description in the deed is a matter of legal construction and to be determined accordingly as a question of law by the Judge, and not as a question of fact by the jury."

Land was granted by deed under the following description: "All that piece or parcel of land or ground situate, lying and being in the parish of C. in the county of B., measuring in width from east to west thirty feet, which piece or parcel of land or ground appointed and conveyed is more particularly delineated and described in the map or plan drawn in the margin of these presents, the fences of which piece or parcel of land or ground hereby conveyed on the east or west sides are to be made and maintained by M. (the vendor), his heirs, appointees or assigns." In an action for a trespass to this land evidence was given to shew that, before the deed was executed, the ground had been staked out by the grantee under the direction of the grantor, and that the breadth of the space between the fences was in no part equal to thirty feet:—Held, that after these facts had been proved it was for the Judge to interpret the deed, and to say what passed under it: *Skull* v. *Glenister*, 16 C.B.N.S. 81, 33 L.J. C.P. 185.

In *Herrick* v. *Sixby*, L.R. 1 P.C. 436, an appeal had been taken from the judgment of the Court of Queen's Bench of Quebec, which affirmed the

ONT.

Annotation

Division of irregular lot —conveyance of "half."

Annotation (*continued*)—Deeds (§ II D—37)—Construction — Meaning of "half" of a lot.

judgment of the Superior Court for the district of Montreal in an action brought *en bornage* to ascertain the boundary line between two contiguous pieces of land, originally belonging to the same owner. Sir Richard T. Kindersley at p. 451 says: "If in a deed conveying land, the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what were intended to be the boundaries of the land and the language of the description equally admits of two different constructions, the one which would make the quantity of land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail."

The Ontario Surveys Act, 1 Geo. V. (Ont.) ch. 42, sec. 19, taken from R.S.O. 1897, ch. 181, sec. 18, on which the Judge in the Court below in the case of *Hooey* v. *Tripp*, *supra*, based his decision, is held by the judgment of the Divisional Court to have no application to this case, as it expressly referred to the two prior sections of the Act, and does not apply to the manner of dividing a lot laid out on a private plan, and even if it did, it casts no light on the method of running the dividing line by which an aliquot part is to be ascertained. This amended section is as follows: "18. Except as hereinafter provided every patent, grant or instrument, purporting to be for any aliquot part of any concession, section, block, gore, common, lot or parcel of land in any such township, city, town or village, shall be construed to be a grant of such aliquot part of the quantity the same may contain, whether such quantity be more or less than that expressed in such patent, grant or instrument."

In *Jordan* v. *Frogley*, 5 O.W.R. 704, the expression in "equal moities" as contained in a will was interpreted as meaning equal parts not two halves, and the representatives of the son and three daughters of the deceased took equal shares under a devise of lands "in equal moities to my son William Sharp and my three daughters, Ellen, Sarah and Fanny."

In *Morrow* v. *McConville*, L.R. 11 Ir. Ch. 236, the testator left a moiety of his property in trust for each of three purposes, and Chatterton, V.-C., in construing its meaning in the will, said: "Although the proper meaning of the word 'moiety' is a half-part, in my opinion, used by the testator in the sense of an equal part or share, I am not aware of any judicial opinion having been expressed on the meaning of this or a similar word. In the Imperial Dictionary, a book of some authority to which I have referred, I find one of its meanings given as a part or share, as distinguished from a half-part."

The general rules of construction as applied to deeds and grants are applicable in the case of boundaries. Intention, whether express or shewn by surrounding circumstances, is all-controlling; and that which is most certain and definite will prevail over the less certain and indefinite: Cyc. vol. V. Title Boundaries, page 880 *et seq.*

In all cases the intention of the parties, as gathered from a consideration of the whole instrument, is of controlling authority, and such construction will be given it as will, if possible, satisfy each of several descriptions: *Law* v. *Hempstead*, 10 Conn. 23; *Thompson* v. *Robertson*, 9 B. Mon. (Ky.) 383; *Adams* v. *Marshall*, 138 Mass. 228; *Norton* v. *Hughes*, 17 Abb. (N.C.) n. 287.

In the subdivision of a lot rectangular in form it will be presumed in the absence of evidence to the contrary that the exterior lines of the sub-

Annotation (*continued*)—Deeds (§ II D—37)—Construction — Meaning of "half" of a lot.

ONT.

Annotation

Division of irregular lot —conveyance of "half."

divisions will be parallel with the exterior lines of the lot subdivided: *Austrian* v. *Davidson*, 21 Minn. 117; *Beecher* v. *Parmele*, 9 Vt. 352. In *Rich* v. *Elliot*, 10 Vt. 211, it was decided that a grant of a certain number of acres off the west end of a lot in rectangular form and the sides being towards the cardinal points, is in legal intendment to be divided from the lot by a line parallel with the lot lines.

"Half" as used in a description of premises in which they are described as the south half of a certain quarter section of land, would ordinarily be presumed to refer to the half quarter section according to the government surveys; but it may be shewn by extrinsic evidence that the parties intended, by such description, one-half of the area of the quarter section, the intention of the parties being the controlling element as to its meaning: *Prentiss* v. *Brewer*, 17 Wis. 656.

"Half" as used in a deed conveying the half of a certain tract of land, will be held to mean the half in quantity and not the part lying on one side of a line drawn midway between and parallel to the side lines: *Dart* v. *Barbour*, 32 Mich. 267. The following principles are laid down in this case: "Where two persons having together purchased a triangular lot receiving separate deeds, one of which conveyed the north half and the other the south half of the lot described by its number on the plot, and have respectively occupied the north and south portions without any established division line between them, though one paid two-thirds and the other only one-third of the price of the whole lot, the one who paid the largest amount is not entitled, upon a shewing of that fact and of a prior verbal understanding with the other as to the portion each was to get or the purchase to have his deed corrected in the description according to such verbal understanding upon the ground of a mistake of the scrivener, as against vendees of the other who have bought in good faith, and without notice assuming their grantor to be lawfully entitled to convey the very quantity denoted by the description in his deed."

The deed in question in this action does not present a case of ambiguity. The idea imparted by the word "half" is half in quantity and is to be applied in that sense. The Court, however, intimated that they were not to be understood as saying that cases may not arise where on application to the subject matter the term "half" or a similar expression would not require to be received and applied in some qualified sense.

A deed conveying the east half of certain irregularly shaped lots is presumed to mean the east half in quantity. There is no presumption that the parties intended that the tract conveyed shall be ascertained by running a line equidistant from the opposite sides of the lot: *Cogan* v. *Cook*, 22 Min. 137.

The use of the word "half" in a description of premises to be conveyed as being the south half of a certain farm, followed by the actual conveyance, with particular description which gave a fraction of an acre less than the one-half of the farm, and were the lines run in such manner as to give the actual south half, they would include a valuable barn which, as the lines are given in the particular description in the deed are left on the defendant's part of the farm, the Court decreed the conveyance of the fraction of an acre with the barn on and this decision was affirmed on appeal: *Heyer* v. *Lee*, 40 Mich. 353.

ONT.

Annotation

Division of irregular lot —conveyance of "half."

Annotation (*continued*)—**Deeds** (§ II D—37)—**Construction — Meaning of "half" of a lot.**

In *Au Gres Boom Co.* v. *Whitney*, 26 Mich. 42, the action was for specific performance of a contract for the purchase of the north half of a certain lot which is bounded on the west side by a river which is not straight and runs so that the north line of the lot is longer than the south line, when the evidence leaves it in doubt whether any division line between the north and south halves was ever agreed upon, the lot will be so divided by an east and west line as to make the two parts equal in quantity; a division such as to give the complainant one-half of the river front is erroneous.

In *Grandy* v. *Casey*, 93 Mo. 595, the owner of a triangular lot conveyed a part of it by a deed describing it as the north half of said lot, to be divided by a line in the middle of the front thereof on a certain street and back eastwardly parallel with the north line of the lot. This particular description was held to prevail over the general description "north half" and his subsequent conveyance of the remainder of the lot as the "south half" will not take the areal half, but only the residue not included in the particular description in the first deed, and subsequent conveyances of the two parts as the "north half" and "south half" will be construed with reference to the conventional meaning given by the particular description to the words "north half" in the first named deed.

None of the authorities nor the reasons which apply to the cases of clearly described boundaries accompanied by an erroneous statement of the quantity apply to the point under discussion.

QUE.

S. C. 1912

April 13.

LAMOUREUX v. CRAIG.

Quebec Superior Court, District of Montreal, Bruneau, J. April 13, 1912.

1. CANCELLATION OF INSTRUMENTS (§ I—6)—FALSE REPRESENTATION OF LAW.

A false representation as to a matter of law is sufficient to have a document signed under such misrepresentation annulled.

2. WILL (§ I D—38*a*)—FALSE REPRESENTATION OF INVALIDITY OF FORMER WILL.

Where a will, which a person had previously refused to sign, is finally signed by such person on the representation that another will signed by her is invalid owing to the illegibility of her signature, such will will be set aside and annulled as having been subscribed to in error.

THIS was an action to set aside a will.

The action was maintained.

Messrs. *J. A. Descarries*, K.C., and *J. A. Hurteau*, for plaintiff.

Messrs. *G. Lamothe*, K.C., and *A. Cinq-Mars*, for defendant.

BRUNEAU, J.:—Plaintiff alleges that she is the legal heir of Dame Flore Lamoureux, wife separate as to property of the defendant, Isaie Craig, piano manufacturer, deceased on July 7th, 1911; that the said Flore Lamoureux died without leaving

either ascendants or descendants, and that her only legal heirs are her two sisters, to wit: the plaintiff and Dame Carmelice Lamoureux, wife of Joseph Hurteau, licensed pilot; that on August 3rd, 1911, defendant, husband of the *de cujus*, caused to be probated by the Superior Court of the district of Montreal, a will apparently made on July 5th, 1911, in the form derived from the laws of England, whereby defendant was instituted universal legatee of all the property, both moveable and immoveable, of his wife, Dame Flore Lamoureux; that the said will is null and void by reason of the testatrix's error, and by reason of the suggestion and captation exercised by the defendant and persons acting under his instructions at the time the alleged will was made; that the formalities required by the laws of England as contained in arts. 851, 852, 853, 854, and 855 of the Civil Code, were not followed in the present case; that on the day and hour at which the will was apparently made the testatrix, on account of her extreme weakness, both of mind and body, could not give a legal and valid consent to the alleged will; that the said testatrix, shortly before her decease, expressed several times her testamentary intentions and that these were totally different from those expressed in the said will; that by virtue of a deed of donation *inter vivos* of December 5th, 1904, the *de cujus* received from her father, Olivier Lamoureux, who died on November 15th, 1909, the sum of $7,000, subject to the payment of a life rent of $350 to the donor and of another life rent of $200 after the donor's death to the plaintiff; that from the 5th of December, 1904, until her death the *de cujus*, Dame Flore Lamoureux, promised solemnly and even pledged her oath before her father and others that the money received from her father would revert to her sisters and nephews; that the donor intended and desired that the money by him given to the said Dame F. Lamoureux should pass to the sister and nephews of the *de cujus*, whom he appointed and instituted his heir by his will and by a codicil thereto.

For these reasons plaintiff prayed for the annulment of the will in question.

Defendant pleaded that the action was unfounded in law and in fact.

The facts as proven before me are as follows:—

Defendant's wife fell ill on July 1, 1911. In the afternoon of the fifth, the *curé* came to hear her confession and considered it his duty to advise her to settle all her temporal affairs. She then had her husband, the defendant, summoned to her bedside by the nurse. When alone with him she requested him to have her will prepared. Fernand Craig, advocate, and brother of the defendant, living at his house, thereupon prepared the following will:—

QUE.

S. C.
1912

LAMOUREUX
v.
CRAIG.

Bruneau, J.

Outremont, Montréal,
5 juillet 1911.

Par mesure de prudence et sans me croire nullement dangereusement malade; je prends à tout évènement les présentes dispositions; je donne et lègue sans restriction, à mon époux Isaie Craig, tous mes biens, tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches, comme souvenirs. Et je déclare ne pouvoir signer.

This will was read by the defendant to his wife before the nurse at about eleven o'clock in the forenoon. It was probated, according to law, on August 3rd, 1911.

Defendant states that after he had read this will his wife said: "I wish you could do something for my family; my father always asked me to remember them as much as possible, as much as I possibly could; so then I wish you would do the same thing if you could. She didn't ask me to add that, she only asked me to think of it. In order to be all right as regards the other family, I thought I should get something added; I saw my brother, Fernand, and told him what had happened, that she didn't want anything but what was mentioned on the paper, but that by word of mouth she gave me the power to fix up everything later according to my discretion."

Fernand Craig then prepared a second will, reading as follows:—

Outremont, Montréal,
5 juillet 1911.

Par mesure de prudence et sans me croire dangereusement malade, je prends à tout évènement les présentes dispositions: je donne et légue à mon époux, Isaie Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches, comme souvenirs. Suivant les recommandations de mon défunt père, je lui recommande de même de ne donner ou léguer ces dits biens à nuls autres qu'aux membres de ma famille. Et je signe.

However, this second will was not immediately signed nor attested, because, according to defendant's version, his wife had taken a soothing potion and was then resting. Between 5 and 6 in the afternoon, after the plaintiff, who had remained part of the afternoon in the room of her sick sister, had gone, the defendant read to his wife the second will as above. She then called for her glasses and a pen, and affixed her signature. The following attestation, prepared and written by Fernand Craig, was then executed by the witnesses:—

Nous attestons que la signature ci-dessus est celle de Dame Flore Lamoureux, épouse séparée de biens de Isaie Craig, et nous signons comme témoins, de suite, après elle, en sa présence et à sa réquisition.

Dorila Amiot Lessard.
Marie Louise Craig.
Anna Maria Laporte.

After he had taken communication of the signature affixed by the testatrix, Fernand Craig declared that it was worthless

because "illegible," and suggested that the first will he had prepared should be signed by means of a cross or mark. On this representation that her signature was invalid because illegible—and this fact is vouched for by several witnesses—defendant's wife requested that the first writing prepared be brought to her.

Defendant returned to his wife's room with the document firstly prepared; she did not wish to have it read over again and asked her husband if it was the one he had read to her in the morning. On his affirmative answer she called for her glasses and a pen and signed by means of her mark, in the presence of the same witnesses who attested thereto in the same manner as previously the authenticity of her signature.

It is plain, therefore, according to the evidence, that the secondly prepared will, considered as having an illegible signature, contains the true desires and intentions of the defendant's wife regarding the disposal of her property; for she had promised her father—a promise oft-repeated to her sisters — that his property would revert to his own family. This intention clearly appears, besides, by the recommendation made to her husband, which recommendation he admits having received, and which he had embodied, according to her desires, in the document secondly prepared. Evidently the first will did not embody this intention in a sufficiently clear and precise manner, since the testatrix at first refused to sign it as drawn.

Now, this will was only substituted to the one actually signed by the testatrix's own signature on a false representation as to a question of law: to wit, that the will was worthless on account of the illegibility of the signature.

This representation was false for an imperfect, badly formed, or illigible signature does not vitiate a will or entail its nullity. Such a signature is perfectly valid in law.

13 Laurent, p. 416, No. 359; 8 Toullier, p. 153, No. 96; Demolombe, p. 288, No. 305; 2 Rutgeers et Arnaud, No. 516. Article 992 of the Civil Code reads as follows:—

> Error is a cause of nullity only when it occurs in the nature of a contract itself, or in the substance of the thing which is the object of the contract, or in something which is a principal consideration for making it.

It is clear that the principal and determining cause which led the defendant's wife to place her mark to the will firstly prepared after she had signed the other one was the legal error made by Fernand Craig, defendant's brother, who represented that the illegible signature of his sister-in-law was invalid. This is the cause and reason of the execution of the will now attacked.

And it is well settled that error in law is a cause of nullity as well as error in fact, and under the same conditions. (Mer-

QUE.
S.C.
1912
LAMOUREUX
v.
CRAIG.
Bruneau, J.

lin, Rep. Vo., Testament, sec. 2; par. 5; 6 Toullier, No. 60; 10 Duranton, Nos. 127 and *seq.;* 24 Demolombe, No. 129; 4 Aubry and Rau, p. 298, par. 344, *bis;* 15 Laurent, No. 505, and *seq.;* Solon, Nullités, No. 196; Larombière, art. 1110, No. 22, Beaudry-Lacantinerie, No. 804.)

It is clear that the testatrix would never have affixed her mark to this will had she known that her signature to the other will was perfectly valid and legal, even though it was illegible.

I, therefore, come to the conclusion that the sole and true will of the defendant's wife, the will which contains her true testamentary dispositions, and which should be given effect to, is the one to which she affixed her signature, and the other will to which she affixed her mark and which has been probated is declared null and void.

Plaintiff's action is maintained with costs.

Action maintained and will set aside.

Re HAY.

ONT.
H. C. J.
1912
Feb. 19.

Ontario High Court, Middleton J., in Chambers. February 19, 1912.

WILL (§ III G 9—162)—LEGACY—POSTPONEMENT OF TIME FOR PAYMENT—VESTING.

Where a testator directed his trustee to "set apart" a sum of money, and the investments representing the same, and to "pay over" the same to the testator's son a portion thereof within two years, and the remainder within four years after the testator's death, and in the meantime to pay to the son, quarterly, the net profits on the unpaid portion of the legacy, a gift accompanied by a direction is created in the son's favour and the vesting of the legacy is not dependent upon the son surviving either the two or four year periods, after the death of the testator.

[*Hanson* v. *Graham*, 6 Ves. 239, applied.]

MOTION by the Toronto General Trusts Corporation, executors of the will of George Hay the elder, deceased, for an order, under Con. Rule 938, (Ont. C.R. 1897), determining a question arising upon the construction of his will.

W. Greene, for the applicants.

G. McLaurin, for the executors of the will of George Hay the younger.

J. F. Orde, K.C., for the children of George Hay the elder.

O. Ritchie, for the Official Guardian.

BRITTON, J.:—George Hay the elder made his will on the 7th July, 1906. Several codicils were subsequently made; and he died on the 25th April, 1910.

By the will, the widow is provided for, and she is not interested in the parts of the will now under consideration.

These parts are as follows:—

I direct my trustee to set apart the sum of $35,000 and the investments representing the same, and pay and deliver the same, free from succession duty, to my son George Hay, whereof $5,000, part thereof, shall be paid to him within two years after my death, and the residue thereof, amounting to $30,000, within four years after my death, and in the meantime the net rents issues revenues and profits on the unpaid portion thereof shall be paid to him quarterly.

"And I further direct and declare that my trustee shall stand possessed of and interested in the whole residue of my estate and property and as soon as conveniently may be shall divide the same equally between and pay the respective shares to my sons and daughters and thereafter upon the death of my wife shall, in like manner divide the fund hereinbefore directed to be invested for her equally between and pay the respective shares to my sons and daughters. And in the case of the death of any one or more of my sons or daughters leaving a child or children him or her surviving, then the child, and if more than one, equally between them, shall take his or her respective parent's share, whether original or accrued. But if any of my sons or daughters shall die without leaving any child or children him or her surviving, then such share shall be divided equally between his or her surviving brothers and sisters, in equal shares.

Codicil No. 3, executed on the 19th April, 1910, contains the following: "I give devise and bequeath to my son George Hay a further legacy or additional sum of $6,000 for the purpose of furnishing him with means to purchase or acquire a home."

George Hay the younger died on the 26th November, 1911, having made his will on the 11th February, 1910.

The executors of George Hay the elder now apply for the construction of his will, so far as it relates to the legacy of $35,000 to George Hay the younger, and they submit the following questions:—

1. "Did the legacy or bequest of $35,000 to the late George Hay the younger vest in him and become his property in his lifetime and upon the death of his father, the late George Hay the elder?

2. "Or did the said legacy of $35,000, upon the death of the said George Hay the younger, lapse, and pass under the last clause of the will of the late George Hay the elder, disposing of the residue of his said estate as in his will set forth?" . . .

This case seems to come quite within the rule in *Hanson* v. *Graham*, 6 Ves. 239. That case decided that the word "when" in a will, alone and unqualified, is conditional, but it may be controlled by expressions and circumstances so as to postpone payment or possession only and not the vesting; as, where the interest on the legacy was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately.

In the present case the word "when" is not used, but the words, after directing the trustee to set apart the sum of $35,000 and the investments representing the same, are, that

ONT.
H. C. J.
1912
RE HAY.
Britton, J.

the trustee shall "pay and deliver the same . . . $5,000, part thereof," *within* two years after the death of the testator, "and the residue thereof, amounting to $30,000, *within* four years after my death, and in the meantime the net rents issues revenues and profits on the unpaid portion thereof shall be paid to him quarterly": *In re Gossling, Gossling* v. *Elcock*, [1903] 1 Ch. 448.

The present is a stronger case. It is a specific sum over and above residue, and the payment is not restricted to the two and four years respectively, but payment may be made within the time mentioned: *In re Bowlby*, [1904] 2 Ch. 685; *In re Couturier, Couturier* v. *Shea*, [1907] 1 Ch. 470; *In re Eve, Belton* v. *Thompson* (1905), 93 L.T.R. 235.

That case (the last-cited) turned upon the construction put upon the will by the learned Judge (Kekewich), that there was no gift—only a direction to pay. There was no interest to pay, nothing to denote a gift, beyond the direction to pay a certain sum in case the brother should survive the testator by six years. The learned Judge, in referring to the cases cited—which included these now cited—stated that these cases did not assist much in the construction of this particular will. I agree in that.

This is not a mere direction to pay; but it is a gift accompanied by a direction; and the payment of the money is not dependent upon the expiration of four years after the death of George Hay the elder and before the death of George Hay the younger.

This conclusion must be reached whether the particular clauses in the will are alone considered, or whether the will, taken as a whole, is considered. The testator George Hay the elder intended to dispose of his whole estate.

I find no difficulty in the clause as to residue. The residue is divided into two parts: first, residue before death of wife; second, residue consisting of that the use of which his widow had during her widowhood.

The words "original or accrued" are not inconsistent with the interpretation that what went to the children could not in any case be part of the residue. The will is one carefully drawn; and the testator, adopting the words of the draftsman, which he fully understood, left no room for doubt as to his intention to make a gift to each of his children.

The words "set apart" and "pay over," in the paragraph where and as used, are equivalent to words creating a gift.

(1) The separation of the amount for the legatee George Hay the younger, (2) the payment of interest for the time the principal remained unpaid, (3) the way the testator dealt with residue, and (4) the additional or further gift of $6,000 to George Hay the younger, by codicil 3, dated the 19th April, 1910, are all in favour of vesting, and I have no doubt in decid-

ONT.

H. C. J.
1912

RE HAY.

Britton, J.

ing that the legacy of $35,000, upon the death of the late George Hay the elder, became the property of the late George Hay the younger, in his lifetime.

The legacy did not lapse, and so did not pass under the residuary clause of the will of the late George Hay the elder, or become part of his residuary estate. Costs of all parties out of the estate, and of the executors as between solicitor and client.

Judgment accordingly.

LAFVENDAL v. NORTHERN FOUNDRY COMPANY.

MAN.

C. A.
1912

April 8.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. April 8, 1912.

1. MASTER AND SERVANT (§ II A 4—63)—SAFETY OF FLOORS—DEFECTIVE JOISTS.

An employer of workmen in the construction of a building is charged with the duty of making a reasonable inspection of the joists placed in the building on which and about which it is necessary for his servants to work, to ascertain their soundness and suitability for such purpose, and where an employee, in the absence of other means of egress, is compelled to walk across a joist placed in the building twenty-five feet above the ground in order to leave the building when work has ceased, the master, in the absence of such inspection, is liable for personal injuries to the servant resulting from the breaking of the joist from a defect therein.

APPEAL by the plaintiff from the decision of Mathers, C.J. K.B., *Lafvendal* v. *Northern Foundry Company*, 19 W.L.R. 30, on the trial of the action for personal injuries caused by the breaking of a joist on which the plaintiff was walking in the course of his employment.

The appeal was allowed.

Messrs. *M. G. Macneil* and *B. L. Deacon*, for plaintiff.

Messrs. *R. M. Dennistoun*, K.C., and *K. R. M. Daly*, for defendants.

HOWELL, C.J.M.:—The joist which broke was intended to be placed, and was placed, amongst others to span a distance of 20 feet from one iron beam to another up in the air 25 feet above ground. These timbers (6 inches by 10 inches) were placed with their greatest width vertical and about 3 feet from one another. It was intended that boards at right angles with the timbers should be placed upon them in part construction of the roof of the building. It was a part of the system of construction that men should walk upon these timbers while being placed and that in the construction of the roof men should be upon them for many purposes. It was contemplated and expected that men should use the timber to walk upon as the plaintiff did at the time of the accident.

MAN.

C. A.
1912

LAFVENDAL
v.
NORTHERN
FOUNDRY
COMPANY.

Howell, C.J.M.

The fact that a beam of British Columbia fir 10 inches by 6 inches broke when the weight of a single man was put upon it, shews that there was a serious defect in it, a defect which any reasonable test or even visual examination should have disclosed.

Applying the rules of *res ipsa loquitur* there was evidence of negligence, but the learned Chief Justice found that the very slight evidence of inspection given at the trial satisfied the onus which was thrown upon the defendants.

It seems to me that when timbers are to be used to support a roof 25 feet from the ground and that when they are to cover a span of 20 feet without support except at each end, it is not too much for workmen to expect that these timbers have first been tested by being stretched for that distance on the ground with no supports except at the ends and some reasonable weight put upon each. The defendants gave evidence that each timber was raised from the ground by a grab-hook around the centre and that this was a test, but this joist perhaps was caught just at the diagonal crack and was possibly strengthened by the clamp. They also gave evidence that the man operating the hoist stepped on the centre of each timber after it was placed on the iron beams, but as I read the evidence I gather that the timbers were all brought up at one place, and then, by the plaintiff and a fellow-workman, moved therefrom to their proper places, and perhaps the man piled several on each other. At all events, the timber when placed in its proper position broke when the plaintiff was properly using it as a means of egress. The evidence of Toye's inspection is to me of the most perfunctory kind and he does not pretend to have examined the timbers to find or test their strength.

The trial Judge drew conclusions from established facts, but, with great deference, I would draw different conclusions. The defendants do not pretend that Toye, their foreman, was bound to do or should do more than he had done. Toye did not test the strength of these timbers, nor did the defendants employ any competent person to do this work.

I shall assume that the defendants intended the work to be done in the manner in which it was done, for by their evidence they do not pretend that any other system or methods of procedure should have been adopted. It is evident that the work which the plaintiff was called upon to perform was of a dangerous character, and I think the defendants were called upon to take all reasonable precautions for the safety of the workmen.

In *Brooks* v. *Fakkema*, 44 Can. S.C.R. 412, the system of working was to have a movable engine for the purpose of breaking jams in a logging slide. There was an experienced foreman in charge who directed the changing of the position from time to time of this engine. It had been placed too near the slide

apparently by direction of the foreman, and a log jumped the slide and injured the plaintiff. It was held that the operations carried on were dangerous and that the company were liable at common law and could not be relieved by the employment of a competent foreman because they had failed to provide a safe and proper place in which the employee could do his work.

Sir Louis Davies, in *Ainslie* v. *McDougall*, 42 Can. S.C.R. 420, at p. 424, uses the following language:—

> In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable, cannot be extended to cases arising out of neglect of the masters' primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others.

All the authorities on this subject are referred to in these two cases and need not be again discussed.

The defendants' plan of building was to have these timbers span a space of 20 feet at an elevation of 25 feet from the ground, expecting and intending to have men walk upon and work upon them, and made no provision for their strength being tested other than a casual examination, by looking at them, and I think they are therefore liable at common law.

I think they are liable at common law even if Toye had been instructed to test the strength of each piece and had neglected to do so, for they owed a duty to the plaintiff to provide a reasonably safe place on which to work and reasonably safe materials in a work of such imminent danger.

As set forth in the judgment of the Chief Justice of the King's Bench, the plaintiff is a human wreck beyond any hope of recovery.

The judgment must be set aside and a verdict entered for the plaintiff, with costs of this appeal and of the trial. The damages are most difficult to assess, but after careful consideration they have been assessed at $7,000, and the judgment for the plaintiff will be for that amount with costs.

RICHARDS, J.A.:—The plaintiff was a workman in the employ of the defendants, his work consisting in the fixing in place of certain wooden joists which, at the height of about 25 feet from the ground, extended from one steel "I" beam to another, the "I" beams being 20 feet, or thereabouts, apart. The plaintiff worked on the "I" beam furthest from the only place provided for getting up to the "I" beams from the ground below, so that, when work ceased at dinner time, he was compelled, for lack of other means, to walk across one of these joists, to get to the place from which he could descend to the ground. These were 20 feet long and only sustained by a few inches, at each

MAN.

C. A.
1912

LAFVENDAL
v.
NORTHERN
FOUNDRY
COMPANY.

Richards, J.A.

end, resting on the "I" beams, there being no other support under them. Their dimensions were 10 inches by 6 inches, the 6-inch surface being uppermost. They had been freshly sawn on one 6-inch side and on one 10-inch side.

While he was thus crossing to go to his dinner, the joist on which he was walking broke under the plaintiff, so that he fell to the ground and was very seriously injured for life. The break extended through about six feet of the length of the joist, and the evidence seems to me conclusive that it must have happened because of the grain of the wood crossing from the upper to the lower side in that distance.

There were no ladders provided for the workmen to get up and down by. I cannot see that there would have been any inconvenience, or serious expense, if two ladders had been provided, one at each "I" beam, so that workmen would not need to walk upon the joists. It is said, however, that a break of this kind was such an extremely unusual thing that the need to provide ladders could not be foreseen by a reasonable person.

It seems to me that, because of the non-providing of ladders, or other means of getting down without crossing the joists, the defendants necessarily invited the plaintiff to use a joist as a means of crossing from one "I" beam to the other, in order to get off the building when work ceased. That being the case, I think that they made whatever joist might be used for that purpose a part of their ways and system, and, in the present case, that part has turned out to be defective. If I am right in that the employers are liable for the result of that defect. It is true that they could not tell in advance what joist would be so used, but they must have known that some joist would. It seems to me, therefore, that, as to each joist which could be so used, the defendants owed to the plaintiff the same duty that they would have, if they had said to him: "This joist is the one which we have provided for you to use in crossing from one 'I' beam to the other. It is part of our ways and system." I do not see how, in the absence of ladders or other means of descending, such a conclusion can be avoided.

If I am right in the above, the result is that the defendants are in the same position as if they had provided the joist in question as part of their ways.

I have no doubt whatever that where the grain ran completely across the ten inches of depth of timber in six feet of its length, as it patently did in this case, that fact could have been seen by anyone looking at it carefully, and if it had been seen, it would be patent that it was not likely to be strong enough to carry the weight of a man crossing it, particularly when it would be strung over 20 feet with supports only at the ends, in which position its own weight between the ends would, in itself, be a serious load for so defective a timber to carry.

The defect being thus in what was in effect part of the system of the defendants in connection with this work, there is, I think, a liability at common law. I do not see how they could avail themselves of what is known as the fellow-servant line of defence, even if they shewed, as they probably did, that Toye was a competent man to inspect timbers.

With every respect for the views of the learned trial Judge, I would allow the appeal.

CAMERON, J.A.:—The accident in this case was due to a defect in the joist which was not readily discernible by visual observation. Toye, the foreman, cannot say that he inspected this particular joist, but believes he saw them all. The learned Chief Justice found that this examination was sufficient to ascertain whether they were straight and of proper length, or had any other faults apparent to a person standing by and looking at them as they were being handled. At the trial an amendment was asked setting up a further act of negligence in the lack of proper inspection by the defendants of the joists before they were used. This amendment the Chief Justice held he would have allowed had he deemed it necessary in the interests of the plaintiff. The action was dismissed at the trial for the reasons set out by the learned Chief Justice in his judgment.

The plaintiff moves to set aside the judgment on the grounds that the defendants were negligent in not furnishing scaffolding or ladders to enable the plaintiff to safely reach the work assigned to him, and in not providing a reasonable system of inspection of the joists, when it was known to the defendants for what purposes they were to be used. In point of fact, the joists were not only for the purpose of sustaining the roof of the building, but were also used for the purpose of enabling the workmen, employed in the work in which the plaintiff was engaged, to go to and to come from this work. As the joists were 25 feet above the level of the ground, it is clear that a much greater degree of care with reference to their soundness and suitability would have to be taken than if they were to be used to support flooring one or two feet above the ground level.

Plaintiff's counsel urged that the inspection made in this case was really no inspection at all. When the timber was delivered at the building from the mill where it was sawn, Toye says he usually stood by when it was unloaded for the purpose of seeing that it was "all right." I extract from the evidence:—

Q. Was there any examination made of that timber on arrival?

A. Well, I looked over the timber as it was being unloaded myself. I didn't take the timber and put any applied pressure on it to see what it would stand. I didn't think it was necessary.

Q. What did you do?

A. I simply used my eyes.

MAN.

C. A.
1912

LAFVENDAL
v.
NORTHERN
FOUNDRY
COMPANY.

Cameron, J.A.

The timber was then cut to the proper length, carried to the proper place, and caught by a grab-hook and hoisted into place on the top of the "I" beams. Later in his evidence Toye gives an account of what he saw after the timber was broken. In the centre of the timber he found an old pitch pocket, which he says was not apparent from the outside, but this, he says, was not sufficient to cause the break.

Mr. Bruce, an architect, in answer to a hypothetical question, stated in terms of the facts here, said that a defect of this kind would easily be seen before the timber was laid if there was a foreman in charge.

Peppiatt, one of the workmen whose duty it was to cut the timbers to their proper length, says there was no inspection, that as soon as the timbers were cut they were hoisted up "as fast as we could do it, and in fact faster than we could do it, the two of us," p. 32.

As between himself and his servants, the master is bound to exercise due care in selecting proper and competent persons for the work (whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work: Pollock, Torts, 102.

This statement is largely founded on Lord Chancellor Cairns' *dictum* in *Wilson* v. *Merry* (1868), L.R. 1 Sc. & D. 326, at p. 333.

> If they (the jury) were of opinion that the respondent exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident.

It had been previously held (1861) by Lord Wensleydale, that the master is bound "to provide machinery fit and proper for the work and to take care to have it superintended by himself or his workmen in a fit and proper manner": *Weems* v. *Mathieson*, 4 Macq. 215, at p. 227.

The master is not liable for the negligence of his superintendent, but he is bound to see that his works are suitable for the operations he carries on at them; and he cannot, by leaving the supervision of his works to his superintendent, escape liability: Beven, Negligence, 611. "If the appliances he supplies are not reasonably suitable, the neglect is the master's." That this was the law before *Smith* v. *Baker*, [1891] A.C. 325, may have been arguable, but is so no longer in view of the dictum of Lord Watson in that case that "a master is responsible in point of law, not only for a defect in his part in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used." The duty of the master to secure an efficient scheme and appliances is, therefore, indefeasible and incapable of being delegated.

"The doctrine is now regarded as axiomatic that the employer

is bound to furnish adequate materials and means and resources suitable to accomplish the work: that is to say, all that is necessary to carry on the business, including premises reasonably safe for that purpose." Labatt on Master and Servant, at p. 46, where there is given a valuable list of epithets and phrases used by the Courts to designate the obligatory quality of the instrumentalities which the master is to furnish.

I refer also to the cases of *Brooks* v. *Fakkema*, 44 Can. S.C.R. 412, and *Ainslie* v. *McDougall*, 42 S.C.R. 420, where the master's duty to provide fit and proper places for the workmen to work in and suitable materials to work with and the impossibility of his divesting himself of the responsibility thereby imposed on him, are clearly set forth.

I have read the judgment of the Chief Justice and agree with his reasoning and conclusions that the appeal must be allowed.

PERDUE, J.A., concurred.

Appeal allowed.

CONTRACTORS SUPPLY CO. v. HYDE.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel, and Middleton, JJ. February 16, 1912.

1. CONTRACTS (§ I B—5)—IMPLIED CONTRACT OR TERM OF CONTRACT.

Where the language of the contract and the circumstances under which it was entered into lead to the inference that a stipulation not expressed in the writing must have formed a part of the bargain, the Court may consider such unexpressed stipulation as an implied term of the contract.

2. ARBITRATION (§ IV—42)—COMPULSORY REFERENCE—STAY OF ACTION.

When the parties to a construction contract are before the trial referee under the Mechanics' Lien Act (Ont.), for the purpose of tendering evidence at the trial of the contractor's claim in a mechanics' lien proceeding, an order cannot be made for the compulsory reference of the matters in dispute to arbitration or to compel the contractor to proceed to arbitration before going on with his action, although the contract provides that any dispute as to extras or reductions after the architect's certificate should be referred to arbitration, if an arbitration and award is not made a condition precedent to the action.

3. CONTRACTS (§ II D 4—192)—BUILDING CONTRACT—CONDITIONS PRECEDENT.

Where a building contract provides that any dispute as to extras or reductions after the issuance of the architect's certificate shall be referred to arbitration and also provides for the recovery of what is "justly due," the latter stipulation not being conditioned upon an architect's certificate or upon an award, and the contract does not contain any proviso that the certificate of the architect shall be final, the contractor is entitled to recover the amount earned under the contract and for extras, without either an architect's certificate or an award, particularly where no certificate had been given by the architect until after the litigation had begun and no arbitrator had been appointed.

ONT.

D. C.
1912

CONTRACTORS SUPPLY CO. v. HYDE.

4. ARBITRATION (§ IV—44)—ENFORCEMENT OF SUBMISSION AGREEMENT—STAY OF ACTION.

A stipulation for an arbitration to determine the amount due under a building contract is subject to the provisions of the Arbitration Act, 9 Edw. VII. (Ont.), ch. 35, sec. 8 and the party invoking the same must apply to stay the action before his defence is pleaded or other step taken in the cause after entering his appearance.

Statement

AN appeal by the defendants Hyde & Powell, contractors from the judgment of J. A. C. Cameron, an Official Referee, in a proceeding under the Mechanics' Lien Act, finding, as between the appellants and the defendants the News Publishing Company, owners, that the appellants were bound by the certificates of the architect, and that if they had any claim for extras it must be determined by arbitration.

G. H. Kilmer, K.C., for the appellants.

M. H. Ludwig, K.C., for the defendants the News Publishing Company.

The judgment of the Court was delivered by MIDDLETON, J.:—By contract of the 20th August, 1910, Hyde & Powell agreed with the News Publishing Company to do the reinforced concrete and brickwork required in the erection of a certain building, for $8,587. This building was for a newspaper office and press rooms.

The plans do not shew a press pit; and on the 30th September, 1910, Hyde & Powell tendered for the construction of a press pit at the price of $1,100. This tender was accepted on the 6th October.

The contract of the 20th August is in a printed form in general use, and contains the usual provision by which the architect is given extensive powers, and his certificate is made final and a condition precedent to any action.

The tender of the 30th September contains no reference to this contract by which it can be said expressly to import its terms so as to make them govern the new work.

The Referee has treated the contract of August as governing the entire work. No reasons are given by him.

The contract provides: "Should the proprietor or their (sic) architects at any time during the progress of the said works require any alterations of or deviations from, additions to or omissions in, the said plans and specifications, they shall have the right and power to make such change or changes, and the same shall in no wise effect (sic) or make void the contract . . . and for additional work required in alterations the amount to be paid thereof (sic) shall be agreed upon before commencing additions," etc.

It is argued that the press pit either was an "addition" to the original work, or that the parties have chosen to treat it as an "addition," within the meaning of the contract—and,

in that view, the tender and acceptance are to be regarded as a supplemental agreement by which the price was ascertained.

This view is fortified by the fact that the contract provides that the agreement for additional work shall "state also the extension of time (if any) which is to be granted by reason thereof." This tender says: "It is understood that we would start work at once, using a separate gang from the building gang, and our tender price included the shifting of our plant in order to allow this work to go on, and in this way making it possible to have the press erected without any delay on account of the building being a little behind time."

The conduct of the parties shews that this tender and acceptance were not regarded as constituting the whole bargain, because the work went on under the supervision of the architect, and his certificate was obtained.

Beyond this, I can see no reason why, in circumstances such as these, the same rule that has frequently been applied between landlord and tenant, when a new term is arranged for, should not be applied here. The common sense of the transaction would appear to be that, although there may have been a new contract, its terms must have been understood to be that, save as varied and expressly provided, all was to go on as under the old contract. See *Phillips* v. *Miller*, L.R. 10 C.P. 420; *Doe dem Monck* v. *Geekie*, 5 Q.B. 841.

I am aware of the reluctance the Court has, when asked to imply terms in a written contract; but, I think, the case falls within the rule laid down by Kay, L.J., in *Hamlyn* v. *Wood*, [1891] 2 Q.B. 494, and adopted by the Privy Council in *Douglas* v. *Baynes*, [1908] A.C. 477, at p. 482:—

> The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it was entered into, such an inference that the parties must have intended the stipulation in question that the Court is driven to the conclusion that it must be implied.

The contract provides that any dispute as to extras or reductions, after the architect's certificate, shall be referred to arbitration. The Referee has determined that the claim of the contractors for extras must be determined by an arbitration under this clause; and, as no arbitrators have been appointed, has adjourned the hearing until arbitrators have been appointed and an award made.

This cannot be supported. A clause in an agreement providing for an arbitration cannot be invoked save in the manner provided in sec. 8 of the Arbitration Act (9 Edw. VII. ch. 35) by a motion to stay made after appearance and before defence and before taking any other step. This order was made at the hearing, when the contractors were present and endeavouring to prove their claim.

ONT.

D. C.
1912

CONTRACTORS SUPPLY CO. v. HYDE.

Middleton, J.

The course adopted by the learned Referee of preventing the contractors from presenting their claim in their own way, and of himself calling the architect and allowing him to be examined by counsel for the owners, before the contractors had given any evidence in support of their claim, is most unusual and quite unwarranted.

An argument presented at the hearing should not be left unnoticed. It was suggested that the architect's certificate was final, unless varied by the arbitration contemplated by clause 6; and, therefore, that a reference back would not be of any real value to the appellants. A study of the contract has convinced me that this is not so.

The contract is very peculiar in its terms, and does not contain the usual provisions relating to the finality of the architect's findings as evidenced by his certificate; and it, perhaps, might create embarrassment to discuss the terms of the contract in detail at this stage. No certificate was here given until long after the litigation had been on foot; and, whatever the true meaning of the contract, in the circumstances of this case there is a right to recover what "is justly due" under the contract and for extras, without either a certificate or an arbitration. The amount "justly due" must be ascertained by the Referee upon the evidence when given.

The appeal should be allowed, and the matter should be referred back to the Referee to hear the evidence and to ascertain the sum due the contractors under the contract and for extras. The costs of the appeal should be in the cause; but the costs which are lost or occasioned by the refusal of the Referee to allow the contractors to prove their claim in the usual way should be paid by the owners in any event.

Appeal allowed.

ONT.

C. A.
1912

Feb. 15.

SIVEN v. TEMISKAMING MINING CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. February 15, 1912.

1. APPEAL (§ VII M 8—657)—SUFFICIENCY OF VERDICT.

It is the duty of an appellate Court to sustain a judgment upon a verdict if there is reasonable evidence to support the findings and if the findings themselves are reasonably sufficient to determine the issues between the parties.

2. MASTER AND SERVANT (§ II E 2—216)—COMMON EMPLOYMENT—NEGLECT OF STATUTORY DUTY.

The defence of common employment has no application to the breach of the statutory duty to supply a "pentice" to protect a shaft, imposed by statutory rule 17 of sec. 164 of the Mining Act of Ontario, 8 Edw. VII. ch. 21.

[*Sault Ste. Marie Pulp and Paper Co.* v. *Myers*, 33 Can. S.C.R. 23, followed; *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, specially referred to.]

ONT.

C. A.

1912

SIVEN v. TEMISKAMING MINING CO.

3. MASTER AND SERVANT (§ II A 4—76)—MINING—PROTECTION OF MINERS —"SUITABLE PENTICE."

Where a trap door built over a mining shaft was negligently left open, by reason whereof a rock fell through it from another level of the mine and injured one of the miners, there is an omission on the part of the mining company of a statutory obligation under rule 17 of the Ontario Mining Act, 1908, to "provide a suitable pentice" for the protection of the workmen working on the lower level while work was going on on a higher level, and this notwithstanding that the trap door while kept closed would be effective as a pentice.

ACTION by a miner to recover damages for injuries sustained by him by reason of the falling of a large rock from the third level in the defendants' mine down the shaft or winze upon the plaintiff's left hand. It was alleged by the plaintiff that the injury was caused by a defective condition of the defendants' works, and in particular by their not sufficiently protecting the head of the shaft or winze from loose and falling rock, as required by the Mining Act of Ontario, 1908, sec. 164, rules 17 and 31.*

April 3 and 4, 1911. The action was tried before FALCONBRIDGE, C.J.K.B., and a jury, at North Bay.

The questions left to the jury and their answers were as follows:—

1. Were the plaintiff's injuries caused by the negligence of the defendants? A. Yes.

2. If so, what was their negligence? A. In not providing proper pentice over the man-hole into the stope.

3. Did the defendants fail to provide a suitable pentice for the protection of workmen in the shaft in which the plaintiff was injured (as required by sub-sec. 17 of sec. 164 of the Mining Act of Ontario)? A. Yes.

4. Did the defendants fail to comply with sub-sec. 31 of sec. 164, by examining the working shaft, level, and stope, in order to ascertain that they were in a safe and efficient working condition? A. We are of opinion that the shift boss or other officer going through the mine in the ordinary discharge of his duties does not fulfill the requirements of this sub-section. There has been no evidence produced to shew that systematic examination of the work was carried out.

5. Was the plaintiff guilty of negligence which caused the

*Section 164 of the Act (8 Edw. VII. ch. 21): The following general rules shall so far as may be reasonably practicable be observed in every mine: * * * * *

17. Where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for protection of the workmen in the shaft. * * * * *

31. The Manager or Captain or other competent officer of every mine shall examine at least once every day all working shafts, levels, stopes, tunnels, drifts, cross-cuts, raises, signal apparatus, pulleys and timbering in order to ascertain that they are in a safe and efficient working condition, and he shall inspect and scale, or cause to be inspected and scaled, the walls and roofs of all stopes or other working places at least once every week.

ONT.
C. A.
1912
SIVEN
v.
TEMISKAMING MINING CO.
Argument

accident or which so contributed to it that but for his negligence the accident would not have happened? A. No.

6. If you answer "Yes" to the last question, wherein did his negligence consist? (No answer.)

7. At what sum do you assess the damages in case the plaintiff should be entitled to recover? A. $2,500.

Messrs. *A. G. Slaght* and *G. G. T. Ware*, for the plaintiff, moved for judgment in his favour on the findings of the jury.

Messrs. *M. K. Cowan*, K.C., and *G. H. Sedgewick*, for the defendants, renewed a motion for a nonsuit made at an earlier stage.

April 21 and May 24, 1911. Written arguments were submitted by counsel.

May 25, 1911. FALCONBRIDGE, C.J.:—The plaintiff proved, and the jury found failure by the defendants to comply with rules 17 and 31 of sec. 164 of the Mining Act of Ontario.

I do not consider myself bound to accept the defendants' definition of a "pentice" as a covering erected within the shaft itself or at its mouth.

To the quotations in the defendants' argument I add:—

> Sleep shall neither night nor day
> Hang upon his pent-house lid.
>
> (Macbeth, Act I, sc. iii.)

Pent-house lid, i.e., eye-lid—a projection or lean-to attached to the wall of the face.

Judgment for the plaintiff for $2,500 and costs.

The defendants, by leave, appealed directly to the Court of Appeal from the judgment of FALCONBRIDGE, C.J.K.B.

Messrs. *H. E. Rose*, K.C., and *G. H. Sedgewick*, for the defendants, argued that, if there was any negligence that caused the accident, other than that of the plaintiff himself, it was the negligence of Crabbe, who was the plaintiff's fellow-servant; and, as the action could not succeed under the Workmen's Compensation for Injuries Act, it must fail altogether. It was alleged on the part of the plaintiff that the defendants had been guilty of a breach of the duty imposed upon them by rule 17 of sec. 164 of the Mining Act of Ontario in failing to provide "a suitable pentice" for the protection of the workmen in the shaft. There is no evidence shewing that the defendants failed to comply with the provisions of rule 17, and the finding of the jury in answer to the questions submitted to them is, in effect, that the negligence causing the accident was the omission of the defendants to provide a proper pentice over the man-hole into the stope, where there is no statutory requirement, nor obligation at common law, that such a pentice should be provided.

A. G. Slaght, for the plaintiff, argued that, from the condi-

tion of the works, the defendants were bound to take extraordinary precautions to ensure the safety of their employees, and the evidence shewed that it was quite possible for them to have taken such precautions. The defendants, as found by the jury, had failed to perform the statutory duties cast upon them by rules 17 and 31 of sec. 164 of the Mining Act of Ontario, and they had also failed to discharge the obligation cast upon them at common law to adopt a reasonably safe system for the protection of their workmen: *Myers* v. *Sault Ste. Marie Pulp and Paper Co.* (1902), 3 O.L.R. 600, affirmed, *sub nom. Sault Ste. Marie Pulp and Paper Co.* v. *Myers* (1902), 33 Can. S.C.R. 23.

Rose, in reply, argued that, if no breach of statutory duty was shewn on the part of the defendants, the plaintiff's case fell to the ground.

February 15. GARROW, J.A.:—The statement of claim alleges that the plaintiff, while in the employment of the defendants as a miner, on the 13th January, 1910, was engaged in running a drill at the bottom of a shaft or winze from the third level in the defendants' mine, when a piece of rock from the third level came down the shaft or winze upon the plaintiff and severely injured him; that the injury was caused by a defective condition of the ways, works, etc., of the defendants' mine, whereby the same were left unprotected or insufficiently protected; that the defendants were further negligent by a failure to have the working parts of the mine examined by a competent officer, and in not ascertaining that they were in a safe and efficient working condition, and in not keeping loose and falling rock clear from the shaft or winze in which the plaintiff was employed, and in not sufficiently protecting the head of such shaft or winze, as required by sec. 164, rules 17 and 31, of the Mining Act of Ontario, 1908, and amendments thereto. And the plaintiff claimed to recover under the common law, the Mining Act, and the Workmen's Compensation for Injuries Act.

The statement of defence set up, as to the claim under the common law, was that the defendants had employed competent servants and supplied them with proper material and appliances for the proper and efficient maintenance and management of the defendants' premises, plant, and business, and that the negligence, if any, was that of a fellow-servant; that the defendants' system of carrying on their business was the best and safest which they had been able to discover or devise, and was not such as to be liable to cause or contribute to the plaintiff's injury; that the plaintiff voluntarily assumed the risk; that the defendants had not been negligent, and that the plaintiff was guilty of contributory negligence; as to the claim under the Workmen's Compensation for Injuries Act, that no notice of the claim had been given within the time specified in the Act, nor had the action been brought within the period in that behalf

ONT.

C. A.
1912

SIVEN
v.
TEMISKAMING MINING CO.

GARROW, J.A.

therein prescribed. And, generally, the defendants denied that they had been negligent or had neglected any duty owing to the plaintiff.

Several witnesses were examined on both sides, and from the testimony so adduced the essential facts appear to be as follows. The plaintiff was severely injured and disabled by a piece of rock falling down the shaft in which he was working, through no fault of his. This rock came through a man-hole situated above the mouth of the shaft, where men were engaged in what is called "stoping." The stope is an overhead excavation, which was being made in the roof of the 300-foot level, below which was the shaft or winze in which the plaintiff was working. The entry into the stope was made through this man-hole, which was reached by a ladder resting on the floor of the level, near the mouth of the lower shaft or winze, in which the plaintiff was working. There was, at the time, a trap-door or covering over the mouth of the shaft or winze in which the plaintiff was, but which, unfortunately, was open at the time of the accident. If it had been closed, the injury to the plaintiff would not have occurred. This trap-door could not be and was not intended to be kept closed all the time. It had to be opened from time to time to permit men to pass up and down with the drills which the plaintiff was using, and it was open at the time, so the plaintiff said, to let the drill bucket down.

Before proceeding with the stoping, Kelly, the workman in charge, sent his helper (Crabbe) to see that this trap-door was closed, and Crabbe called back that "everything was all right," upon which the stoping proceeded.

Kelly was examined as a witness, but Crabbe was not. It was Crabbe's duty, so Kelly said, not only to see that this trap-door was closed, but to remain near and see that it remained closed while the stoping operation was going on. That he did not do so is made evident by the undisputed fact that it was open, or the plaintiff would not have been injured in the manner in which no one disputes he was.

The learned Chief Justice left the case to the jury, in a very full and careful charge, to which no substantial objection was taken, and the jury answered the questions submitted as follows:—

(The learned Judge then set out the questions and answers as above.)

It was conceded that the action could not be maintained under the Workmen's Compensation for Injuries Act, because it had not been commenced in time.

And the defendants contend that there was no evidence proper for the jury of negligence at common law, or of a breach of duty under the provisions of the Mining Act, sufficient to entitle the plaintiff to maintain the action.

In my opinion, the plaintiff established a good cause of action

ONT.

C. A.

1912

SIVEN v. TEMISKAMING MINING CO.

GARROW, J.A.

against the defendants for a breach of rule 17 of sec. 164 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, which provides that "where a shaft is being sunk below levels in which work is going on, a suitable pentice shall be provided for protection of the workmen in the shaft." The shaft in which the plaintiff was, was being sunk below a level in which work was going on. The circumstances, therefore, called upon the defendants to supply a "suitable pentice." The duty itself is too clearly expressed to admit of argument against it. The only real question is, therefore: Did the evidence shew that it had been reasonably performed? The jury by their third answer find generally that it was not. This finding, however, the defendants contend, must be interpreted by the second answer, and, so interpreted, means the placing of the pentice over the man-hole, which they say is an unreasonable and in fact impossible position in which to place it. I do not accede to either view, that is, that such an interpretation is compulsory, or that it would have been impossible so to place a pentice at the man-hole as to have prevented rock from falling into the shaft where the plaintiff was, although it may be conceded that to do so would, to some extent, have lessened the convenience of the man-hole, and would, of course, have involved the expenditure of money. The statutory duty, however, takes no account of inconvenience, or even expense, but is quite absolute in its terms. And the defendants themselves, in effect, so regarded it; for, while they contest the propriety, and even the possibility, of a pentice at the man-hole, they claim that the trap-door over the shaft itself was a pentice, and that, having supplied it, they have complied with the statute. That question was, upon the evidence and the charge, one which the jury was required to pass upon. The question itself (No. 3) was, as the learned Chief Justice told the jury, expressly based upon rule 17. After reading the rule he said: "The question follows that exact language, and the plaintiff asks you to say that the defendants did fail to provide a suitable pentice." He then described the meaning of the term "pentice," and wound up his remarks upon this head as follows: "Well, the defendants go further and say the trap-door was a pentice; and, if the trap-door had been closed, as it ought to have been, that was sufficient protection for the men below. There is the argument on one side and the other, and it is for you to determine upon your view of the case, and of the evidence, whether they did provide a suitable pentice for the protection of the men under the provisions of the Act."

Our duty, as I understand it, is to sustain the judgment if there was reasonable evidence to support the findings, if the findings themselves are reasonably sufficient to determine the issues between the parties. It sometimes happens that a finding is imperfact, or that two or more findings are inconsistent or even

ONT.

C. A.
1912

SIVEN
v.
TEMISKAMING
MINING
CO.

GARROW, J.A.

contradictory of each other. In such cases the remedy is usually a new trial—a thing to be avoided unless it is clearly required in the interests of justice. In this case, having regard to the whole evidence, the charge, and the findings, I am quite unable to see any imperfection or inconsistency which requires our interference.

Nothing that I see requires the third answer to be confined as the defendants contend. On the contrary, it seems to cover, or at least to be sufficient to cover, other and wider ground than was intended by the second answer, and is, in my opinion, upon the evidence, the more complete and satisfactory answer of the two. The trap-door, if kept shut, would, as the learned Chief Justice seemed to think, have been a "suitable pentice," in the language of the Act, but when open was no pentice at all. And for the failure to keep it shut the defendants, and not the plaintiff, should suffer; the defence of common employment, it need scarcely be said, having no application in the case of a breach of a statutory duty: see *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402; *Sault Ste. Marie Pulp and Paper Co.* v. *Myers*, 33 Can. S.C.R. 23.

This conclusion makes it unnecessary to consider the effect of the answer to the fourth question.

I would dismiss the appeal with costs.

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

MAGEE, J.A.:—It is manifest from the reading of sec. 164 of the Mining Act that the danger to be guarded against by a suitable pentice over a shaft is not that from the fall of tools or material falling from within the shaft itself, but from the carrying on of work in levels above the shaft. Therefore, while perforce it must be adapted to the confined space, it should, above all, be sufficient for protection against that danger. I see nothing to say of what particular shape or how close to the shaft it must be, but it must be sufficient; and, if it is not, the Act has not been complied with. A covering from outside danger, which yet would allow free access to the shaft for workmen and for hoisting from and into it, might readily be provided. But the very object of the Act is, that there shall be something beside the carefulness of workmen which shall protect those who cannot protect themselves in the space below; and, if it is to be effective and suitable, it should be in operation without dependence on carefulness, and should only be out of operation when interfered with improperly.

Here the evidence is, that in the ordinary course of operation the trap-door was frequently and necessarily open, and, while open, no covering over it or protection was provided against the danger from the operations in the stope overhead near-by. That was left to the carefulness of the workmen only, and the

improbability of that happening which did happen. The only wonder to me is, that it did not happen before. And, so far as I can see, a few short sloping boards inside the stope, in front of the so-called man-hole, would have prevented the danger, and yet afforded access to the stope behind them. That was the "work going on" in the level below which the shaft was sunk, and was the very thing from which there was most danger to be apprehended; and, unless danger from that source to the men in the shaft was guarded against, the pentice from other dangers was ineffectual; and, if it had been guarded against, there was practically little danger, so far as shewn, from other sources. That, I think, was what the jury had in mind by their second finding—not a pentice for the man-hole, but a pentice for the shaft, against that danger from the man-hole. In that finding they were well warranted by the evidence; and it is no answer to say, that the foreman or some one else sent some one to see at the last moment that the insufficient because open pentice was made sufficient for the time being by closing it.

I would dismiss the appeal.

MEREDITH, J.A.:—There is nothing extraordinary in the words "a suitable pentice." A suitable pentice is merely a suitable covering to save those below from things falling from above; protection from many more things than that which in falling from the west stope extraordinarily found its way from the stope through the small "man-hole" between the stope and the shaft, and then through the small opening in the covering of the shaft, called the trap-door, which happened to be open at the very moment when the work, which loosened the rock which caused the plaintiff's injury, was begun; open through the direct neglect of the plaintiff's fellow-workmen or workman, in regard to the closing of the trap-door. The workman who did the work which loosened the stone was Kelly, and he, before beginning that work, directed the other fellow-workman, Crabbe, to see that the trap-door was closed; Crabbe negligently reported to Kelly that the door was closed, and this negligence was the direct and immediate cause of the plaintiff's injury.

The course of the stone was, as I have said, extraordinary: it first bounded through a small man-hole space in a protecting structure provided at the place where the mining was going on; and then, coming down to the pentice over the shaft, dodged again, as it were, through the small man-hole opening in that large structure, the door of the man-hole happening, at the moment, to have been very negligently left open. It is surely extraordinary that at both places it should find and pass through the very small opening rather than fall against very large protecting surfaces.

The covering of the shaft which I have mentioned was a

ONT.

C. A.
1912

SIVEN
v.
TEMISKAMING
MINING
CO.

Meredith, J.A.

perfect safeguard of the shaft below it, when the trap-door was closed. A trap-door was obviously necessary for the working of the mine; it was the only means of access for men and material to the shaft below it; and, of course, miners below are in danger from anything that may fall down upon them, whether bucket, man, tools, or materials, as much as rock being loosened.

It is said that the covering was not a pentice, because it had a trap-door in it; but how can that be, if, as is the fact here, a trap-door was necessary for the working of the mine?

If one have the mistaken notion that the trap-door was the pentice, it is very easy to go wrong. The trap-door was but a necessary opening in the large roof-like structure which was the pentice of the shaft in question. What the law required was a covering of the shaft for the protection of the men working in it against anything falling down upon them. What the defendants did was to roof the shaft over completely so as to form a complete protection of that character: but it was absolutely necessary that there should be a means of ingress and egress to and from the shaft, if men were to work in it and so need protection—if it were not to be abandoned: so what else was possible and practicable other than the man-hole; and what possible better "reasonably practicable" method of protecting it, and of at the same permitting reasonable use of the shaft, than a trap-door—the usual, if not the invariable, arrangement? To treat the trap-door as the pentice is to quite fail to grasp the situation—it covered but an absolutely necessary small opening in the large and complete pentice. Therefore, not only did the defendants provide "a suitable pentice," "so far as was reasonably practicable," but they provided one upon which no one's ingenuity has yet been able to suggest a practicable improvement. To say that a pentice is not a pentice because it has a necessary door in it is equal to saying that a house is not safe if it have any door in it, because some one may negligently leave the door open.

I would allow the appeal and dismiss the action, which should have been brought against the men or man whose negligence caused the injury, or the defendants under the Workmen's Compensation for Injuries Act.

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

QUE.

Court of Review. 1912

April 3.

STARKE COOPERAGE CO. et al. v. MIGNEAULT and VALLEE (mis-en-cause).

Quebec Court of Review, Tellier, De Lorimier, and Dunlop, JJ. April 3, 1912.

1. VENDOR AND PURCHASER (§ I E—28)—FAILURE TO PAY PURCHASE MONEY —RESCISSION.

In an action in dissolution of sale by reason of non-payment of price the buyer may pay the instalments due, with interest and costs not only before judgment is rendered by the Superior Court, but, if the case be inscribed in Review, at any time before judgment is pronounced by the Court of Review and thus avoid the cancellation of the sale. (C.C. 1538; C.P. 1203.)

PLAINTIFFS had sued the defendant Migneault in dissolution of sale for non-payment of the purchase price and obtained judgment in the Superior Court cancelling the contract of sale. The *mis-en-cause*, Vallée, who had bought the property from the defaulting defendant, inscribed in Review, and before judgment was pronounced tendered into Court the instalments due to date, with interest and all costs, both in the Superior Court and in the Court of Review and prayed *acte* thereof. The Court of Review recognized his right to do so on the ground that it acts as "three Judges of the Superior Court sitting as a Court of Review" (C.P. 1189), and that such judgment in Review once rendered "must be sent back to the Court in which the case was first decided, to be there registered as being the judgment in the suit. . . . ." (C.P. 1203), and as art. 1538 C.C. (on Sale) says: "the judgment of dissolution by reason of non-payment of the price is pronounced at once, without any delay being granted by it for the payment of the price; nevertheless the buyer may pay the price with interest and costs of suit at any time before the rendering of the judgment," the Court concluded that the *mis-en-cause* was still in time to pay.

Judgment accordingly.

SASK.

S.C. 1912

April 4.

TOBIN v. CANADIAN PACIFIC RAILWAY CO.

Saskatchewan Supreme Court, Newlands, Johnstone, Lamont, and Brown, JJ. April 4, 1912.

1. MASTER AND SERVANT (§ II A 4—71)—DANGEROUS MACHINERY—NEGLIGENCE.

In an action by the conductor of a construction train for injuries resulting from a wing of a gravel spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, which, owing to the darkness, he could not see from where he stood without a light, to ascertain if there was sufficient air in the reservoir of the machine to operate the same, a motion for the nonsuit was rightly refused, it being for the trial Judge to say whether any facts have been established in evidence from which negligence may be inferred, and for the jury to say whether or not from these facts negligence ought to be inferred.

[*Metropolitan R. Co.* v. *Jackson*, 3 A.C. 197, followed.]

SASK.

S.C.
1912

TOBIN
v.
CANADIAN
PACIFIC
RAILWAY
CO.

2. TRIAL (§ II C 8—146)—PERSONAL INJURY ACTION—INSTRUCTION AS TO NEGLIGENCE.

In an action for personal injuries to the conductor of a construction train resulting from a wing of a gravel spreading machine operated by air pressure, coming down upon him, caused by the engineer in charge of the machine unintentionally starting it by striking his knee against the handle of a valve used to set it in motion while attempting to get closer to the air gauge, a statement by a witness that the engineer must have been climbing up the machine, together with the evidence that the valve was from two and a half to three feet above the spot where the engineer was standing, would justify a suggestion in the trial Judge's charge that the engineer might have touched the valve with his knee while climbing up the machine to get a nearer view of the gauge.

3. APPEAL (§ VIII M 8—659)—EXCESSIVE VERDICT—MEASURE OF DAMAGE—PERSONAL INJURIES ACTION.

Twelve thousand dollars is not an excessive verdict for damages for personal injuries to one left a permanent cripple and unable to follow his usual occupation as conductor of a construction train earning two hundred and fifty dollars a month in summer and as conductor of a freight train in winter earning, at least, one hundred and twenty dollars a month, whose future earning power would be problematical, and such verdict cannot be said to have been founded upon a wrong measure of damage where the income which it would bring in, at current investment rates, would be less than one half of his previous earnings.

[*Johnston* v. *G.W.R. Co.*, [1904] 2 K.B. 250; *Bateman* v. *Middlesex*, 25 O.L.R. 137, and *Sheahen* v. *Toronto Ry. Co.*, 25 O.L.R. 310, specially referred to.]

APPEAL by defendants from the judgment entered at the trial by Wetmore, C.J., on the findings of the jury.

The appeal was dismissed.

In August, 1910, the plaintiff, who was a conductor on one of the defendants' construction trains, was injured by one of the wings of a machine for spreading gravel coming down on him with great force. In his statement of claim he alleged that his injuries resulted from the improper and negligent act of one Neil Woodhouse, another servant of the defendant company, in setting the machine in motion. The evidence shewed that Woodhouse was the engineer in charge of the spreading machine and that the plaintiff, in the execution of his duty, was properly standing alongside of it. The machine had large iron wings on each side weighing between two and three tons each. When in operation these wings were let down and were used to spread the gravel or ballast, which was brought on cars. It was operated by air pressure. The accident took place about eight-thirty o'clock p.m., and at that time of night it was quite dusk. Orders had been given to spread some more ballast that night. It was customary for the man in charge of the machine, before commencing to use it, to look at the air gauge, which was situated on the top of the cylinder or air-tank, to ascertain if there was the proper pressure for operating purposes. Woodhouse, who was called as a witness for the plaintiff, stated that on the night in question he looked at the gauge, but it was too dark for him

to see the amount of pressure registered on it without leaning over the tank. He states that he could have seen it without leaning over if he had used a lantern. A lantern had been provided for his use, but on this occasion he did not use it, although on some other occasions he had done so. He also stated that when he leaned over to see the gauge his knee touched the lever or handle which opens the valve by which the air pressure was applied to the wing on the north side of the machine. As a result of the application of the pressure, the wing descended rapidly, struck the plaintiff and knocked him down, breaking his left leg between the knee and the ankle, and otherwise injuring him. The evidence shewed that the air tank was circular in shape and was situated in a horizontal position on the platform of a car, and that the gauge was in the centre of the tank on the top, about level with the eyes of a man standing on the car platform. The plaintiff in his evidence testified that the levers or handles of the valves by which the machine was operated were from two and a half to three feet above the platform. It was also shewn that the valve which put on the pressure which caused the injury was slack. This evidence was all submitted on behalf of the plaintiff. At the close of the plaintiff's case, counsel for the defendants moved for nonsuit on the ground that there was no evidence of negligence to go to the jury. The learned Chief Justice, who was presiding, refused the motion. Evidence was then put in for the defence. At the conclusion of the case, the learned Chief Justice submitted to the jury the following questions, to which the jury brought in the following answers:—

Q. 1. Was there any actionable negligence on the part of the defendants or their servants which contributed to the injury to the plaintiff?

A. Yes.

Q. 2. If so, what did such negligence consist of?

A. We find the negligence consisted of the fact that Woodhouse endeavoured to inspect the gauge without a light at a time when a light was necessary, and in so doing touched the valve that caused the accident.

Q. 3. At what amount do you assess the damages?

A. $12,000 plus $97.50 unpaid expenses.

Q. 4. If you find the defendants guilty of actionable negligence by Woodhouse touching the valve, did he touch it merely in leaning over to inspect the gauge, or did he touch it in an endeavour to climb on to the tank, or did he, seeing that he was near those valves, conduct himself negligently or carelessly in a general way and so touch it?

A. We are of opinion that the evidence goes to shew that the valve was moved by contact with Woodhouse's knee. It must have been done while he was endeavouring to climb up on the tank in his endeavour to get near enough to the gauge to ascertain what pressure registered thereon.

SASK.

S.C.
1912

TOBIN
v.
CANADIAN
PACIFIC
RAILWAY
CO.

Statement

On these answers the learned Chief Justice entered judgment for the plaintiff for $12,097.50. From that judgment the defendants brought the present appeal to the Court *en banc*. In the notice of appeal many grounds of appeal were set up, but on the argument only these three were urged:

(1) That the learned Chief Justice should have nonsuited the plaintiff at the close of the plaintiff's case.

(2) That in his charge to the jury and in the questions submitted to them the learned Chief Justice threw out the suggestion that Woodhouse might have touched the valve with his knee in attempting to climb up the tank to get a nearer view of the gauge, when no such suggestion appeared in the evidence.

(3) That the damages were excessive.

Messrs. *W. B. Willoughby* and *W. B. Powell*, for appellants, defendants.

H. Y. MacDonald, for respondent, plaintiff.

NEWLANDS, J.:—The plaintiff, while in the employ of the defendant company, was injured by one of the wings of a McCann machine, a machine used in grading, falling upon him; and he brought this action for damages, alleging (1) the negligence of the defendant, its workmen and servants, and (2) that the machine was defective in that the staple in the upright post thereof and the chain between said staple and the wing of the machine were not sufficiently secure or strong to prevent said wing from coming down when pressure was improperly, carelessly, or negligently applied. There was no evidence to sustain the second ground, and the sole question, apart from the amount of damages given by the jury, is whether there was any evidence of negligence on the part of the defendant company to go to the jury.

Mr. Willoughby argued that the learned trial Judge, having expressed the opinion at the close of the plaintiff's case that there was no evidence of negligence, should have nonsuited the plaintiff instead of letting the case go to the jury. Upon this question the following rule is laid down by Cairns, L.C., in *Metropolitan Railway Co.* v. *Jackson*, 3 App. Cas. 193, as the principle which was decided in *Bridges* v. *North London Ry. Co.*, L.R. 7 H.L. 213, namely, "that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred."

It was shewn by the plaintiff's evidence that one Woodhouse, an employee of the defendant company, went to the machine which caused the accident for the purpose of ascertaining by the air gauge whether there was sufficient air in the reservoir to operate the machine; that it was dusk at the time, and not having a light with him, he had to lean over, and in doing so his knee caught one of the valves and opened it, and caused the wing to drop which injured the plaintiff.

Now, I have no doubt that negligence can be legitimately inferred from the above facts, and I am, therefore, of the opinion that the learned trial Judge was right in not nonsuiting the plaintiff. By the defendants' evidence it was shewn that the valve in question was some two or three feet above the floor of the car, and that Woodhouse could not have touched it with his knee unless he had climbed up on the machine when he went to look at the gauge. This is corroborated by the pictures of the machine put in as exhibits.

The following questions were left to the jury:—

(1) Was there any actionable negligence on the part of the defendants or their servants which contributed to the injury of the plaintiff?

(2) If so, what did such negligence consist of?

(4) If you find the defendants guilty of actionable negligence by Woodhouse touching the valve, did he touch it merely in leaning over to inspect the gauge, or did he touch it in an endeavour to climb on to the tank, or did he, seeing he was near these valves, conduct himself negligently or carelessly in a general way and so touch it?

To these questions the jury found the following answers:—

(1) Yes.

(2) We find the negligence consisted of the fact that Woodhouse endeavoured to inspect the gauge without a light at a time when a light was necessary, and in so doing touched the valve which caused the accident.

(4) We are of opinion that the evidence goes to shew that the valve was moved by contact with Woodhouse's knee. It must have been done while he was endeavouring to climb up on the tank in his endeavour to get near enough to the gauge to ascertain what pressure registered thereon.

As to the questions put to the jury, Mr. Willoughby argued that No. (4) was an improper one, in that it left the jury to draw an inference for which there was no evidence—*i.e.*, "did he touch it in an endeavour to climb upon the tank?" The same objection was taken by him to the learned trial Judge before the jury returned; and his Lordship's reply, that "it was an argument based upon the evidence, because when the witness was on the stand to whom you refer—McCallum—Mr. Macdonald drew attention to the height of his knee, and he put this question to him: 'Seeing the height of the valve and the height of his knee, he must have been attempting to climb the tank?' and the witness replied that he must have been," is one with which I entirely agree.

I am, therefore, of the opinion that the learned trial Judge was right in leaving the question of negligence to the jury, and that the evidence justified the jury in bringing in the verdict which they did, and that that verdict should not be disturbed.

As to the amount of the damages, I can see no adequate reason for disturbing the verdict.

SASK.

S.C.
1912

TOBIN
v.
CANADIAN
PACIFIC
RAILWAY
CO.

Lamont, J.

LAMONT, J.:—As to the first of the above contentions, I do not see how the learned Chief Justice could properly have directed a nonsuit. A plaintiff cannot be nonsuited if there is any evidence from which a jury may properly infer negligence on the part of the defendants of the character alleged in the statement of claim. It has long been an established rule that it is for the Judge to say whether any facts have been established in evidence from which negligence may be inferred. If so, it is for the jury to say whether or not from those facts negligence ought to be inferred: *Metropolitan R. W. Co.* v. *Jackson*, 3 A.C. 193, at p. 197.

Here the evidence established that the plaintiff's injuries resulted from the action of the defendants' servant, Woodhouse, who was in charge of the machine, in striking the handle of the valve with his knee while he was endeavoring to see the amount of pressure registered on the face of the gauge. Whether in so striking it he was acting as a reasonable, cautious, and prudent man would have acted under the circumstances is the question. There was before the Court the fact that he could have seen the gauge without touching the tank at all if he had used a lantern, also the fact that a lantern had been provided for his use and that on other occasions he had used it. Then there was the further evidence of the plaintiff that the handle or lever opening the valve in question was from two and a half to three feet above the platform on which Woodhouse says he was standing; and there was also a fact not then expressly stated in evidence, but of which the Court had ocular evidence, namely, that Woodhouse's knee when he was standing on the platform was only eighteen inches above the platform and would not, therefore, reach the handle of the valve. From these facts the question would naturally present itself, how could a knee which reached only eighteen inches above the platform strike a lever situated two and a half or three feet above the same platform. The answer which, it seems to me, would readily suggest itself is either that he was climbing up to get closer to the gauge, or else he sprang up, hoping by that means to get his eyes near enough to the gauge to see the amount of pressure registered thereon. In the evidence given on behalf of the defendants, one of the witnesses was asked how Woodhouse's knee could touch the valve, and his answer was, "He must have been trying to climb up." If from the facts proven a reasonable inference may be drawn that Woodhouse was either climbing up the side of the tank when he opened the valve or that he sprang up and in so doing struck the valve with his knee, there is evidence from which negligence may be inferred, for such conduct cannot *prima facie* be said to comply with the standard of care required from those in charge of such machines. I am, therefore, of opinion that

the learned trial Judge was right in refusing the application for nonsuit.

As to the objection raised to the charge, I am clearly of opinion that it is totally without merit. When the case was given to the jury, there were not only sufficient facts before the jury to enable them to draw the inference that Woodhouse was climbing up the tank when he touched the valve with his knee, but there was also the express statement of one of the witnesses for the defence that he must have been doing so.

The last ground of appeal was that the damages allowed were excessive. The jury awarded the plaintiff $12,000 damages and $97.50 unpaid expenses. The plaintiff was very severely injured in the left leg between the knee and ankle. For a space of five inches where the bar of the wing caught his leg the bones were broken in more than one place. There was what is called a multiple fracture. The bone was so crushed that several pieces were removed. At the date of the trial, some fifteen months after the accident, inchamic paralysis had set in. The injury to his left leg is of a permanent nature and will cripple him for life. In addition, five teeth were knocked out, and the plaintiff suffered several flesh wounds on the head, body and right leg. From these, however, at the time of the trial he had pretty well recovered with, of course, the exception of his teeth. He also suffered from nervous shock occasioned by the accident.

The rules to setting aside a verdict on the ground of excessive damages was laid down by Lord Esher, M.R., in *Praed* v. *Graham*, 24 Q.B.D. 53, as follows:—

> I think that the rule of conduct is as nearly as possible the same as where the Court is asked to set aside a verdict on the ground that it is against the weight of evidence. If the Court, having fully considered the whole of the circumstances of the case, come to the conclusion only, "We think that the damages are larger than we ourselves should have given, but not so large as that twelve sensible men could not reasonably have given them," then they ought not to interfere with the verdict.

This rule, however, as was pointed out in *Johnston* v. *The Great Western Railway Company*, [1904] 2 K.B. 250, must be construed in the light of the other decisions of the Court.

In his "Laws of England," volume 10, at p. 350, Lord Halsbury lays down the rule relating to excessive damages, as gleaned from all the cases, as follows:—

> Where the damages awarded by a jury are excessive a new trial will be granted if the Court of Appeal, without imputing perversity to the jury, comes to the conclusion, from the amount of damages and the other circumstances, that the jury must have taken into consideration matters which they ought not to have considered or have applied a wrong measure of damages. The mistake of the jury caused either by misdirection as to the measure of damages, or by failing to consider right matters or considering wrong matters of damage,

SASK.

S.C.
1912

TOBIN
v.
CANADIAN
PACIFIC
RAILWAY
CO.

Lamont, J.

or by applying a wrong measure of damage although rightly directed as to the rule applicable, may be rectified by the Court of Appeal under this power.

It was not suggested on the argument before us that there was any misdirection by the learned Chief Justice in his charge to the jury as to the measure of damages, nor, apart from the fact itself that the amount awarded is very large, can I find any evidence that the jury allowed damages in respect of matters which should not have been considered or that they applied a wrong measure of damage. The question, then, is, from the fact alone that they have awarded $12,000 are we forced to conclude that they must have erred in assessing the damages? Is the amount so unreasonably large that twelve sensible men, properly instructed, and assessing damages on proper principles, could not have awarded it? In fixing the amount, the jury were entitled to award damages not only for the actual pecuniary loss occasioned by the injury, but also for the pain and suffering of the plaintiff and the diminution of his capacity for the enjoyment of life, as well as in respect of his probable inability to earn an income equal to that which he had earned previous to the accident, and the probability that but for the injury he might have earned an increasing income: Halsbury's "Laws of England," vol. 10, at p. 323.

The plaintiff had been in the defendants' employ constantly since 1896 as brakesman and conductor. This has been practically his life's work. At the time of the accident he was the conductor of a construction train. As such, his wages amounted to as much as $250 per month. Construction work, however, lasted only through the summer months. In the winter months he was employed as a conductor on freight trains, and earned from $125 to $170 per month. His injuries have permanently disabled him, and he can no longer follow the occupation at which he has been employed for so many years. To earn an income he will have to employ himself at some business suited to his crippled capacity. What he can earn is problematical. He tried selling insurance, but was not able to make more than travelling expense. The only money he has been able to earn since the accident, in addition to what he received from the insurance company, was some $38 for enumerating. Under these circumstances it is impossible to say with any degree of accuracy what would be the difference between the amount he would have earned had there been no accident and the amount he will be able to earn in his crippled condition. Yet this is an important factor to be considered by the jury in fixing the damages awarded, and by us in determining whether or not the amount awarded is excessive. In *Johnston* v. *Great Western Railway* Co., [1904] 2 K.B. 250, (*supra*), Vaughan Williams, L.J., at p. 257, said:—

Now, in my opinion, the only way in which the figure of the damages and the circumstances of the present case could prove that the jury in measuring the damages took into consideration topics which they ought not to have taken into consideration, or applied a measure of damages which they ought not to have applied, would be, if we could draw the inference that the amount of the verdict proved that the jury had disregarded the fact to which their attention was drawn by Grantham, J., that the accidents of life and other elements ought to be taken into consideration so as to prevent a jury from giving a plaintiff such a sum as would be simply an investment, enabling him to do nothing to earn his livelihood. Now, one could only come to such a conclusion if it could properly be said that no jury, having regard to the evidence, could have put the difference between the prospective earnings of the plaintiff if he had been uninjured and those earnings after his injury at a higher figure than, say, —— a year, and then if you found that the amount of the verdict, after deducting all special damage and all damages given for personal pain and suffering, was a sum which equalled or exceeded the sum which would purchase a life annuity for a person of the plaintiff's age equal to the difference to which I have referred. In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the quantum. In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial.

There was no evidence from which the Court could ascertain what was the plaintiff's age at the time of the trial or the value of an annuity a person of the plaintiff's age could purchase with the amount awarded. It is, however, clear that the amount awarded, even without making any deduction therefrom for the pain and suffering of the plaintiff, if put out at interest would not yield anything like the income which the plaintiff could reasonably expect he would have made but for the accident. Even if it could be invested to yield 8 per cent. per annum, which it was argued is the prevailing rate of interest in this province, it would not earn much more than a half of what the plaintiff had been earning. But I do not think that it could be invested to yield eight per cent. for the rest of the plaintiff's life. With the development of the province, the rate of interest to be obtained here will approximate to that of the older provinces, where five or six per cent. is the prevailing rate. On the other hand, it must not be forgotten that, in assessing damages for personal injuries caused by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider under all the circumstances a fair compensation: *Rowley* v. *London and North-Western Railway* (1873), 8 Ex. 221; *Sheahen* v. *Toronto Railway*, 25 O. L.R. 310.

SASK.

S.C.
1912

TOBIN
v.
CANADIAN
PACIFIC
RAILWAY
CO.

LAMONT, J.

Looking at all the circumstances, the permanently crippled condition of the plaintiff, the income he was earning and likely to earn but for his injuries, the problematical amount he may earn in future, and the pain and suffering he has endured, I cannot say that a jury have awarded an amount which, after deducting all special damages, and all damages for personal pain and suffering, would purchase a life annuity for the plaintiff equal to or approaching the difference between his prospective earnings, had he not been injured, and the amount he will probably earn in his injured condition. Nor can I say they have taken into consideration matters which they ought not to have considered, or that the amount awarded is such that twelve sensible men could not have awarded it. It is more, considerably more, than I would have awarded had I been called upon to assess the damages in the first instance, but that of itself is not sufficient to justify interference by an appellate Court. In *Johnston* v. *G. W. R. Co.*, [1904] 2 K.B. 250, above referred to, Vaughan Williams, L.J., at p. 254, said:—

> If the only matter brought before the Court is an over-estimate of the damages, I take it that the rule laid down by Lord Esher, M.R. in *Praed* v. *Graham* is incontrovertible.

In the recent case of *Bateman* v. *County of Middlesex*, 25 O.L.R. 137, the point came before the Ontario Divisional Court. In that case the plaintiff, a physician fifty-five years old, was injured while driving along a country road early in the morning, by reason of a barricade being left without a light. The accident caused a falling of the right kidney, an injury to the right pleura, an infected gall bladder and a milder form of neurasthenia. Riddell, J., before whom the case was tried, awarded $12,500 damages. An appeal was taken to the Divisional Court on the ground that the damages were excessive. Boyd, C., in giving the judgment of the Court, said:—

> The amount awarded is larger than we should have awarded, had the case come before us in the first instance. The Legislature has seen fit to provide that actions of this kind shall be tried by a Judge without a jury; and we must attribute to this assessment of damages as much weight as would be given to the finding of a jury. It is not suggested that the learned Judge acted upon any wrong principle; and the fact that in his discretion he has given more, even much more, than we should have given, is not enough to warrant the interference of an appellate Court.

I am, therefore, of opinion that sufficient has not been shewn to justify us in interfering with the amount awarded by the jury. In addition to the authorities above referred to, the following are instructive: *Taylor* v. *B. C. Electric Railway Co.*, 1 D.L.R. 384, 19 W.L.R. 851; *Carty* v. *B. C. Electric Railway Co.*, 19 W.L.R. 905; *Bradenburg* v. *Ottawa Electric Railway Co.*, 19 O.L.R. 34; *Hansen* v. *Canadian Pacific R. Co.*, 7 Can. Ry. Cas.

429, and 7 Can. Ry. Cas. 441; Clark's "Accident Law," 2nd ed., at page 416 *et seq.*

The appeal should be dismissed with costs.

JOHNSTONE, and BROWN, JJ., concurred with LAMONT, J.

Appeal dismissed.

GORDON v. CANADIAN NORTHERN RAILWAY CO.

Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Johnstone, and Lamont, JJ. April 4, 1912.

1. MASTER AND SERVANT (§ I B—7)—EMERGENCY EMPLOYMENT ON RAILWAY.

An employee is shewn to have been injured during and in consequence of his employment with the railway where it appeared that he, with others, was hired by the conductor to dig out a freight train stalled in snow, and was told at the time of the hiring that he would be carried to the place and back and after the train was dug out the men, at the invitation of the conductor, went into the caboose to warm themselves and to wait to go back and, while they were there waiting, another train collided with the caboose and caused the injuries complained of.

[*Holmes* v. *Great Northern R. Co.*, [1900] 2 Q.B. 409, approved.]

2. APPEAL (§ VII M 8—659)—EXCESSIVE VERDICT—MEASURE OF DAMAGE—PERSONAL INJURIES.

The sum of ten thousand dollars is not excessive damages for personal injuries to a servant twenty-six years old due to a collision between trains causing him to be knocked down by the coal heater of the car he was in and to be so severely burned by the coals that his face was badly disfigured and his head was left so tender that he would not be able to stand extreme heat or cold and his right hand was so severely burned as to render it permanently useless, leaving him unable to follow his trade of blacksmith.

[*Tobin* v. *Canadian Pacific R. Co.*, 2 D.L.R. 173, and *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250, specially referred to.]

APPEAL from the judgment of Brown, J., at the trial, in favour of plaintiff on the findings of the jury in an action for personal injury. The appeal was dismissed, Wetmore, C.J., dissenting as to the *quantum* of damages and favouring a new trial on that ground only.

Messrs. *O. H. Clark*, K.C., and *J. H. Lindsay*, for appellants, defendants.

A. E. Doak, for respondent, plaintiff.

WETMORE, C.J.:—I concur in the judgment of my brother Lamont, which I have had the opportunity of reading, except in so far as the question of damages is concerned. I am of opinion that the damages are outrageously excessive. The matter of determining, in an action of this character, whether damages are excessive or not must, in my opinion, depend altogether upon the reasonableness of them, and I admit that that is a question upon which there may be a great difference of opinion. I adopt

SASK.

S.C.
1912

GORDON
v.
CANADIAN
NORTHERN
RAILWAY
CO.

Wetmore, C.J.

what was laid down by Lord Esher in *Praed* v. *Graham*, 24 Q.B. D. 53, cited in the judgment of my brother Lamont delivered at this Sittings in *Tobin* v. *Canadian Pacific Railway Co.*, [2 D.L.R. 173] and that is that a new trial will not be granted because the damages are larger than the members of the Court would have given, but because they are so large that twelve sensible men could not reasonably have given them, and that is just the opinion that I have reached here—that these damages are so large that twelve reasonable men could not have given them. I know of no case binding upon me at present by which such damages are to be measured by a set rule. We have in this case ten thousand dollars awarded—an amount which, taking the average of the earning ability of persons in the plaintiff's employment or trade, would not likely be accumulated in the course of a long lifetime; and I, for one, am not disposed to encourage the idea that every time a person is injured under circumstances which render a corporation liable, that a small fortune is to be bestowed on the unfortunate victim of the accident. I recognize, however, the pain and suffering consequent upon such an accident, and that compensation should be given therefor. In this case, while the plaintiff was very badly injured, I would gather that he was not rendered incompetent for obtaining employment and earning a fair living. I cannot help but feel that corporations in matters of this sort are not fairly treated. In this case the defendants were not the parties actually guilty of the negligence. It was their servants, and especially the conductor and engineer of the passenger train, who were the actually guilty parties. The defendants are liable upon a well-known principle of law which makes an employer liable for the consequences of negligent acts by his servants. I do not find any fault with that law. I am now about to speak merely from conjecture, but at the same time as the result of experience, and I have no hesitation in stating that if the conductor and the engineer, the parties so actually guilty of the negligence, had been the defendants in the place of the railway company, the jury would have hesitated before giving a verdict for half the amount which they did give in this case. This is the first opportunity that I have had of putting my opinions upon record in a question of this character, and having done so, as a matter of course, I will hereafter feel myself bound, as I must be, loyally to follow the judgment of the majority of this Court, as expressed both in this case and in the *Tobin* case: [*Tobin* v. *C.P.R.*, 2 D.L.R. 173]. In my opinion there should be a new trial, but solely on the question of excessive damages.

NEWLANDS, J.:—I agree with my brother Lamont's judgment, and in addition to the authorities he has referred to, would point out that the case of *Holmes* v. *Great Northern Railway*,

[1900] 2 Q.B. 409, and cited by Mr. Clark for the appellants, is almost identical with the present case, with the exception that there he was injured before, and in this case after, his work. On p. 411 A. L. Smith, L.J., says:—

> The deceased was admittedly employed by the appellants. They had started a new goods-shed at Hornsey, and he had been told to go there and clean engines; it was his duty to obey the order. He was taken there for nothing by the appellants in one of their trains, and he undoubtedly went there on the business of his employers; he arrived there a quarter of an hour before his actual work started in the shed, and in crossing the line to get to the shed he was run over. Under those circumstances, was the learned County Court Judge justified in finding that the accident arose out of and in the course of the employment of the deceased? I am of opinion that he was. It must be borne in mind that there is a difference between the beginning of a man's employment and the beginning of his work; for instance, in a coal pit the employment begins as soon as the miner leaves the bank, although he may have some distance to go to his actual work after he has got down the pit. In the present case I think there was satisfactory proof of an implied contract on the part of the appellants to take the deceased from King's Cross to Hornsey, there to find him work, and to take him back again when his day's work was over. Then comes the question, was the deceased being employed on the railway at the time of the accident? In my opinion he was.

In this case the respondent's work was completed, but his employment was not at an end, because the appellants agreed to take him back to Star City, and he was injured by them while still in their employment, he being in the caboose waiting to be taken back, having been injured by the negligence of the defendants' employees while in their employment, and there being no contributory negligence on his part, the defendants are liable.

LAMONT, J.:—This is an action for damages for personal injuries received through the negligence of the defendants' servants. The plaintiff was hired along with a number of others by the conductor of one of the defendants' freight trains to go out and help dig a freight train out of the snow. In the negotiations for hiring, the plaintiff asked the conductor if he would have to walk out to the place where the train was stalled, and the conductor said: "No, we will take you up on the engine and bring you back to town." The plaintiff, with the others, was conveyed to the point at which the train was stalled by the conductor on an engine. After they had finished digging out the train the conductor said to them, "Boys, if you are through with the work come inside and warm yourselves, and we will go back to the station." The place into which he thus invited them was the caboose of the freight train. They went in. A few minutes afterwards the caboose was run into by the defendants' passenger train. As a result of the collision the plaintiff was knocked

SASK.

S.C.
1912

GORDON
v.
CANADIAN
NORTHERN
RAILWAY
CO.

Lamont, J.

down by the coal heater of the caboose, and for the moment rendered unconscious; the burning coals were spilled over him, and the caboose set on fire. The plaintiff was severely burned about the head and face, and his right hand was so badly burned that the muscles of the fingers were destroyed, the only muscle of the hand not completely destroyed was that of the thumb, which is still capable of slight movement. The crew of the passenger train had been notified at Melfort that a freight was stalled in the snow ahead and that they were to go slowly beyond a certain point and look out for the freight. The jury found that the collision occurred through the negligence of the defendants or their servants, the crew of the passenger train, in not obeying their orders, and assessed the damages at $10,000, and judgment was entered by my brother Brown for that amount. From that judgment the defendants now appeal to this Court.

Counsel for the defendants seeks to set aside the judgment for two reasons. In the first place he contends that the plaintiff cannot recover unless he was in the employment of the defendants at the time the accident occurred, and that the plaintiff's statement of claim and the answers of the jury shew that his employment was at an end when the accident happened. In his statement of claim, the plaintiff, after setting out that he had been employed to assist in removing an accumulation of snow from the defendants' right of way, alleged that "the plaintiff did perform the work and services which he was employed to perform, and after performing the same did, at the request and invitation of the defendant company, its servants and employees, enter the caboose for the purpose of returning to Star City."

At the close of the evidence, plaintiff's counsel asked to be allowed to amend the claim by alleging that it was part of the agreement of hiring that the defendants should return the plaintiff to Star City. The application was refused. One of the questions submitted to the jury was: "Was he (the plaintiff) in the caboose at said time during and in consequence of his employment?" to which the jury answered: "Yes, in consequence of his employment."

From this, counsel for the defendants argued that the jury held that he was not there during his employment. The evidence satisfies me that under the contract of hiring there was an obligation resting upon the defendants to convey the plaintiff back to Star City. In the view, however, which I take of the case, it is immaterial whether the action is founded in contract or in tort. If, when the plaintiff was injured, he was still in the employment of the defendants, he is entitled to recover, because the defendants owed him a duty to see that he was not injured by their negligence or that of their servants; the defence that the negligence of a fellow-servant engaged in a common em-

ployment was one of the risks undertaken by the plaintiff not being open to the defendants under our statute, R.S.S. ch. 52, sec. 31, sub-sec. 14.

Then, assuming, as contended by counsel for the defendants, that the plaintiff's employment had ceased prior to the accident, we have to inquire as to the relationship existing between the parties at the time the accident happened, and the duty, if any, which that relationship imposed upon the defendants. The plaintiff was in the caboose at the time he was injured by reason of the express invitation of the defendants through their conductor. Neither in the pleadings nor in the Court below, nor yet in their notice of appeal, did the defendants set up that the conductor had no authority to so invite him. An attempt was made on the argument before us to amend by setting up that contention, but the Court refused to allow it. Not only was the plaintiff in the caboose by express invitation of the defendants, but he was there, as the jury found, in consequence of his employment, and had there been no express invitation given him to enter the caboose to be transported back to Star City, I am of opinion an invitation would necessarily be implied under the circumstances. The plaintiff was, therefore, lawfully in the caboose, not as a guest nor yet as a mere or bare licensee but in consequence of his contract of employment with the defendants.

In *Indermaur* v. *Dames*, L.R. 2 C.P. 312, Kelly, C.B., in giving the judgment of the Court of Exchequer Chamber, said:—

> I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for the purpose incidental to the contract, and so intimately connected with it, that few contracts are completed without a similar act being done.

In view of this relationship, which I hold existed, what was the duty of the defendants towards the plaintiff? The duty of a railway company to a person upon its property by its invitation, express or implied, and its liability for injuries received by such person while on such premises, have been the subject of many judicial decisions. The law, as I gather it from the cases, may be stated as follows:—

If the plaintiff is a bare licensee, that is, one who is permitted to go upon premises of another solely for his own interest, convenience or gratification, he takes the property as he finds it, with all the risks incident thereto, subject, however, to this, that he must not be led into danger by anything in the nature of a trap, nor must he be injured by any wrongful act on the part of the company or its servants amounting to gross negligence: *Gautret* v. *Egerton*, L.R. 2 C.P. 371; *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219; *Nightingale* v. *Union Colliery Co.*, 35 Can. S.C.R. 65.

SASK.

S.C.
1912

GORDON
v.
CANADIAN
NORTHERN
RAILWAY
CO.

Lamont, J.

But if the plaintiff is not a mere or bare licensee, but is lawfully on the company's premises by the company's invitation, on a matter of common interest, or in the exercise of a right, the company owe him the duty of taking reasonable care that he is not injured through the negligence of its servants, and if he is thus injured, the company are liable to him in damages: *Indermaur* v. *Dames*, L.R. 1 C.P. 274; *Wright* v. *London & North Western R. Co.*, L.R. 1 Q.B.D. 252; *Thatcher* v. *Great Western R. Co.*, 10 Times L.R. 13; *Marney* v. *Scott*, [1899] 1 Q.B.D. 986.

In the present case, the plaintiff, as I have said, comes within the latter class. His employment by the defendants was a matter of common interest to both, and his being in the defendants' caboose when he was injured was in consequence of and as incident to that employment, and it was solely on account of that employment that he received the invitation to enter the caboose. He was, therefore, on the defendants' premises on a matter of common interest to both parties, and the defendants owed to him, under the authorities above referred to, the duty of taking reasonable care to keep the premises in a safe condition. That duty they did not perform, and must be held accountable for the injuries received by him.

But, even if this relationship had not existed, if the plaintiff had no higher right than that of a bare licensee, he would, in my opinion, still be entitled to recover, because the injuries received by him were not the result of any dangers incident to his entering upon the defendants' property, but were caused by a wrongful act of the defendants' servants on the passenger train amounting to the grossest kind of negligence. The passenger crew had been notified that a freight train was ahead of them stalled in the snow; they had been given orders to go slowly from a certain point and to protect the stalled train. Instead of doing this, they proceeded at full speed until they crashed into the caboose. A more glaring example of gross negligence it would be hard to imagine. A bare licensee in going into the defendants' caboose must assume all the risks incident thereto, but surely it cannot be said that one of the risks incident thereto and which he assumes is that he may be run down by a train following the one he has entered upon. However, as I have already stated, the plaintiff was not simply a bare licensee, but a licensee by express invitation, and also on a matter of common interest, and is on that account entitled to recover for the injuries sustained.

The other ground on which the judgment appealed from is sought to be set aside is that the damages awarded are excessive. On this point I do not know that I can add anything to what I have just said in *Tobin* v. *The Canadian Pacific Railway Co.* 2 D.L.R. 173.

Neither in the notice of appeal nor in the argument before us

SASK.

S.C.
1912

GORDON
v.
CANADIAN
NORTHERN
RAILWAY
Co.

Lamont, J.

was any objection taken to the learned trial Judge's charge, nor was it contended that the jury had assessed the damages on any wrong principle. As I said in the *Tobin* case, the question then is, are the damages awarded so unreasonably large that twelve sensible men, assessing damages on proper principles, could not reasonably have allowed them? If not, can we say that the sum awarded is such that after making a proper allowance for the pain and suffering of the plaintiff and the diminution of his capacity for the enjoyment of life, it would purchase an annuity equal to the difference between the prospective earnings of the plaintiff if he had been uninjured and those earnings after his injury? If we can, then a new trial should be ordered: *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250. If we cannot, there does not seem to be any ground on which to justify interference by an appellate Court. The only limit placed upon the amount that may be awarded is, that it must be reasonable. The plaintiff as a result of his injuries was in the hospital between sixteen and seventeen weeks, and from the character of his injuries, necessarily suffered great pain. He was burned very severely about the head and face. The skin was to a great extent burnt off his face, with the result that he is now very badly disfigured, and his face and the top of his head are so tender that he may not be able to stand either extreme heat or cold. This will certainly interfere with his enjoyment of life. In addition, his nose and jaw were broken, and his right hand was so badly burned that it is practically of no use. He is a young man, twenty-six years of age, and a blacksmith by trade. He has followed his trade for the last twelve years. As a blacksmith, he earned three and a half dollars per day when working for others. About two months before the accident he started business for himself in partnership, and was averaging thirty-five dollars per week. One difficulty I experience in cases such as this is that there is no evidence whatever given from which either the Court or jury can ascertain what annuity can be purchased for a given sum, and in this province the purchase of annuities is so rare that not one person in fifty has any knowledge on the point. Another difficulty in this case is that at the trial stress was laid upon the disfigurement of the plaintiff's face. It is certainly an element of damage to be considered, and the jury having seen the disfigurement and this Court not having done so, I cannot escape the conviction that the jury were in a better position to appraise the damage than I am. Then there is the difficulty of estimating his probable future earnings. If the plaintiff had the proper mental equipment, he might even in his disabled condition go into some walk of life requiring mental alertness rather than manual labour and make a good living; but if he is qualified only to earn an income by manual labour, it will not be denied that a man with only one hand is in a very unfortunate position. He

SASK.

S.C.
1912

GORDON
v.
CANADIAN
NORTHERN
RAILWAY
CO.

Lamont, J.

cannot, of course, continue at his business of blacksmithing. The evidence shewed that he had entered for a homestead, and that he would be able to do something on the farm. Upon these points also the jurors, a number of whom doubtless were farmers, were, it seems to me, in as good if not much better position than I am to estimate the plaintiff's earning capacity. Further, it must not be forgotten that it is rarely that any two Judges or any two juries award the same amount. On the whole there is no evidence upon which I can say that the rule as laid down in *Rowley* v. *London and North-Western R. Co.*, 8 Ex. 221, and *Johnston* v. *Great Western Railway Co.*, [1904] 2 K.B. 250, (*supra*), has been infringed nor am I prepared to say that twelve sensible men might not reasonably have given the amount awarded.

I would dismiss the appeal with costs.

JOHNSTONE, J., concurred with Lamont, J.

Appeal dismissed.

ONT.

C. A.
1912

March 19.

BULLEN v. WILKINSON.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. March 19, 1912.

1. SPECIFIC PERFORMANCE (§ II—42)—PERFORMANCE PRO TANTO—DEFICIENCY IN QUANTITY.

Where in addition to a claim for specific performance of a contract for the sale of land, a claim is made by the purchaser for compensation for an alleged deficiency in the quantity, a Court of equity has a discretion to refuse the relief sought and to leave the purchaser to his rights at law if any.

[*Mortlock* v. *Buller*, 10 Ves. 292, specially referred to.]

2. SPECIFIC PERFORMANCE (§ I—9)—MISDESCRIPTION GIVEN IN GOOD FAITH —LUMP SUM PRICE—PURCHASER'S KNOWLEDGE OF TRUE DESCRIPTION.

Where house premises were sold for a lump sum and the purchaser knew that the vendor had title only to the frontage of twenty feet occupied by the dwelling, and a right of way jointly with an adjoining owner over and upon a passageway eight or nine feet wide at the side of the house, but the property was in good faith described in the contract of sale as having a frontage of "twenty-four and one half feet more or less" (that frontage being the basis of the tax assessment) the purchaser who has declined either to receive back his deposit or to accept the property as it stands without abatement in price and who has insisted upon his requisition of title for the full twenty-four and one half feet frontage or compensation for a deficiency of four and one half feet without reference to the value of the right of way, will not be allowed, after the dismissal of his action for specific performance against the vendor tried upon that issue, to change his position upon an appeal from such dismissal and to then elect to take specific performance without compensation, if such claim would raise a new cause of action not upon the record, especially where there was no evidence that the value of the twenty feet frontage and of the vendor's rights over the passageway which the vendor offered to convey was any less than would have been the value of the frontage contracted for, and where the contract provided that the agreement should be null and void if any objection to title was insisted upon, which the vendor was unable or unwilling to remove.

ONT.

C. A.

1912

BULLEN v. WILKINSON.

Statement

3. APPEAL (§ VII J 3—409)—CHANGING POSITION ON HEARING OF APPEAL —NEW THEORY OF CLAIM—AMENDMENT.

A plaintiff whose claim is wholly for equitable relief to which he is found disentitled may be refused leave on an appeal from such finding to change the form of his action so as to raise a new cause of action regarding the same subject-matter in lieu of the claim already made.

APPEAL by the plaintiff from the order of a Divisional Court, 3 O.W.N. 229, affirming the judgment of SUTHERLAND, J., 2 O.W.N. 1202.

The appeal was dismissed.

The action was brought for specific performance of a contract for sale of certain lands, and for an order or judgment that if defendant cannot convey all the lands described in the contract, that she may be required to convey such portion thereof as she can convey, and that the plaintiff shall be compensated by the defendant by way of abatement from the purchase-money for the difference.

The plaintiff prior to the 12th December, 1910, had been negotiating with the defendant, a widow, whose title, for the purchase of the property in question herein, and had at one time made her an offer therefor of $3,000. Some time later in that year, the defendant placed the property for sale in the hands of a real estate agent named Wood, and on or about the 9th day of December, 1910, the plaintiff made an offer in writing to purchase the said land, which had been prepared by the said Wood, and subsequently, on the 12th day of December, 1910, said offer with some slight alterations which had been made therein meantime, and which only affected the question of the terms of payment, was accepted by the defendant. The description in said document was as follows:—

> All and singular the premises situated on the north side of Maitland street, in the city of Toronto, known as No. 44, having a frontage of about 24·6 feet more or less by a depth of about 169 feet more or less at the price or sum of $4,000.

A difficulty soon after arose between the plaintiff and the defendant as to the said description, the plaintiff contending that according to the same he was entitled to a conveyance of a frontage on Maitland street of 24 feet 6 inches, or if the defendant was unable to convey more than 20 feet, as she contended, was entitled to a rebate in price for the four feet six inches on the basis of a sale of 24 feet 6 inches for $4,000. This he claimed would entitle him to a rebate of about $800.00.

It appeared that some time before the final negotiations between the plaintiff and defendant which ended in the offer and acceptance already referred to, the plaintiff had seen and made enquiries of one Butler, a real estate dealer, who at one time had had considerable to do with the property in question. Butler on the occasion in question, not knowing from memory

ONT.

C. A.

1912

BULLEN v. WILKINSON.

Statement

the exact description of the property, had produced and shewn to the plaintiff an assessment notice indicating that the husband of the defendant in his lifetime had been assessed as though the owner of 24 feet 6 inches. Butler, however, called the attention of the plaintiff at this interview to the fact that there was a lane, and that he did not know whether the defendant owned it, or half of it, or any of it, or only a right-of-way over it. It appeared that the house on the land in question is about 20 feet in width, and that the lane in question lies between it and the next adjoining house. There is a fence or lattice work at the front on Maitland Street between these two houses, in the middle of which is a gate or door furnishing a common entrance to the lane, and a casual inspection of the premises would apparently indicate and shew that the lane is used in common for the adjoining premises.

It appeared also that the plaintiff had built an apartment house on land lying east of the property in question, and wished to secure the latter for the purpose of making an extension of said apartment house.

It also appeared that in a general way he knew the property and had been examining it, had entered the lane and looked over the property, in fact was fairly familiar with it. It also appeared that the defendant had at one time lived on the property and was familiar with it also in that way.

The plaintiff had first spoken to the tenant, who was then in the house, and was then informed that the defendant owned the house and half of the lane, and he, the plaintiff, had estimated that the frontage of the house would be about 19 feet, and half of the lane would bring the property up to about 25 feet. It did not appear that the plaintiff in his conversation with the defendant or her agent, made any mention of the land at so much per foot frontage. The plaintiff had offered at first $3,000 for the property, and the defendant's price at first was $5,000. In the end the sum of $4,000 was agreed upon.

When the plaintiff finally made up his mind to pay $4,000 for the property and interviewed Wood, the defendant's agent, what took place was as follows, as found by the trial Judge: On the plaintiff intimating that he would pay the $4,000 and the contract being discussed, it developed that Wood did not know the quantity of land in question. There was a suggestion that the property be described as street No. 44, and all lands pertaining to it, but the plaintiff wanted to know the frontage. Before drawing up the contract, Wood called up the defendant by telephone and intimated to her that the plaintiff wanted to know the dimensions. He was referred by the defendant to Butler, but did not call him up. Later on he again called up the defendant, who after telephoning to Butler, told him that the frontage was 24 feet 6 inches, which he says he

then put upon a memorandum, which he had originally made in connection with the property, and which memorandum he produces with the figures 24-6 x 169 marked on it. Thereupon he prepared the offer to purchase.

The plaintiff in his evidence at the trial admitted that the defendant had not wilfully deceived him, and the trial Judge thought it likely she had not as definite or practical a knowledge of the dimensions of the property as the plaintiff himself.

The description inserted in the deed of conveyance which the defendant offered, was one by metes and bounds, comprising a frontage of 20 feet on Maitland street, together with a right-of-way over the lane 8 feet wide. The consideration mentioned therein was $4,000. The plaintiff declined to accept the said conveyance and the defendant declined to concede any rebate in price.

The plaintiff served requisitions on title which contained, among others, the following:—

> We notice by your draft deed submitted that the vendor apparently proposes to convey 20 feet frontage on Maitland street together with a right-of-way over a lane 8 feet wide adjoining on the east. The agreement for sale calls for a frontage of 24 feet 6 inches. This is entirely too great a discrepancy, and forms a proper matter for compensation, and the purchaser asks that a proper proportionate allowance be made him by way of compensation. Roughly speaking, it makes to the purchaser this difference: At 24 feet 6 inches, he is paying about $160 a foot. At 20 feet he is paying $200 a foot, or say a difference of $800.

The agreement contained the following clause:—

> The purchaser is to be allowed 10 days to investigate the title at his own expense, and if within that time he shall furnish the vendor in writing with any valid objection to the title, which the vendor shall be unable or unwilling to remove, and which the purchaser will not waive, this agreement shall be null and void and the deposit money returned to the purchaser without interest.

It appeared that $100 was paid to Wood on account at the time the plaintiff signed the offer to purchase, and that upon the defendant notifying the plaintiff in writing of her intention to put an end to the contract, she intimated that she would write to Wood, the holder of said deposit, to return it to the plaintiff. Up to the time of the trial it had not been tendered or paid to the plaintiff.

The plaintiff, in the letter of his solicitors dated 27th of December, 1910, to the defendant's solicitors, put the plaintiff's position with respect to the 4½ feet in the following way:—

> Our demand for compensation, as we informed you on Saturday, is not an objection to title, and does not give rise on your part to any right to rescind the contract.

ONT.

C. A
1912

BULLEN
v.
WILKINSON.

Statement

The defendant also contended that under the terms of the contract time was expressly stipulated to be of the essence thereof, and that the plaintiff not having completed the same on his part by the time mentioned therein, the purchaser had a right to and did put an end to the contract in consequence.

The contract contains these terms:—

> This offer to be accepted by.....otherwise void, and same to be completed on or before the 31st day of December, 1910, on which date possession of said premises is to be given, and also time shall be of the essence of this offer.

On the 31st December, 1910, the defendant's solicitor wrote to the plaintiff's solicitor and delivered at his office a letter as follows:—

> I have, however, had the conveyance as submitted to you engrossed and executed and ready for delivery. I am ready to close upon receipt of a properly executed mortgage and a cash payment as provided by the agreement. The taxes are all paid for the year. The insurance, first mortgage and interest are matters for adjustment. I am now ready to close as indicated. Will you close to-day?

To this letter the plaintiff's solicitor replied on the 3rd January, whereupon the defendant's solicitor again wrote in these terms:—

> The time, however, has gone for negotiation. Time was the essence of the agreement, and the time for closing has gone by; therefore, the matter is at an end, and rescinded. Further, you persisted in your requisition in regard to compensation, and refused to withdraw or waive it. The vendor, therefore, takes advantage of the provision in the agreement in that behalf and hereby declares the agreement to be null and void. I have written the agent, Mr. F. A. Wood, the holder of the deposit, to return it to your client, although it is doubtful whether he is entitled to the whole amount.

The learned trial Judge, Sutherland, J., dismissed the action, applying the rule laid down in *Wilson Lumber Co.* v. *Simpson*, 2 O.W.N. 410, 22 O.L.R. 452, affirmed by the Divisional Court, 23 O.L.R. 253.

In giving judgment Mr. Justice Sutherland said:—

"Having regard to the knowledge which the plaintiff had with reference to the property and which he had obtained on the ground, and on application to Butler as already mentioned, having regard also to the fact that the defendant acted in perfect good faith throughout, and intended to sell only what was covered by the terms of her husband's will, and having regard also to the indefiniteness as to frontage in the offer of purchase, I do not think this at all a case in which a judicial discretion as to specific performance should be exercised in favour of the plaintiff, even if that is now open to me.

"The defendant was not aware of the exact dimensions of the property in question, and she was misled into any represent-

ation which she made over the telephone to Wood as to the exact frontage of the property. While the plaintiff says that he bought on the basis of a value of so much per foot frontage he never intimated this to the defendant, or to Wood. The action must be dismissed with costs."

The plaintiff appealed from the above judgment to the Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON, and RIDDELL, JJ.), which affirmed the judgment at trial, *Bullen* v. *Wilkinson* (1911), 3 O.W.N. 229. The present appeal was brought from that decision.

W. J. Elliott, for the plaintiff.

W. E. Raney, K.C., for the defendant.

The judgment of the Court was delivered by MEREDITH, J.A.:—The plaintiff is seeking equitable relief; for, in addition to specific performance of a contract for the sale to him of land, he is insisting upon compensation for a deficiency in the quantity which, he asserts, was sold to him: so that, in a sense, the Court has a discretion, which it may rightly exercise, to refuse the relief sought, leaving him to pursue his rights at law, if any he has.

In one of the cases very much relied upon by Mr. Elliott—*Mortlock* v. *Buller*, 10 Ves. 292—the Lord Chancellor, dealing with the question involved in this case, said:—

> For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion of his contract, and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and, the Court will not hear the objection, by the vendor, that the purchaser cannot have the whole. But that always turns upon this; that it is, and is intended to be, the contract of the vendor.

There is little, if any, doubt about the facts of the case. The land in question adjoins lands of the plaintiff upon which he has built an "apartment house," and upon which he has resided for some time; and he is a builder by trade; and quite familiar with the land in question, having had, at one time, the use of part of it.

His contention is, that the defendant agreed to sell to him land having a frontage of 24½ feet for $4,000, and that she is able to convey to him only 20 feet, and that there should be performance of the contract with a proportionate diminution in price.

The contract in writing is to sell the premises known as No. 44, having a frontage of 24.6 feet more or less. The "premises" are residential property, the frontage of which is 20 feet, with a right of way over an additional adjoining 8 feet, and the residential building covers the whole 20 feet frontage.

That the plaintiff knew that the whole frontage over which

ONT.

C. A.
1912

BULLEN
v.
WILKINSON.

Meredith, J.A.

the defendant had ownership rights was not absolutely hers, that she had a right of way only over part of it, is made very plain: that the plaintiff was more than once made aware of the fact is well proved, and indeed is admitted by him: it would be exceedingly improbable that he would not have become aware of it, if he had not been told. So too would it be that he did not know pretty nearly the frontage of the building: he admits that he thought it was between 19 and 20 feet and that the way was "about 9 feet, between 9 and 10 feet."

Some time before buying, he had gone to a land agent, through whom some earlier transactions respecting the land had taken place, and sought from him information as to the property with a view to buying, when, having no better means at hand of finding its dimensions, the land agent shewed him the dimensions as given in "an old assessment," and at the same time told him "that he was not sure whether the plaintiff owned the lane or half of it or had a right of way over it."

The plaintiff and the other land agent, through whom the sale was made, differ as to the manner in which the dimensions of the frontage came to be set out in the agreement. The plaintiff testified that there was no particular discussion on the subject, and that the land agent put them down. The land agent testified that the plaintiff said he wanted to know the frontage and said he would not buy unless he knew what he was buying, and so they were inserted. He says this took place at the time the agreement was signed, which seems to be inconsistent with other parts of his testimony as to when, how, and why he obtained from the defendant the dimensions, but that is not very material except as shewing that care must be taken in accepting everything as a fact that is sworn to, because of memory's defects, to which all are more or less subject.

It was, doubtless, better for the plaintiff to assert that it was not upon his insistence that 24 feet and 6 inches frontage was inserted in the agreement without mentioning in any way the way, or any rights over it, for that might look like getting the defendant into a trap to agree to sell more than she had, when it is manifest that she was really only agreeing to sell that which she actually had, and which they both knew she had and occupied and used: which fact doubtless accounts for the careless way in which the dimensions were obtained, from the municipal assessor's returns only, when accuracy might so easily have been attained.

Whether in strictness an agreement to sell premises known as street number 44, having a frontage of 24 feet 6 inches more or less, would ordinarily bind the seller to convey at least 24 feet, need not be considered, because there is a good deal more in the case than that; there is the knowledge of the plaintiff that part of the defendant's right comprised a common way,

and that number 44 comprised only 20 feet in addition to the right of way, and that that was what she was selling; and, in addition to that, there is no evidence that the 20 feet, with the right of way, is not worth quite as much as 24 feet without any such right, and, if it be, there is no right to compensation.

I am, therefore, of opinion that this is not a case in which the plaintiff is entitled to a judgment such as he seeks in this action, and that, therefore, the dismissal of it should not be disturbed. Nor can I think that he is entitled now entirely to change his position and demand specific performance, a thing which he might have had but would not: it may be that if, in this action, he had claimed such relief in the event of failing to get the greater—in the alternative—he might have it: but as it is, and under all the circumstances, it should, I think, now be refused. In a sale of residential property, promptitude is generally essential.

I would dismiss the appeal.

Appeal dismissed.

COUNTY OF HALDIMAND v. BELL TELEPHONE CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. February 1, 1912.

1. HIGHWAYS (§ II B—49)—TELEPHONE COMPANY—INCORPORATING ACT—CONTROL BY THE RAILWAY ACT (CANADA).

The powers conferred on the Bell Telephone Company of Canada by its Act of incorporation authorizing it to erect its lines along the side and across or under any public highway, bridges, etc., are controlled by the Railway Act, R.S.C. 1906, ch. 37, sec. 248, which imposes certain conditions precedent to the construction by any telephone company of its lines, and this notwithstanding that the word "bridges" is specially mentioned in the incorporating Act and omitted from the Railway Act.

[43 Vict. (Canada) ch. 67, sec. 3; R.S.C. 1906, ch. 37, sec. 248, sub-sec. 2; *Toronto* v. *Bell Telephone Company of Canada*, [1905] A.C. 52, referred to.]

2. HIGHWAYS (§ II B—49)—BRIDGES—PART OF HIGHWAY—RAILWAY ACT R.S.C. 1906, ch. 37, sec. 248.

A bridge crossing a river, connecting the separated parts of a public highway is part of the highway itself and is also a public place and is within the operation of sec. 248, sub-sec. 2 of the Dominion Railway Act, R.S.C. 1906, ch. 37.

3. INJUNCTION (§ I L—104)—TELEPHONE LINE ON HIGHWAY WITHOUT CONSENT OF MUNICIPALITY—TRESPASS.

Where a public service corporation proceeds with its undertaking without complying with the statutory requisites as to its use of the highway, it is deemed a trespasser upon the highway and may be enjoined from further continuance of such trespass.

4. COURTS (§ I C—47)—JURISDICTION OF ONTARIO HIGH COURT OF JUSTICE—BOARD OF RAILWAY COMMISSIONERS.

Where a municipality is entitled to relief by reason of the unauthorized act of a telephone company in proceeding with the erection of poles and wires on the highway without complying with the condi-

ONT.

C. A.

1912

COUNTY OF HALDIMAND v. BELL TELEPHONE CO. OF CANADA.

tions imposed by the Railway Act of Canada, which Act also provides that municipalities have the right to apply to the Board of Railway Commissioners in respect to matters arising in connection with the undertakings of telephone companies, this latter provision is not to be deemed the exclusive remedy and does not oust the jurisdiction of the High Court of Justice of Ontario to deal with the trespass thereby committed by the telephone company.

[*Kemp* v. *London and Brighton R. Co.* (1839), 1 Railway Cas. (Eng.) 495, 504; *Simpson* v. *South Staffordshire Waterworks Co.* (1865), 34 L.J. Ch. 380; *River Dun Navigation Co.* v. *North Midland* R. Co. (1838), 1 Railway Cas. (Eng.), 135, 154, referred to.]

APPEAL from judgment of Latchford, J., who decided that the defendants could not legally do what had been done but as the plaintiffs had suffered no damage, their only remedy was to apply to the Railway Commission to remove the poles, and dismissed the action.

The appeal was allowed.

The action was by the Corporation of the County of Haldimand for a declaration that the defendant had not the right to erect telephone poles upon a bridge built by the plaintiff over the Grand river in the village of Cayuga, and for a mandatory injunction commanding the defendant to remove its poles and wires from the bridge.

Messrs. *T. G. Meredith*, K.C., and *T. A. Snider*, K.C., for the plaintiff.

Messrs. *G. Lynch-Staunton*, K.C., and *J. A. Murphy*, for the defendant.

The judgment now reversed was as follows:—

May 10, 1911. LATCHFORD, J.:—The poles were placed upon the bridge piers early in 1907, without the consent of the plaintiff. Permission to use the bridge in a certain way had been given in 1887, and the defendant had strung a few wires across the river on the brackets it was then permitted to attach to the bridge. But there is not the slightest warrant to be found in the permission granted in 1887 for the acts done by the defendant twenty years later. Nor is any justification afforded by the negotiations had with the plaintiff in November and December, 1907, and the earlier months of 1908. The by-law sanctioning the use of the bridge by the defendant failed to pass the municipal council, and the negotiations resulted in no act binding upon the plaintiff.

The only fact seriously in issue is, whether the attachment of the poles to the piers injures or tends to injure the bridge. The experts called by the parties to the suit give, as might be expected, conflicting evidence, but all agree that no actual injury has thus far occurred. I find, however, that the poles erected by the defendant with cross-arms and wires tend to weaken the piers and cause damage to the bridge. The piers are old. They were built in 1871. The mortar was inferior, and by 1904 the stones had become so loosened that it was found necessary to surround each pier by an eighteen-inch concrete "jacket," extending from the

foundations to within five feet of the top of each pier, and to cement the joints in the stones above that level. The defendant rested its poles on the concrete jacket south of each pier, and secured the poles by passing iron bands around them, and fastening such bands to rock bolts placed in holes drilled in the piers. Some, if not all, of the poles are thus attached to stones supporting the outer bed-plates on which the main trusses of the bridge rest. The poles and attachments placed by the defendant upon the bridge add considerably to the weight the piers have to carry, and, under the influence of the wind, especially when the wires are coated with ice, exert a powerful leverage upon the top courses of the piers and undoubtedly tend to weaken the bridge, though they have thus far, I find, caused no damage to it.

Apart from the issue of fact thus disposed of, the defence is, that, under the Dominion Act incorporating the defendant, 43 Vict. ch. 67, sec. 3, the defendant was empowered to erect and maintain its telephone lines along the sides of and across or under any public highways, streets, bridges, watercourses, or other such places. The location of the lines and the opening up of the streets were required by an amending Dominion Act, 45 Vict. ch. 95, to be under the direction of a certain municipal officer, and in such manner as the municipal council should direct; and the works of the defendant were declared to be for the general advantage of Canada.

In *City of Toronto* v. *Bell Telephone Co. of Canada* (1903), 6 O.L.R. 335, it was held by the Court of Appeal, reversing the judgment of Street, J. (1902), 3 O.L.R. 465, that the defendant, under the powers conferred by sec. 3 of 43 Vict. ch. 67, had the right to erect its telephone lines in the streets of the city of Toronto. On appeal to the Judicial Committee of the Privy Council, the judgment of the Court of Appeal was confirmed: *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52. The principal question considered by the Courts was, whether the legislation was within the proper competence of the Dominion Parliament under sec. 91 of the British North America Act. This was determined affirmatively, and an Ontario Act, 45 Vict. ch. 71, was held to be *ultra vires*. But slight effect appears to have been given to the proviso, as amended by 45 Vict. ch. 95 (D.), that in cities, towns, and incorporated villages the location of the line or lines and the opening up of the streets for the erection of poles or for carrying the wires underground shall be done under the direction and supervision of the engineer or such other officer as the council may appoint, and in such manner as the council may direct. Lord Macnaghten, in stating the judgment of the Committee, says, at p. 60: "Their Lordships . . . do not think the words . . . can have the effect of enabling the council to refuse the company access to streets through which it may propose to carry its line or lines. They may give the council a

ONT.
C. A.
1912
COUNTY OF HALDIMAND v. BELL TELEPHONE CO. OF CANADA.
Latchford, J.

voice in determining the position of the poles in streets selected by the company, and possibly in determining whether the line in any particular street is to be carried overhead or underground."

Bridges, it will be observed, are mentioned in sec. 3 of the statute in the same category as highways and streets; and it is urged on behalf of the defendant that it has all the rights in regard to bridges that under the judgment in the *Toronto* case it has been held it has in regard to streets. The wholesome restrictions imposed upon the defendant by sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, were rendered necessary by the decision in *Toronto Corporation* v. *Bell Telephone Co. of Canada;* and the defendant, notwithstanding the wide powers conferred by 43 Vict. ch. 67, (D.) could not now construct its lines upon, along, across, or under any "highway, square, or other public place," without the consent of the municipality, or, failing such consent, without the leave of the Board of Railway Commissioners. An existing line like that in question in this case falls under sub-sec. 6 of sec. 248, which gives the plaintiff the right to apply to the Board of Railway Commissioners to have the poles removed. But the plaintiff has no other remedy until it suffers actual damage; and this action must be dismissed with costs.

The plaintiff appealed to the Court of Appeal from the judgment of LATCHFORD, J.

T. G. Meredith, K.C., for the plaintiff, argued that, on the facts of the case as found by the learned trial Judge, the plaintiff was entitled to judgment, and that he erred in his view that it was bound to apply to the Board of Railway Commissioners. The jurisdiction of the Courts was not ousted, and the plaintiff was entitled to the relief asked, on the same principles as were acted upon in *McKenzie* v. *Grand Trunk R.W. Co.* and *Dickie* v. *Grand Trunk R.W. Co.* (1907), 14 O.L.R. 671.

G. Lynch-Staunton, K.C., for the defendant, argued that the plaintiff had no right to dictate to the defendant as to the manner in which it should reconstruct its line, which was the real question involved, the defendant having already, with the consent of the plaintiff, attached its wires to brackets on the other side of the bridge. Under the statute 43 Vict. ch. 67, sec. 3 (D.), the defendant was entitled to the same rights as it was held to have in *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52, and these rights are not taken away by sec. 248 (2) of the Railway Act, in which bridges are not mentioned. Some of the lines in question are for long-distance service; and, by sub-sec. 4 of sec. 248, are expressly excepted from the operation of sub-sec. 2. The trial Judge has found that no injury has been done to the bridge; the plaintiff has, therefore, mistaken its remedy, which was to apply to the Railway Board.

Meredith, in reply, argued that the brackets to which the wires were attached with the plaintiff's consent, were altogether

different from the poles which were now in question. As to whether the omission of the word "bridge" from sub-sec. 2 of sec. 248 could have the effect contended for by the defendant, he referred to sec. 2, sub-sec. 11, of the Railway Act, which shewed that "bridge" was included in the term "highway." The right of the plaintiff to bring an action, in such circumstances as were here shewn, was held to exist in *Corporation of Wellington* v. *Wilson* (1864-5), 14 C.P. 299, 16 C.P. 124, and relief should be granted as in the *McKenzie* and *Dickie* cases, without resort to the Railway Board.

February 1, 1912. MACLAREN, J.A.:—This is an appeal by the Corporation of the County of Haldimand from the judgment of Latchford, J., dismissing its action for an order compelling the company to remove its poles from the piers of the bridge crossing the Grand river at the village of Cayuga.

In May, 1887, the county council gave permission to the company to fasten a small scantling fixture to the rafters of the bridge, projecting about three feet from the side, upon which to put its wires. The wires remained there until 1907, when the company removed them to the other side of the bridge, stringing them upon poles inserted in the stone piers of the bridge. There were some negotiations between the parties as to allowing the poles to remain, but no agreement was come to.

By its defence the company asserted that, under its charter, 43 Vict. ch. 67 (D.), amended by 45 Vict. ch. 95, it had a right to do what had been done.

The trial Judge held that, under sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, the company could not do what had been done without the consent of the municipality, or, failing such consent, without the leave of the Board of Railway Commissioners. He found, however, that the plaintiff had suffered no actual damage; and, until it did so, he held, its only remedy was to apply to the Railway Commissioners to have the poles removed; and dismissed the action with costs.

On behalf of the company it was argued before us that, as it was given power, under sec. 3 of 43 Vict. ch. 67, to "construct, erect and maintain its line or lines of telephone along the sides of and across or under any public highways, streets, bridges, watercourses or other such public places, or across or under any navigable waters," and as bridges are not mentioned in sec. 248 of the Railway Act, the company had the same rights with respect to this bridge as it was held by the Privy Council to have with respect to the streets of Toronto in *Toronto Corporation* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52.

Sub-section 2 of sec. 248 of the Railway Act provides that except as therein provided a telephone company shall not "construct, maintain or operate its lines of telephone upon, along, across or under any highway, square or other public place within

ONT.

C. A.

1912

COUNTY OF HALDIMAND v. BELL TELEPHONE CO. OF CANADA.

Maclaren, J.A.

the limits of any city, town or village, incorporated or otherwise, without the consent of the municipality." Sub-section 3 provides that, if the company cannot obtain such consent on terms acceptable to it, it may apply to the Board of Railway Commissioners.

The trial Judge was of opinion that the omission of the word "bridge" in sub-sec. 2 had not the effect the company claimed; and I think he was clearly right. The bridge in question is a part of the highway, and is covered by the language of the sub-section.

The provisions of these two sub-sections do not apply to long-distance or trunk lines. The location of these is, by sub-secs. 4 and 5, subject to the direction of the municipality, or of its officer, unless they, after a week's notice in writing, shall have omitted to prescribe such location and make such direction.

It is admitted that some of the lines in question are local, and some are long-distance or trunk lines. With regard to the former, the company had no right to proceed without the consent of the plaintiff or of the Board. With regard to the latter, it should have given the week's notice or have received the direction of the municipality or its officer. With respect to both classes of lines, it was a mere trespasser; and I can find nothing in the law requiring the plaintiff to apply to the Board, or ousting the jurisdiction of the Courts.

In my opinion, the appeal should be allowed, and the order asked for by the plaintiff should be granted, unless the parties can, within a reasonable time, either make a satisfactory agreement, or, failing this, the defendant take the steps prescribed by the Railway Act.

MEREDITH, J.A.:—If the acts of the defendant, which are complained of, were unauthorised in law, it is a continuing trespasser to land, and ought to be enjoined from all further continuance of such trespass, the result of which would be the removal of its poles and lines from the bridge in question and a restoration of it to the condition in which it would be now but for such trespasses; and this was not at all disputed upon the argument here.

The only substantial questions involved in the case are, therefore, whether the defendant had a legal right to do the things which it has done; and, if not, whether the plaintiff is seeking a remedy in the proper forum.

That there was no leave or license from the plaintiff to do that which has been done is very plain. The leave which had been given was to do something of a very different character; and even that leave was given, and indeed asked for, only subject to the right of the plaintiff to withdraw it whenever it saw fit. Subsequent negotiations never reached the stage of a completed agreement, or of leave or license.

The right upon which the defendant relies is the statutory power conferred upon it in its Act of incorporation; but that right was modified by an amendment to that Act; and subsequently

both were superseded, in so far as the question in this case is concerned, by the provisions of sec. 248 of the Railway Act, R.S.C. 1906, ch. 37, under which no such work as that in question can be done without the consent of the municipality unless the line is a long-distance or trunk line, and in regard to such lines the location of the line upon the highway is made subject to the direction and supervision of the municipality, or of such officer as it may appoint, unless this is not done for a week after notice requiring it.

Some of the lines in question are not long-distance or trunk lines; and, therefore, the defendant had no power to erect them, because no consent of the municipality to it was ever given; and so, too, in regard to the lines which are long-distance lines, because they were erected without giving the week's notice, and without the direction and supervision of the municipality or of an officer appointed by it.

It was, however, contended that this Act did not apply because bridges are not expressly mentioned in it; but the bridge in question is but part of the highway, and is a public place, and the Act expressly applies to "any highway, square or public place in any city, town or village, incorporated or otherwise:" and, in addition to that, the interpretation clauses of the Act provide that the word "'highway' includes any public road, street, land or other public way or communication." The fact that the defendant's Act of incorporation includes the word "bridges" with highways and streets can hardly be considered seriously a reason for excluding all bridges from the effect of the Railway Act.

Another contention was, that the work complained of was nothing more than a renewal or reconstruction of lines before constructed, and so was within the provisions of sub-sec. 6 of sec. 248 of the Railway Act, under which the plaintiff would be required to seek relief from the Board of Railway Commissioners of Canada; that, however, is, in fact, plainly not so; it was a new construction of a different character, upon the other side of the bridge.

Therefore, the plaintiff is entitled to relief; and there is nothing in the way of its coming into the ordinary Courts of the land seeking it; or to prevent such Courts granting it: see *Kemp* v. *London and Brighton R.W. Co.* (1839), 1 Railw. Cas. 495, 504; *Simpson* v. *South Staffordshire Waterworks Co.* (1865), 34 L.J. Ch. 380; and *River Dun Navigation Co.* v. *North Midland R.W. Co.* (1838), 1 Railw. Cas. 135, 154.

The appeal should be allowed, and the defendant should be enjoined from continuing to trespass upon the bridge in question as it has been doing ever since it began the erection of the poles and wires now complained of; no damages are, I understand, sought, and probably no substantial damage will have been sustained if the poles and wires be removed and the bridge made as good as it would be if they had never been erected; but the in-

ONT.

C. A.

1912

COUNTY OF HALDIMAND v. BELL TELEPHONE CO. OF CANADA.

Meredith, J.A.

junction should be stayed for three months to enable the parties to come to some agreement under which the lines may be carried over the bridge; or, failing that, so that the defendant may apply to the Board for such relief as it may think it is entitled to. And I desire to add that, in all such cases as this, it should be borne in mind that a municipality has no right to make use of its power, under the enactment in question, to exact money for ulterior purposes.

The defendant should pay the costs of the action and of this appeal.

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

Appeal allowed.

SASK.

S. C.

1912

Mar. 9

SUTHERLAND (Plaintiff, appellant) v. **RHINHART** et al. (Defendant, respondent.)

Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Lamont and Brown, JJ. March 9, 1912.

1. BROKERS (§ II B—14)—COMMISSION ON SALE OF LAND—QUANTUM MERUIT—OPTION AGREEMENT.

Where a broker obtains an option in his own name and thereby puts himself in the relation of purchaser as regards the owner, he is not entitled to claim remuneration, in the absence of a special agreement to that effect, in respect of a sale afterwards made by the owner without reference to the option to a prospective purchaser whom the broker had introduced within the time limit of the option, the option itself not having been taken up by the broker.

AN appeal by the plaintiff from the judgment of Maclean, J., Judge of the District Court of the District of Battleford, *Sutherland* v. *Rhinhart*, 19 W.L.R. 819, in favour of the defendants, dismissing plaintiff's claim for commission on the sale of certain land belonging to one of the defendants.

The appeal was dismissed.

H. Y. MacDonald, for appellant.

H. C. Lisle, for respondents.

BROWN, J.:—The plaintiff is a real estate and implement agent, and brought his action *inter alia* to recover $218.75 by way of commission. This he claims under an agreement in writing bearing date August 24th, 1909, by which he alleges the defendants listed with him for sale the south-east quarter of section twenty (20) in township forty-nine (49), range twenty-four (24), and the north-west quarter of section twelve (12), township forty-nine (49), range twenty-five (25), all west of the third meridian, together with certain chattels, for $4,375.00, and agreed to pay the plaintiff 5 per cent. commission upon his producing a purchaser therefor at the said price. He further sets up that he produced a purchaser for the said lands at the price

named who was able and willing to complete the purchase, and that in consequence there is due to him the $218.75 as claimed. In the alternative, the plaintiff claims the said amount on a *quantum meruit* basis. The plaintiff's claim from either point of view is based upon the alleged fact that he produced a purchaser for the half section who was ready and able to buy for the price and upon the terms set out in the agreement referred to. The action came on for trial before the Judge of the District Court at Battleford, and although he allowed the plaintiff's claim as to the other items referred to in the action, he found in favour of the defendants on this claim for commission. From that finding the plaintiff appeals. The following agreements were put in evidence by the plaintiff at the trial:—

Agreement between Owner and Agent.
(Combination Plat.)

Lashburn, August 24th, 1909.

Map of S.E. section 20, town. 49, range 24, W. 3.

(Space filled in with plat shewing 64 sections, 36 sections being numbered 1 to 36 and the rest not numbered.)

Lands listed for sale (or lease). Listed by Daniel Rhinhart. Owner's address, Lashburn. Listed 20th August, 1909. Legal description shewn above. Acres cultivated, 100. Acres untillable, acres. Timber, nil. Kinds of timber, nil. Acres grass, nil. Acres of marsh or liable to be overflowed, nil. Acres fenced, nil. Surface, rolling. Soil, black. How watered, good. Crops raised, three.

Building:—House, 14 x 24. Rooms, two. Two storeys. Material, logs. Built in 1907. Condition, . Barn—Size, 45 x 30. Material, logs. Built in 1907. Other buildings, nil. Value of buildings, $400. Taxes, $10. Rental value, . Insurance, nil. Nearest R.R.,

And we the undersigned will take for the north-west of 12-49-25, west 3, and the S.E. 20-49-24, west 3, $4,375, with all goods thereon, and further agree to accept $2,500 cash as soon as money comes from the east, not later than thirty days from date of this agreement, and the balance ($1,875) on the first day of July, 1910. And we further agree to cut and shock said grain, which is about 75 acres in the stook, and turn over all hay now put upon said S.E. 20-49-25 W. 3rd and all other articles not mentioned here for the said sum, for which we accept this day $25 to close said deal. And we further agree to look after all stock and chattels in the same way as at the present time until the full sum of $2,500 is paid us in cash.

(Signed) DANIEL RHINHART. (L.S.)
G. C. RHINHART. (L.S.)

Agreement between Owner and Agent.
(Combination Plat.)

Lashburn, August 24th, 1909.

Map of N.W. section 12, town. 49, range 25, W. 3.

(Space filled in with plat shewing 64 sections, 36 sections being numbered 1 to 36 and the balance not numbered.)

Lands listed for sale (or lease). Listed by George Rhinhart. Own-

SASK.

S. C.
1912

SUTHERLAND
v.
RHINHART.

Brown, J.

er's address, Lashburn. Listed Aug. 20th, 1909. Legal description shewn above. Acres cultivated, 100. Acres untillable, 60. Acres timber, nil. Kinds of timber, nil. Acres grass, nil. Soil, black loam. How watered, natural. Crops raised, four.

Building:—House, 16 x 20. Rooms, one storey. Material, logs. Built in 1907. Condition good. Barn—Size, 16 x 32. Material, logs. Built in 1909. Other buildings, granary. Value of buildings, . Taxes, nil. Rental value, . Insurance, nil. Nearest R.R. point, . Title patented. Incumbrance, seed grain 1908, about $45. Price, . Terms, $1,500 cash. Balance, spring 1910. Exclusive sale N.W. 12-49-25 W. 3rd. Option until the . Cash paid for option $25.

I hereby appoint A. W. Sutherland my exclusive agent for the sale of the above described property until the said date at the above price and on above terms; and if sale is made by them I agree to allow them a commission of five per cent. on selling price.

I further will give with the above land two sets harness, two saddles, good (1) scraper, three grown hogs and five little ones, 50 chickens, one wagon, two plows, walking; one sleigh, one mower, one hay rake, full set of barn tools, set drag harrows, one grindstone, crowbar, two shovels, three axes, two spades, two hay racks, one wagon box, one steer called Foster, three years; two steers with ring in nose, three years; one steer, one year, four one-year-old heifers, two one-year-old steers, three two-year-old steers, 12 four-year-old cows, eight calves, one bull, one grey gelding, four years; one grey mare, five years old; one bay mare, six years; one bay gelding, two years; one one-year bay filly, one black pony.

(Signed) D. RHINHART. (L.S.)
G. C. RHINHART. (L.S.)

It appears that these agreements, which I shall refer to as agreements A and B respectively, were executed by the defendants at the same time, and left with the plaintiff; and it is by virtue of them, and solely by virtue of them, that the plaintiff was justified in purchasing or finding a purchaser of the said land or any part thereof. At the time of the execution of these documents, the plaintiff says he paid the defendants $25 "to bind the bargain."

The plaintiff in his evidence sets up that he within thirty days of the execution of the agreements found a purchaser, William G. Lamb, who was prepared to buy the half section on the terms set out in agreement A, that he took Lamb out to see the place; that he had a document which he describes as a bill of sale ready for the defendants to sign, and that he requested the defendants to sign same, stating that the cash payment, $2,500, was in the bank. He says that the defendants refused to sign the document, giving as their reason that the wife of Daniel Rhinhart had an interest in the stock and that she would not part with it. The plaintiff did not tender any money, nor did he pretend to have any money with him, but according to his

version the money was ready in the bank and he so informed the defendants.

Daniel Rhinhart's version of what took place is that he told the plaintiff he would sign the document if they had the money, and that his wife, in a letter written from Lethbridge to him, instructed him not to turn over the property till he got the money. The trial Judge did not make any finding as to which of these versions was correct, and in my view of the case it is not necessary that this Court should do so. No contract for the half section was entered into, but the evidence shews that subsequently (there is nothing to shew just when) Lamb purchased the north-west quarter of section 12 from George C. Rhinhart.

Assuming the plaintiff's version of what took place to be correct, I do not see how he can recover in this action. As I have already indicated, he has based his claim on agreement A and work done in pursuance thereof. Now agreement A, as I understand it, is an option to the plaintiff, or at most an option to the plaintiff, or anyone else whom he might find, to purchase the property within thirty days on the terms mentioned therein, and this must have been the way the plaintiff understood it, because, as he says himself, he paid $25 to bind the bargain. If it were a mere listing, why should he pay $25, and, as he says, "to bind the bargain"? It is not contemplated by that document that in the event of the plaintiff taking up the option or finding a party ready to take up the option, that the defendants shall pay to the plaintiff a commission therefor, either on a *quantum meruit* basis or otherwise. In the event of the plaintiff taking up the option himself he would get the land, and if he turned his option over to some one else he would be expected to look to that party for his remuneration.

An attempt was made on the part of counsel for the plaintiff to treat agreements A and B as one and the same document. To me they appear quite distinct. Agreement A includes both quarter sections, and settles the terms on which the two quarter sections are offered for sale together. Agreement B, on the other hand, deals solely with the one quarter section. It is the land contained in this latter agreement that Lamb subsequently bought, and had the plaintiff based his action on this agreement, it is just possible that he would have been entitled to a commission as being the *causa causans* of this sale to Lamb. I, however, express no opinion on that point, as it is not necessary to do so for the disposition of this case. For the reasons given I am of opinion that the appeal should be dismissed and with costs.

Appeal dismissed.

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D. C.
1912

Mar. 15.

ABREY v. VICTORIA PRINTING CO.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Middleton, JJ. March 15, 1912.

1. FRAUD AND DECEIT (§ VIII—35)—STOCKHOLDERS' RIGHT OF ACTION—LIABILITY OF CORPORATION AND ITS OFFICERS FOR MISREPRESENTATION.

An executed contract will not be set aside merely on the ground of misrepresentation not amounting to fraud.

[*Angel* v. *Jay*, [1911] 1 K.B. 666, followed.]

APPEAL by the defendant company from the judgment of Mulock, C.J.Ex.D., in favour of the plaintiff as against the defendant company, in an action for rescission of the plaintiff's subscription for shares in the defendant company and for damages against the individual defendants.

The appeal was allowed without costs.

S. H. Bradford, K.C., for the defendant company.

J. Jennings, for the plaintiff.

The judgment of the Court was delivered by MIDDLETON, J.:—The action was brought against the company for the purpose of rescinding a subscription for stock and to recover back the $2,000 paid therefor, and as against the individual defendants for damages for misrepresentations; the misrepresentations charged being certain statements which induced the subscription for the stock in question.

At the trial, the action was dismissed as against the individual defendants, because the representations were not made fraudulently, but innocently. The learned trial Judge, however, set aside the subscription for stock and ordered a refund of the $2,000 by the company; holding that the plaintiff was entitled to this relief because the representations, although innocently made, were material.

With this we cannot agree. It is now settled by a series of cases—of which *Angel* v. *Jay*, [1911] 1 K.B. 666, is the latest—that "misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a Court of law; or, as Lord Selborne stated it, 'unless there is a fraud or misrepresentation amounting to fraud.'"

Mr. Jennings attempted to support the judgment by inviting us to consider the evidence and upon it to find that there was in this case a fraudulent misrepresentation. We have read the evidence with care, and think the case comes perilously near to the line; but we cannot see our way clear to interfere with the finding of the learned trial Judge.

The appeal must, therefore, be allowed; but we think that the reasons which induced the trial Judge to deprive the individual defendants of costs justify us in depriving the company of the costs of either the action or appeal.

Appeal allowed.

MIDDLETON et al. v. BLACK.

MAN.

K. B.

1912

May 3.

Manitoba King's Bench, Macdonald, J. May 3, 1912.

1. SALE (§ II B—30)—WARRANTY — DESCRIPTION — ADVERTISEMENT — GUARANTEE.

Where a motor car company advertised a car for sale "that never goes lame, backed by a five years' guarantee"; and the sale is made under an agreement to supply a written guarantee, but without any definition of the scope of guarantee in the agreement of sale, the presumption is that the warranty is to be in accordance with the advertisement.

2. SALE (§ III A—57)—BREACH OF WARRANTY—CONFLICTING EVIDENCE AS TO EFFICIENCY OF ARTICLE SOLD—ONUS OF PROVING BREACH.

In an action by the buyer for breach of warranty on the sale of a motor car, where the evidence as to the efficiency of the car is conflicting, the Court will not *sua sponte*, appoint an expert to determine and report upon the efficiency of the car, even where the seller will not assist in proving the actual condition of the car; the onus being upon the buyer to establish the breach complained of.

ACTION to rescind a contract of purchase of a motor truck and for cancellation of a promissory note given by defendants who also claimed damages, and in the alternative damages for breach of warranty.

The action was dismissed.

Messrs W. M. Crichton and *E. A. Cohen*, for plaintiffs.

Messrs. R. M. Dennistoun, K.C., and *J. W. E. Armstrong*, for defendants.

MACDONALD, J.:—The defendant advertised through the medium of the local press of the city of Winnipeg a motor truck described as "Van Dyke Light Delivery," a motor wagon that never goes lame, backed up by a five years' guarantee, and the plaintiffs, contemplating engaging in a business as express and baggage transfer agents, were attracted by the advertisement mentioned, resulting in the purchase of a motor truck for the purposes of such business.

The plaintiffs on the 28th of March, 1911, signed an order (Ex. 1), which was addressed to the defendant as "Western distributors of motor delivery trucks," requesting him to ship to them immediately, *via* Windsor, the motor truck in question for which they agreed to pay $1,325.

The truck was duly received by the plaintiffs and a payment of three hundred dollars made on account and a note for $1,025 given by the plaintiffs, payable to the defendant on the 19th day of July, 1911, with interest.

Defendant's chauffeur, Kennedy, received the truck with the plaintiff Betts; the latter had not had any experience or knowledge of a motor car and this was his first experience; they had difficulty in starting, and concluded the batteries were defective; new batteries were procured and the truck was started

MAN.

K. B.
1912

MIDDLETON
v.
BLACK.

Macdonald, J.

and ran to Elmwood, where they met the plaintiff Middleton, and the note for the balance of the purchase price was then given.

On the third day the truck gave fair satisfaction; the plaintiff Betts says, "It ran fairly good," but from then on they had a great deal of trouble with it and frequently had to call for the assistance of the defendant's expert in handling it. The plaintiffs ran it off and on for two months and during that time earned about two hundred dollars with it; they complained several times to the defendant that it was not satisfactory, and at the end of the two months they concluded that it was not as represented and decided to abandon it, and they bring this action seeking to rescind the contract of purchase and for a return of the three hundred dollars paid by them and a cancellation of the promissory note given by them, and also claiming damages, and in the alternative damages for breach of warranty.

I find that the defendant agreed to procure a written warranty from the manufacturers which was not secured and what the warranty is or would be does not appear. It can be assumed, however, that the warranty would be in accord with the advertisement referred to (Ex. 7): "A motor wagon that never goes lame, backed by a five years' guarantee." This guarantee, however, I find was intended only when the defendant himself took care of the truck, that is, that it was to be left in his garage after the day's work was over and cleaned, oiled and otherwise cared for by his or his employees' directions and at a fixed compensation. This guarantee the plaintiffs did not intend to and did not take advantage of.

It is advertised as "efficient, economical and durable, simple to operate and does not require a skilled mechanic." If there was only the evidence of the plaintiffs I would have no difficulty in finding a breach of this warranty, entitling them to relief, but the evidence of the defence makes it impossible for me to conclude that the fault was in the truck alone.

The defence maintains that the truck is everything that it was represented to be and that the fault lies with the plaintiffs in their mismanagement and carelessness in handling it.

It is possible the truck is defective and that there is something materially defective in its construction and it is possible that such is not the case and that the fault is in the handling of it by the plaintiffs.

In the condition in which it is in it would be useless to act on the suggestion of the plaintiff's counsel and appoint an expert to examine and report in order that a conclusion could be arrived at, as to make a proper test would necessitate an expenditure of a sum of money estimated by the defendant at about fifty dollars, and as the defendant will not further assist

in establishing the reputation of the manufacturers or in support of his own warranty, although strongly protesting that the truck is everything it is represented to be, I feel obliged, somewhat reluctantly, to grant a non-suit with costs, leaving it open to the plaintiffs should they see fit to further test the efficiency of the truck, to bring another action for breach of warranty should their contention be further and satisfactorily supported.

There will be judgment for the defendant on his counterclaim for the sum of $1,025 with interest at seven per cent. per annum from the date of the note until maturity and five per cent. from maturity to judgment; costs to the defendant.

Nonsuit on plaintiff's claim; Judgment for defendant on counterclaim.

THOMAS v. McNAUGHTON.

Manitoba King's Bench. Trial before Robson, J. May 8, 1912.

1. JUDGMENT (§ II B—72)—DEFAULT AGAINST ONE PARTNER—EFFECT OF AS AGAINST OTHER PARTNERS.

Signing a default judgment against one of three members of a partnership does not prevent recovery against the others.

[*Castle* v. *Baird*, 15 O.W.R. 273, followed.]

2. PARTNERSHIP (§ VI—26)—TWO MEMBERS DISSOLVING—NECESSITY OF NOTICE TO OTHER PARTNER.

Two members of a partnership may not dissolve the partnership without notice to the third member, even by the one buying out the other's interest.

AN action to recover balance due upon a promissory note. Judgment was given for the plaintiff.

J. B. Hugg, for plaintiff.

Messrs. *A. B. McAllister*, and *J. F. Davidson*, for defendants.

ROBSON, J.:—Plaintiff sues the three defendants McNaughton, Gowler and Edwards, to recover the balance due upon a promissory note for $1,000 made by the McNaughton Dairy Company, of which it is alleged defendants were the members. The note bears date 6th November, 1909. It was payable three months after date. At a period prior to the date of the note, the three defendants had, as partners at will, carried on business in the firm name above stated. The money was borrowed from plaintiff by defendant Edwards for the firm. He signed the note sued on in the firm name. The business consisted of two branches, one being dealing in fruit and produce and the other cheese manufacturing. The latter was in charge of the defendant Edwards. For the purposes of the business he borrowed $1,000 from plaintiff. The money actually went into the business. I have no doubt of Edwards' authority to borrow for the purposes of the firm and give a promissory note so

MAN.

K. B.
1912

THOMAS
v.
MCNAUGHTON.

Robson, J.

as to bind the then members of the firm. The partnership having received and used the money would be liable as for money had and received: see *Reid* v. *Rigby*, [1894] 2 Q.B. 40.

McNaughton was certainly a member of the firm at the time of the transaction. I do not see any way by which he can escape liability. The main dispute is as to the defendant Gowler. His defence is that he retired from the partnership in April, 1909, being six months before the note was made. It seems that McNaughton bought Gowler's interest in the business about this time. Edwards never learned of the completion of any such transaction. He was not a party to it.

It would appear that at all events since the Partnership Act, the assignment by one partner of his share does not *per se* operate as a dissolution: Lindley on Partnership, 7th ed., 621. McNaughton and Gowler could not dissolve the partnership without notice to Edwards: *VanSandau* v. *Moore*, 1 Russ. 441, at 464; *Wheeler* v. *Van Wart*, 9 Sim. 193. See Partnership Act, sec. 35.

Even if there were a dissolution matters went on ostensibly as before. There was no record or publication made of the fact of a dissolution. Plaintiff had known that McNaughton, Gowler, and Edwards formed the business. He had no reason to suppose there had been a change. Gowler stated in evidence that he informed the persons with whom the firm dealt of the change. He said, he also informed plaintiff of the fact. This plaintiff denies, and I accept the denial. It would not be at all likely that he would give notice of it, or even mention the subject to a stranger with whom he had had no business dealings, nor for aught then in contemplation was ever likely to have any.

Judgment has been signed by default against defendant Edwards. This does not prevent recovery against the others, it not being a case of election: *Castle* v. *Baird*, 15 O.W.R. 273; 1 O.W.N. 527.

There will be judgment for plaintiff against defendants McNaughton and Gowler for $900, the balance due on the note, and interest according to its tenor, with costs of suit including costs of examination for discovery of defendant Gowler, but not that of defendant McNaughton.

Judgment for plaintiff.

SMITH v. ERNST et al.
(Decision No. 2).

MAN.
K. B.
1912
April 10.

Manitoba King's Bench. Trial before Mathers, C.J. April 10, 1912.

1. SPECIFIC PERFORMANCE (§ II—42)—ENFORCEMENT AGAINST VENDOR WHERE TITLE INCOMPLETE—DAMAGES.

In an action to enforce specific performance of a contract for the sale of land which stipulated that the purchaser upon completing payment should have a Torrens title to the land, the Court has the power to decree a conveyance in respect of such title as the defendant has and also to award damages for breach of the agreement to give a Torrens title, even though the land is not within its jurisdiction and though the defendant did not own the land at the time the contract was entered into, if he took over the vendor's rights in the agreement and received the greater part of the purchase money with full knowledge that the plaintiff's contract with the owner called for a Torrens title.

ACTION for the specific performance of a contract for the sale of land, or for a return of the money paid and damages. The action was discontinued as against Ernst. Judgment was given for plaintiff against the defendant Just.

A decision upon an interlocutory application in the same case, *Smith* v. *Ernst* (No. 1), 1 D.L.R. 547.

W. H. Trueman, for plaintiff.

Messrs. *E. T. Leech* and *F. J. Sutton*, for defendant Just.

MATHERS, C.J.K.B.:—On the 6th September, 1907, the plaintiff entered into an agreement with the defendant Ernst to purchase from him two lots in the city of Port Arthur in the Province of Ontario, for the purchase price of $130, payable $10 in cash and $4 per month until the whole amount was paid. The defendant Just negotiated the sale on behalf of Ernst, who did not personally appear in the transaction at all.

In negotiating the agreement the plaintiff stipulated with Just that he should be given a Torrens title to the land. When the first agreement was tendered by Just to the plaintiff for execution by him it did not contain this stipulation and the plaintiff refused to execute it. The defendant Just made the necessary change and it was then executed by the plaintiff.

The cash and all subsequent payments were made to the defendant Just, who gave receipts therefor in the name of the Canadian German Realty Company per himself.

In May, 1908, after the plaintiff had paid the cash payment of $10 and eight of the monthly payments of $4 each, the defendant Just took a conveyance of the land in question with a quantity of other lands from the defendant Ernst, subject to the plaintiff's agreement. At that time Ernst had not a Torrens title to the land and of course did not convey by such title to the defendant Just.

The plaintiff continued to pay his monthly payments to the defendant Just as he had previously done, and received receipts

MAN.
K. B.
1912
SMITH
v.
ERNST.
Mathers, C.J.

in the same form; but thereafter the Canadian German Realty Company received the moneys as agent for the defendant Just.

In December, 1909, the defendant Just told the plaintiff that he had taken over the land and asked him if he would accept an Old System title. The plaintiff declined to do so, and Just replied that he had a good mind not to receive the payment unless he consented to take an Old System title, but the plaintiff still refused, and Just then accepted the payment.

After the plaintiff had paid up all the payments and demanded the title which his agreement called for, the defendant Just refused to give him a Torrens title, but offered an Old System title, which the plaintiff refused. Some negotiations then took place between them, which resulted in Just verbally agreeing to pay the plaintiff $250 for a release of his claim upon the land. The plaintiff verbally agreed to accept this amount in full discharge of his claim; but after repeated promises to carry it out Just refused to do so on the ground that he was not bound. The plaintiff then brought this action for specific performance, or for a return of the money and damages.

The fact that the land is out of the jurisdiction is no reason why specific performance should not be ordered as against the defendant Just, where the parties are within the jurisdiction: Dart, V. & P. 1023; and it may be enforced against a purchaser of the land who takes with notice of the agreement: Dart, V. & P. 7th ed., 1030.

In this case, not only had Just notice of the agreement, which was in fact negotiated by himself, but after taking over the land, subject to the agreement, he received from the purchaser the greater part of the purchase money, with a full knowledge that the agreement contained a stipulation that the plaintiff should get a Torrens title. More than that, he accepted an instalment of purchase money when he knew that the plaintiff would accept no other title from him. Under the circumstances, I have no doubt about the Court's power to grant the plaintiff relief as against the defendant Just.

The defendant's counsel contended that the Court had no jurisdiction, and cited the case of *Norris* v. *Chambres*, 3 DeG. F. & J. 583; *Whitaker* v. *Forbes*, L.R. 10 C.P. 583; *Henderson* v. *Bank of Hamilton*, 23 Can. S.C.R. 716, and *Deschamps* v. *Miller*, [1908] 1 Ch. 856. I have read all these cases, but they decide only that the Court has no jurisdiction to enforce a lien or charge upon land out of the jurisdiction, unless there is privity of contract, express or implied, between the parties, or unless there exist between them personal equities, fiduciary relation, fraud or unconscionable conduct.

The Court is not asked, in this case, to deal with the land, but merely to compel the defendant Just, by a judgment *in personam* to carry out an agreement upon the faith of which the plaintiff

paid, and Just received, the consideration moving from the plaintiff.

The Court cannot possibly compel Just to apply for and obtain a Torrens title for the purpose of conveying the land by such title to the plaintiff, but it can compel a conveyance by such title as the defendant has, plus damages for breach of agreement to give a Torrens title: Fry, Sp. Per. par. 1309.

There will be judgment for the plaintiff for specific performance of the contract. There will be a reference to the Master to ascertain the cost of obtaining a Torrens title to the land if the parties cannot agree upon the amount, and the plaintiff will have judgment against the defendant Just for the amount so found or agreed upon as damages, together with the costs of this action and of such reference.

Any amendments to the statement of claim necessary to give the plaintiff this relief may be made.

Further directions may be reserved if necessary.

Judgment for plaintiff.

Annotation—Courts (§ I B 3—32)—Specific performance—Jurisdiction over contract for land in another jurisdiction.

Annotation.

Specific performance —Land in another jurisdiction

It is a well established principle of law that a court of equity, if it has jurisdiction of the persons of the parties, may, by decree *in personam*, direct a specific performance of a contract for the sale of land situate beyond the limits of its jurisdiction. "A court of equity operates primarily *in personam* and not *in rem;* and in the exercise of its jurisdiction *in personam* it will compel a performance of contracts and trusts relating to property which is not locally in the jurisdiction": 13 Halsbury's Laws of England, sec. 75. See also Leake, on Contracts, 6th ed., 830, and Fry's Specific Performance, 5th ed., 58.

In *Montgomery* v. *Ruppensburg*, 31 Ont. R. 433, the court decreed specific performance of an agreement in writing by which the plaintiff, a non-resident, was to exchange certain land in the United States for land belonging to the defendant in Ontario.

And this rule finds support also in *Guan* v. *Harper*, 30 Ont. R. 650, affirmed 2 O.L.R. 611, which was an action to have declared that a conveyance of lands lying out of Ontario by the plaintiff to one of the defendants absolute in form was in equity a mortgage, though relief was refused because the grantee in the deed made an absolute conveyance of the lands to the other defendants and the Court had no power to declare the other defendants constructive trustees of foreign lands. Chief Justice Meredith was of the opinion that if the application had been against the original grantee alone, the relief asked for would have been warranted if the plaintiff were otherwise entitled thereto. He then went on to say: "The granting of relief in such cases is an exception to the general rule that the Courts of this Province have no jurisdiction to entertain an action for the determination of the title to, or the right of possession of, any immovables situate out of Ontario, and proceeds upon the principle that Courts of equity are, and always have been, Courts of conscience, operating *in personam* and not *in rem*, and in the exercise of their personal jurisdiction

MAN.

Annotation.

Specific performance —Land in another jurisdiction

Annotation (*continued*)—**Courts (§ I B 3—32)—Specific performance—Jurisdiction over contract for land in another jurisdiction.**

have always been accustomed to compel the performance of contracts and trusts as to subjects which are not either locally or *ratione domicilii* within their jurisdiction: Dicey, on Conflict of Laws, Rule 39, pp. 214, 218."

In *Penn* v. *Baltimore*, 1 Ves. Sen. 443, the Court granted specific performance of articles drawn up between the proprietors of the provinces of Pennsylvania and Maryland for the purpose of settling boundary disputes between them. Here, however, no objection was made to the jurisdiction of the court because of the location of the lands; it was contended only that being a question as to boundaries of Provinces it should be heard by the King and Council.

In *Arglasse* v. *Muschamp*, 1 Vern. 75, which was an action for relief against fraudulent conveyances of land in Ireland, the Lord Chancellor, in reply to the contention that the Court had no jurisdiction because of the location of the land, used the following language: "This is surely only a jest put upon the jurisdiction of this Court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you that the authority of this Court is only to regulate a man's conscience, and ought not to affect the estate, but that this Court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local; and so would wholly elude the jurisdiction of this Court. But certainly they forget the case of Archer and Preston, 1 Eq. Ca. Ab. 133, pl. 3, in which case, if in any, the jurisdiction was local, the matter there being not only for land that lay in Ireland, but of a title under the Act of Settlement there; yet the defendant coming into England, a bill was exhibited against him here, and a *ne exeat regno* granted, and he put to answer a contract made for those lands; and when he departed into Ireland without answering, he was sent for over by a special order from the King, and made to answer the contempt, and to abide the justice of this Court."

And the rule here discussed finds almost unanimous support in the American cases: *Montgomery* v. *United States*, 36 Fed. 4; *Western Union Telegraph Co.* v. *Pittsburgh C. C. & St. L. R. Co.*, 137 Fed. 435; *Wilhite* v. *Skelton*, 78 C. C. A. 635, 149 Fed. 67, reversing 5 Ind. Terr. 621; *Smith* v. *Daris*, 90 Cal. 25, 25 Am. St. Rep. 92; *Griffith* v. *Stewart*, 31 App. D. C. 29; *Winn* v. *Strickland*, 34 Fla. 610; *Cloud* v. *Greasley*, 125 Ill. 313; *Garden City Sand Co.* v. *Miller*, 157 Ill. 225; *Bethel* v. *Bethel*, 92 Ind. 318; *Rea* v. *Ferguson* 126 Iowa 704; *Robinson Mineral Spring Co.* v. *De Bautte*, 50 La. Ann. 1281; *Pingree* v. *Coffin*, 12 Gray (Mass.) 288; *Lindley* v. *O'Reilly*, 50 N.J. Law 636, 1 L.R.A. 79, 7 Am. St. Rep. 802; *Davis* v. *Headley*, 22 N.J. Equity 115; *Shattrick* v. *Cassidy*, 3 Edw. Ch. (N.Y.) 152; *Ward* v. *Arredondo*, Hopk. Ch. (H.Y.) 213; *Mead* v. *Merritt*, 2 Paige Ch. (N.Y.) 402; *Mitchell* v. *Bunch*, 2 Paige Ch. (N.Y.) 606; *Cleveland* v. *Burrill*, 25 Barb. (N.Y.) 532; *Myers* v. *De Mier*, 4 Daly (N.Y.) 343; *Baldwin* v. *Talmadge*, 39 N.Y. Super. Ct. 400; *Orr* v. *Irwin*, 4 N.C. 351, 2 Law Repository 465; *Burnley* v. *Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621; *Beidler* v. *Miller*, 1 Woodward Decisions (Pa.) 222; *Conover* v. *Wright*, 9 Pa. Dist. R. 688; *Gavin* v. *Jennings*, 1 Lackawanna Jurist (Pa.) 55; *Morris* v. *Hand*, 70 Tex. 481.

Annotation (*continued*)—Courts (§ I B 3—32)—Specific performance—Jurisdiction over contract for land in another jurisdiction.

A suit for specific performance of a contract for the conveyance of land proceeds *in personam*, and may be maintained in any Court of equity which has jurisdiction of the parties, even if the land lies in another state or a foreign country: *Brown* v. *Desmond*, 100 Mass. 267.

The decrees of Courts of equity do, indeed, primarily and properly act *in personam* and, at most, collaterally only *in rem*. Hence, the specific performance of a contract for the sale of lands lying in a foreign country will be decreed in equity, whenever the party is resident within the jurisdiction of the Court: *Olney* v. *Eaton*, 66 Mo. 563.

The fact that the land which is the subject of the suit is beyond the jurisdiction of the Court, and situate in another State, constitutes no reason why relief should be refused, if in other respects the complainants have made a case which entitles them to a decree, for the principle is firmly established that it is not necessary to have jurisdiction in such cases that the land, which is the subject of the suit, should be located within the territory over which the Court, in which suit is brought, may rightfully exercise its power. All that is necessary in such cases to enable the Court to exert its power is, that it shall have jurisdiction of the parties, for in all suits in equity the primary decree is *in personam* and not *in rem*: *Potter* v. *Hollister*, 45 N.J. Eq. 508.

It is perfectly well settled that this Court has jurisdiction to decree the specific performance of a contract for the sale of lands in another State, where the person of the defendant is within the reach of its process: *Sutphen* v. *Fowler*, 9 Paige (N.Y.) 280.

This Court, having jurisdiction of the person of the defendant, will by its process of injunction and attachment compel him to do justice by the execution of such conveyances and assurances as will affect the title of the property in the jurisdiction within which it is situated: *Newton* v. *Bronson*, 13 N.Y. 587, 67 A.D. 89.

In an Ohio case the court said:—"The proposition that a Court exercising chancery powers in one State, can compel specific performance of agreements to convey lands, after it has acquired complete jurisdiction over the person of the party bound by the agreement, is too well settled by numerous decisions in England and in this country, to be now disputed": *Penn* v. *Hayward*, 14 Ohio St. 302. Here, however, the Court refused to entertain such a suit because all the persons whose signatures were necessary to the conveyance had not been personally served within the State.

In *Macon Episcopal Church* v. *Wiley*, 2 Hill Eq. (S.C.) 584, 30 Am. Dec. 386, it was declared in reply to the contention that the Court had no jurisdiction over lands in another State, that if the thing required to be done was that which the defendant could do in the State in which he was sued, and there was the obligation of law upon him to do it, the authorities left no doubt that the Court, acting on the person and not *in rem*, was not only competent but bound to make him fulfil his obligations.

It is certainly true that a Court of equity may entertain a bill for the specific performance of a contract respecting land situate in a foreign country, if the parties are resident within the territorial jurisdiction of the Court. In such case, although the Court cannot bind the land itself by the decree, it can bind the conscience of the party in regard to the land, and enforce him, by process against his person, to perform his agreement, but

MAN.

Annotation

Specific performance —Land in another jurisdiction

MAN.

Annotation

Specific performance —Land in another jurisdiction

Annotation (*continued*)—Courts (§ I B 3—32)—Specific performance—Jurisdiction over contract for land in another jurisdiction.

the decree is merely *in personam* and not *in rem*. Still, the want of power to act upon the land, or to enforce the decree *in rem*, is no objection to the jurisdiction to act upon the person, and in that mode compel an execution of the contract according to equity and good conscience: *Johnson* v. *Kimbo*, 3 Head (Tenn.) 557, 75 Am. Dec. 781.

One American case has sought to make a distinction in the application of this rule, depending upon whether the party suing is the vendor and vendee in the contract giving rise to the suit, but no such distinction seems to be made in any other case. "It is not necessary, in an action by the vendor for specific performance, that the land, the subject matter of the contract sought to be enforced, be within the jurisdiction of the Court, though the rule is different where the vendee seeks performance by decree of Court. In such a case the Court cannot decree a transfer of the title of land beyond its jurisdiction; but where the vendor brings the action, the whereabouts of the land is immaterial. The action is personal and operated upon the person of defendant. The Court requires a delivery to him of a solid conveyance of the land, and decrees that he thereupon pay the purchase price": *O. W. Kerr* v. *Nygren*, 114 Minn. 268.

MAILLET et vir v. FONTAINE.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. March 15, 1912.

QUE.

K. B. 1912

Mar. 15.

1. COSTS (§ I—9*a*)—SEQUESTRATOR—IMMOVEABLES—TWO CLAIMANTS—JOINT AND SEVERAL RECOURSE.

A person appointed by the Court as sequestrator to an immoveable concerning the ownership of which two or more parties are litigating has a joint and several recourse for the costs of his administration against all the parties to the said litigation.

2. COSTS (§ II—20)—SEQUESTRATOR'S COSTS NOT PRIVILEGED—LIABILITY OF PURCHASER OF IMMOVEABLE.

A sequestrator's costs of administration, however, are not privileged law costs within the meaning of C.C. 2009 and cannot be recovered hypothecarily from a third party who buys the immoveable from the person declared to be the true owner by the Court.

3. COSTS (§ II—20)—PREFERRED COSTS—PROCEEDINGS ON BEHALF OF THE CREDITORS GENERALLY.

There is a preference or privilege only for those law costs or expenses incurred for the seizure and sale of the property of a common debtor and those of judicial proceedings for enabling creditors generally to obtain payment of their claims.

4. COSTS (§ II—20)—PROCEEDINGS ON BEHALF OF ONLY ONE CREDITOR.

Where expenses or costs are incurred for the benefit of one creditor alone and not for the creditors generally, there can be no privileged claim therefor.

THE judgment of the Superior Court, Laurendeau, J., was rendered at Montreal on October 11th, 1910, maintaining plaintiff's action for his bill of costs of $627.40 as administrator of an immoveable sequestered in his hands by the Court. Defendants R. J. Demers and Louis Demers were condemned jointly and severally (the latter by default) as personally indebted to

plaintiff, and Dame A. Maillet was ordered to surrender this property unless she preferred to pay the amount claimed (*i.e.*, hypothecary condemnation).

R. J. Demers and the female defendant inscribed in appeal from this judgment.

The appeal of R. J. Demers was dismissed; that of the female defendant allowed.

G. Désaulniers, K.C., for appellants:—To maintain plaintiff's action the Superior Court had to adopt two legal heresies: Firstly, that plaintiff's account should be assimilated to law costs; and secondly, to declare this account executory against third parties without registration. Appellant submits four propositions. No text of law establishes a special privilege on immoveables in favour of a sequestrator except the Railway Act, not applicable here; C.C. 1825, C.P. 626, 627; *Bédard* v. *Lusignan*, Torrance, J., 3 L.N. 86; *Monette* v. *D'Amour*, Mathieu, J., 12 R.L. 418, *Durocher* v. *Sarault*, Johnson, J., confirmed in Review, 7 L.N. 96, 102; Pothier, Dépôt, Nos. 92, 96. The account of the sequestrator is not exempted from the formalities of registration, for, if it were, a special law would be required and none such exists. The costs of a sequestrator are not privileged law costs: C.C. 1995, 1996, 2009 C.C. And finally in order to hold as against third parties privileged law costs as any other privilege must be registered: C.C. 2056, 9 Colmet de Santerre, Nos. 147, bis. 14; 31 Laurent, No. 242; Beaudry-Lacantinerie and de Loynes, No. 809; *Bérubé* v. *Morneau*, 14 Q.L.R. 90.

Messrs. *Aimé Geoffrion*, K.C., and *J. A. Labelle*, K.C., for respondent:—A sequestrator is entitled to be paid from all the parties interested in the immoveable administered: *Bédard* v. *Owens*, 8 Que. P.R. 81; Guillouard, Dépôt and Séquestre, Nos. 182, 183, 184 and 185. His claim is a *jus in re* and registration of such law costs is not necessary being exempted therefrom by C.C. 2084. It follows that the claim follows the property into whatever hands it may fall without registration and that the hypothecary action must lie. Sequestrator's costs are law costs: 1 Guillouard, Privil. and Hyp., Nos. 184 and 186; 1 Pont, Privil. and Hyp., Nos. 66, 67 and 68; 1 Troplong, Privil. and Hyp., Nos. 120 and 121; 1 Beaudry-Lacantinerie, Privil. and Hyp., No. 311; Fuzier-Herman, art. 2101, Nos. 24, 26, 28. And in any event female appellant knew of the sequestration seeing the registration of the judgment appointing the sequestrator.

Désaulniers, in reply.

March 15, 1912. The unanimous judgment of the Court was delivered by

ARCHAMBEAULT, C.J.:—The judgment appealed from declared an immoveable belonging to appellant affected by privilege for the payment of a sum of $627.40 due respondent.

QUE.
K. B.
1912
MAILLET
v.
FONTAINE.
Archambeault, C.J.

Respondent was named sequestrator to this immoveable on June 24th, 1907, in a lawsuit between two brothers, Rodolphe Demers and Louis Demers, who both laid claim to the ownership thereof.

This judgment of June 24th, was registered on November 9th following (1907).

On December 16th, Rodolphe Demers was declared, by final judgment in that case, the true proprietor of this immoveable.

Subsequently, on March 27th, 1908, Rodolphe Demers sold this property to his brother-in-law, Dr. Lanoie, and he, in turn, re-sold it to female appellant, the wife of Randolphe Demers, on April 1st.

The validity of these transactions has not been questioned in the present case, which involves only the costs of administration of the sequestrator.

Respondent, in his action, claims these costs jointly and severally against Rodolphe and Louis Demers and hypothecarily as against Mrs. Rodolphe Demers.

The Court below has accepted and approved of this claim, and appellants, Rodolphe Demers and his wife, seek the reversal of this judgment.

I shall first of all examine the grounds of appeal of Rodolphe Demers, and after that those of Mrs. Demers.

Appellant argues that the appointment of respondent as sequestrator was made at the request of Louis Demers; that he objected to this nomination and never accepted respondent as sequestrator, and that he even prayed for his destitution; that respondent never performed any act of administration; that he tried, on the other hand, to interfere with appellant's administration; and that not only did he, appellant, not benefit from the services of respondent, but that he was prejudiced by the useless costs incurred by him.

We are dealing here with judicial sequestration; with the third case foreseen by art. 1823 C.C.

Pothier says that when a sequestrator is appointed by judicial authority, a quasi-contract arises between the sequestrator and the litigating parties and creates between them the same obligations respectively as in the case of conventional sequestration.

And on the subject of conventional sequestration, Pothier teaches that each of the parties is jointly and severally responsible for the execution of their obligations to the sequestrator: (Du Dépôt, Nos. 89 and 91, par. 6).

Modern authors unanimously teach the same doctrine: Laurent, vol. 27, No. 182, speaks as follows on the subject:—

> Le dépositaire judiciaire n'est pas un simple dépositaire; il est chargé d'administrer les choses, d'ordinaire des immeubles, dont le séquestre lui est confié; et des immeubles ne sont pas l'objet d'une garde; ils sont l'objet d'une administration. Voilà pourquoi la loi ne

dit pas du séquestre judiciaire ce qu'elle dit du séquestre conventionnel, qu'il peut n'être pas gratuit; il n'est pas gratuit de sa nature; le dépositaire a droit à un salaire proportionné à la gestion dont il est chargé; et il a action, de ce chef, contre ceux dans l'intérêt desquels il administre, alors même qu'il tiendrait sa nomination du tribunal; dans tous les cas, il est mandataire, soit conventionnel, soit judiciaire. Il s'est même présenté un cas dans lequel le dépositaire avait été nommé par l'autorité administrative; il s'agissait d'un cheval dont aucune des parties litigantes n'entendait être propriétaire; le cheval, laissé à l'abandon, fut mis en fourrière par l'ordre du maire; la cour de cassation a jugé que le gardien avait le droit de réclamer les frais de fourrière contre les deux parties engagées dans le litige.

The fact that respondent was appointed sequestrator at the instance of Louis Demers and that appellant opposed the appointment of any sequestrator at all cannot deprive respondent of his joint and several recourse against both parties. Such facts cannot affect him. He has been appointed by the Court, and that is all that is necessary to allow him a recourse against both parties.

Appellant invokes the last paragraph of art. 1825 C.C., which states that the judicial sequestrator "is entitled to be paid by the party seizing, such compensation as is fixed by law or by the Court or the Judge, unless he has been prevented by the party on whom the seizure is made."

Appellant sees in this enactment the indication that the legislature intended to allow the judicial sequestrator a recourse only against the party who prayed for his appointment.

I cannot concur in any such interpretation. The case covered by the last paragraph of art. 1825 C.C. is not at all the case we are called upon to decide. In the present case we are dealing with an immoveable concerning the ownership of which two persons were in litigation.

Article 1825 covers the case of things seized at law, either before judgment or in execution of a judgment.

The two cases are, therefore, quite distinct and the disposition on which appellant relies does not and cannot deprive respondent of his joint recourse against both parties. He was appointed by judicial authority in the interest of both parties, who submitted to this judgment and allowed respondent to take possession of this immoveable and to administer the same. He is entitled to claim payment of his bill of costs from both parties.

I am, therefore, of opinion that the judgment of the Court below is well founded in so far as Rodolphe Demers is concerned.

Is it also well founded as regards Mrs. Demers?

I do not think so.

Female appellant is not respondent's personal debtor. She acquired the property without assuming the debt of appellant.

QUE.
K. B.
1912
MAILLET
v.
FONTAINE.
Archambeault, C.J.

The hypothecary action can be maintained against her only on condition that respondent's claim be a privileged claim.

And, as a matter of fact, respondent maintains that his claim is privileged. According to him we have to deal with privileged law costs.

Article 2009 C.C. mentions as the first of privileges upon immoveables law costs and the expenses incurred for the common interest of the creditors.

The first question to be decided then is as to whether or no the costs due respondent are privileged law costs or expenses incurred for the common interest of the creditors.

In France, as under our law, law costs rank as the first privileged claim. But the Code Napoleon contains no text of law defining law costs.

And, therefore, we find the authors asking themselves what is meant by this expression.

It is quite evident that law costs do not include all legal costs which may be due or payable by a debtor. The term must be understood and interpreted in the special sense required by the chapter on privileges.

Understood in this special sense, law costs are all those which the creditors must incur to realize their common pledge, namely, the property of their debtor. They are those costs necessary to or useful in bringing about the judicial sale of this property.

> On doit considérer comme frais de justice, say Aubry and Rau, tous les frais faits dans l'intérêt commun des créanciers, pour la conservation, la liquidation, la réalisation des biens du débiteur, et pour la distribution du prix en provenant."

See also 29 Laurent, No. 322.

Guillouard—Priv. & Hyp., No. 182, speaks as follows:—

> Les frais de justice doivent s'entendre, dans la matière des priviléges, de tous les frais faits pour la conservation, la liquidation, la réalisation et la distribution du patrimoine du débiteur; et rien n'est plus facile à justifier que le privilége donné à cette créance. Les frais qui ont été faits étaient des frais *nécessaires*, qui s'imposaient à tous les créanciers, et celui qui les a avancés a fait l'affaire de tous les autres; il est donc de toute équité que ces frais soient privilégiés.

At No. 183 he quotes Dénizart:—

> Les frais de vente, ceux qui sont faits pour y parvenir, et même ceux qui ont la distribution pour objet, sont toujours privilégiés et les premiers puis; parce que c'est par le moyen de ces frais que les privilégiés même parviennent à leur paiement.

25 Beaudry-Lacantinerie, No. 314, also indicates that such is their nature:—

> Il faut refuser le privilége de l'art. 2101-lo-aux frais faits par le débiteur pour défendre son patrimoine contre les réclamations des tiers ou pour l'augmenter. Si les frais profitent à ses créanciers en conservant ou en accroissant leur gage, ils ne rentrant pas dans la

catégorie des frais de justice, tels que nous les avons définis. Ils n'ont pas été faits en vue de la réalisation du gage commun, c'est-à-dire, au moment de la déconfiture du débiteur.

The Court of Douai sanctioned the same doctrine in 1847 in a case reported in the Journal du Palais, 47-2-61, and in very clear terms:—

Si le créancier dont les biens du débiteur sont le gage, dit l'arrêt, ont intérêt à l'issue de ces procès; parce que leur gage peut s'en trouver augmenté ou diminué, cet intérêt éloigné n'est pas celui que la loi a considéré quand elle a protégé la créance des frais de justice par le privilège si favorable de l'article 2101. L'application de cet article aux dépens des procès ordinaires soutenus par le débiteur, aurait pour effet de créer, au profit des avoués et autres officiers ministériels, un privilège occulte dont l'exercice, longtemps différé, pourrait être gravement préjudiciable aux tiers, créanciers ou autres, qui, dans l'intervalle, auraient traité avec le débiteur.

Répertoire de Carpentier, Vo. Priviléges, No. 28:—

Parmi les créances privilégiés sur les meubles, le législateur a placé en première ligne les frais de justice. Bien qu'il se soit exprimé d'une façon générale, il ne faut pas croire cependant qu'il ait voulu dire que tous les frais de justice seront privilégiés. Il a eu seulement en vue les frais qui sont exposés dans l'intérêt commun de les créanciers, pour conserver et réaliser le gage, et qui, par suite, doivent être payés avant toute autre créance sur le gage réalisé; ils doivent venir au premier rang, puisque sans eux aucun créancier ne pourrait être payé.

30 Laurent, No. 59, says:—

Si les frais de justice priment les créanciers dans l'intérêt desquels ils sont faits, c'est parce que les créanciers doivent faire ces frais pour réaliser leur créance, et, partant, leur privilège, s'ils sont privilégiés; il est de toute équité qu'ils payent ces frais avant d'être payés eux mêmes, puisque, sans ces frais, ils n'auraient pas obtenu leur payement. Cela s'applique à tous les privilèges, immobiliers ou mobiliers.

I could multiply these citations as all the authors express the same opinion.

Law costs, covered by the privilege allowed by the Code, are those incurred in the course of litigation, resulting in the realization of the common pledge of the creditors, that is to say, in the judicial sale of that pledge. Privileged law costs cannot possibly cover any costs outside of those incurred in bringing about this judicial sale, and the collocation of the price obtained therefrom.

Otherwise, why should law costs be privileged?

29 Laurent, No. 323:—

Maintenant on comprendra pourquoi et en quel sens les frais de justice sont privilégiés. Les termes dont les lois se servent pour marquer l'exercice du privilége des frais de justice sont très significatifs; ils sont déduits prélevés, distraits, sur les deniers qui composent l'actif. En réalité, le créancier des frais de justice ne con-

QUE.

K. B. 1912

MAILLET v. FONTAINE.

Archambeault, C.J.

court pas avec les autres créanciers, il n'est pas en conflit avec eux, ce sont les créanciers eux-mêmes qui payent les frais qu'ils ont dû faire pour conserver le gage commun, pour le vendre et pour s'en distribuer le prix; il est naturel que celui qui fait ces frais les paie; or, les frais de justice sont faits par les créanciers, quand même ils ne figurent pas tous dans les actes qui y donnent lieu.

This doctrine of the French authors was adopted by our codifiers and reproduced in art. 1995 C.C. as follows:—

"Law costs are all those incurred for the seizure and sale of the moveable property and those of judicial proceedings for enabling the creditors generally to obtain payment of their claims."

What the Code lays down here as regards moveables applies with equal force to immoveables.

Therefore, are law costs in this sense only those necessary to bring about the sale of the property of a debtor and the distribution of the moneys realized from such sale or those resulting therefrom?

Do the costs of administration payable to respondent fall within this category?

We are of opinion that they do not.

The costs were incurred in a lawsuit in which the Demers brothers were both laying claim to the ownership of an immoveable. The Court ruled that this immoveable belonged to one of the contending parties. And there never was any judicial seizure of the immoveable which has now passed into the hands of a third party.

So that these are not law costs according to the special meaning given to these by the Code when it declares them privileged.

I must say it once more: there are no privileged law costs outside of those incurred in judicial proceedings resulting in the sale by authority of justice of the common pledge of the creditors.

The Pandectes Francaises, Vo. Priviléges and Hypothèques, at No. 493, report a judgment of the Seine Tribunal in 1892, wherein it was held that when a creditor has waived further proceedings and has consented to a voluntary sale of the immoveable he has seized, the costs incurred by him not having benefited all the creditors, cannot rank as privileged.

I do not for one moment wish to be understood as saying that the costs of sequestration are never privileged law costs. Far from it, and I have found a large number of decisions, cited in the authors and the digests, holding that where such costs are incurred after the judicial seizure of an immoveable, or in the case of liquidation, and where the sequestrator has been appointed by consent of the creditors and in their interest, these costs are privileged. But I have not found a single case where a sequestrator was appointed, outside of a seizure or a sale by authority of justice, where the costs of the sequestrator were held to be privileged.

QUE.
K. B.
1912
MAILLET
v.
FONTAINE.
Archambeault, C.J.

I am, therefore, of opinion that the costs involved in the present case are not privileged law costs.

But are they expenses incurred for the common interest of the creditors? Paragraph 1 of art. 2009 C.C. allows these expenses to rank equally with law costs, and respondent quotes it in support of his claim that the costs of his administration as sequestrator are privileged.

I fail to see, in the present case, where we can find expenses incurred for the common interest.

The Code is evidently dealing with expenses incurred in the interest of all the creditors or of the creditors generally. And it is only natural and proper that in such case the creditor who has incurred this expense should have a preferred claim for such costs or expenses, which, having been made in the general interest, must rank before the other claims.

But here there are no creditors. Hence, how can there be any question of expenses incurred for the common interest of the creditors?

These costs may have been incurred in the interest of the person who was declared proprietor of the immoveable by final judgment of the Court. But they could not be incurred in the common interest of the creditors, as there are none.

Nor can respondent argue successfully that he preserved the common pledge, seeing that the immoveable he administered was transferred to a third person after his functions as sequestrator had ceased and seeing that this third person is supposed to have paid the value of the said immoveable at the time of its purchase.

One last question has to be disposed of. As already stated, respondent, on the 9th November, 1907, registered the judgment of June 24th, 1907, appointing him sequestrator.

Appellant acquired the immoveable on April 1st, 1908, subsequently therefore to the registration of such judgment.

After the immoveable had been purchased by appellant, respondent got his bill as sequestrator taxed in February, 1909, and on March 4th, 1909, had the same registered on the immoveable—nearly a year after it had passed into appellant's hands.

This last registration could not, of course, avail as against female appellant without prior registration of the judgment appointing respondent as sequestrator.

But did the registration of the judgment itself before the sale to female appellant constitute a mortgage or hypothec in favour of respondent?

I am of opinion that this registration could not confer any rights to respondent, as against third parties. Our law no longer recognizes an indeterminate hypothec. Judicial hypothec as well

QUE.
K. B.
1912
MAILLET
v.
FONTAINE.
Archambeault, C.J.

as conventional hypothec is not valid unless the sum for which it is granted is certain and determined.

There is no necessity for examining the interesting question raised by female appellant, that law costs have only a "*droit de suite*" by registration thereof. As we are of opinion that the costs due respondent are not privileged law costs, the solution of the other question becomes unnecessary.

I am of opinion that there is error in the judgment "*a quo*," as regards Mrs. Demers; that her appeal must be allowed and that of Rodolphe Demers dismissed, and this is the unanimous judgment of the Court.

Appeal of R. J. Demers dismissed; appeal of female appellant allowed with costs.

MALOUF v. LABAD.

ONT.
H. C. J.
1912
Mar. 5.

(Decision No. 1).

Ontario High Court, Kelly, J. March 5, 1912.

1. WRIT AND PROCESS (§ II B—28)—SEIZURE OF SHARES—CHANGE OF PLACE OF HEAD OFFICE—NOTICE BY SHERIFF—EXECUTION ACT (ONT.), 9 EDW. VII. CH. 47.

Where the directors of a company passed a resolution authorizing a transfer of its head office to another place and appointed a representative there to receive legal notice addressed to the company and went no further, failing to pass the by-law required by sec. 88, Ontario Corporation Act, and to comply with other requirements of that section, there was no place in the bailiwick of the sheriff of the district to which the head office was attempted to be moved at which service of process could be made under the Ontario Execution Act, 9 Edw. VII. ch. 47, providing that upon an execution being directed against the shares in a company owned by a debtor a notice that the shares are to be seized thereunder must be given by the sheriff if the company has within his bailiwick a place at which service of process could be made.

2. EXECUTION (§ II—15)—SEIZURE OF SHARES—NOTICE BY SHERIFF—SERVICE.

In the absence of the legal representative of a company appointed to receive legal notice addressed to the company from the bailiwick of a sheriff where the company had an office, the notice required to be served on the company that such of its shares as were owned by an execution debtor were to be seized on execution cannot be served on any other person unless he has been authorized to receive the same on behalf of the representative.

ACTION to set aside a sale made by the Sheriff of the District of Nipissing of 75,000 shares of the capital stock of the defendants the Gold Pyramid Mining Company of Larder Lake Limited, and other interests in that company owned by the plaintiff Malouf, under an execution in an action brought by the defendant Labad against him, and to cancel the entry of transfer thereof in the books of the company in favour of the defendants the Malouf Realty Company, and that the plaintiff Malouf, or

the plaintiffs McCrae and Kouri, be entered as owners of these shares and interests. There was judgment for the plaintiffs with costs against all the defendants but Varin.

G. A. McGaughey, for the plaintiffs.
A. G. Browning, K.C., for the defendant Varin.
G. R. Brady, for the other defendants.

KELLY, J. (after setting out the facts and detailing the proceedings taken):—It is declared by sec. 10 of the Execution Act, 9 Edw. VII. ch. 47, that "shares and dividends and any equitable or other right, property, interest, or equity of redemption in or in respect of shares or dividends in an . . . incorporated company having transferable shares, shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property."

Sub-section 1 of sec. 11 provides that "the Sheriff . . . shall forthwith serve a copy of the execution on the . . . company, with a notice that all the shares of the execution debtor are seized thereunder; and from the time of service the seizure shall be deemed to be made; and no transfer of shares by the execution debtor shall be valid unless and until the seizure has been discharged," etc.

Sub-section 2 of sec. 11 is, that "such seizure may be made and notice given by the Sheriff where the . . . company has within his bailiwick a place at which service of process may be made."

The Gold Pyramid Mining Company of Larder Lake Limited was incorporated by letters patent under the provisions of the Ontario Companies Act, 7 Edw. VII. ch. 34. Notwithstanding that the letters patent named Ottawa as the place of the company's head office, and that there is no evidence that authority was given, as required by sec. 44 of the Act, to hold meetings of directors or of shareholders outside of the province of Ontario, all the meetings of both directors and shareholders, down to the time of the trial, were held in Montreal; moreover, the books of the company were kept in Montreal, contrary to the requirements of sec. 114 of the Act.

The records of the company shew that on the 8th May, 1911, the directors passed a resolution authorising the transfer of the head office from Ottawa to Cobalt, and that, in Cobalt, Sol White, barrister, be appointed legal representative of the company to receive legal notice addressed to the company.

The words referring to the authority of Mr. White to receive legal notices were written in the margin of the company's minute-book some time after the minutes were written. The

ONT.
H. C. J.
1912
MALOUF
v.
LABAD.
Kelly, J.

secretary's explanation of this is, that his clerk omitted these words when writing the minutes.

It is quite clear to me that what the directors had in mind was formally to make the change of head office to Cobalt, and, as meetings would continue to be held in Montreal, where the chief officers of the company were (and the occurrences subsequent to the 8th May shew that this state of things continued), Mr. White, as the company's legal representative in Cobalt, would, on the change of the head office being made, in some way be associated with it. The company failed, however, to carry this into effect.

The by-law required by sec. 86 of the Ontario Companies Act, in changing the place of the head office, was not passed, nor were the other requirements of that section complied with; nor can I find that, under the circumstances, the company had established, or, if so established, that there was existing at the time of the seizure, a place within the bailiwick of the Sheriff of the District of Nipissing at which service of process could be made, as required by sub-sec. 2 of sec. 11 of the Execution Act.

Assuming even that the resolution of the 8th May was sufficient to constitute Mr. White a proper person on whom to make such service as it was necessary for the Sheriff to make upon the company, I find that the service made by the Sheriff on MacPhie was not a compliance with the requirements of the Act. Mr. White was absent, and at a distance of hundreds of miles, not only from Cobalt, but from this Sheriff's bailiwick, at the time of the alleged service, and for weeks both before and after it; his place of business was closed and locked, and the key thereof in the possession of another person on whom the alleged service was made, but who had no authority to accept service of process for or on behalf of Mr. White; and it is not shewn that the notice served on MacPhie ever reached Mr. White.

The head office of the company not having been changed to Cobalt, and there being no place within the Sheriff's bailiwick where process could then be served upon the company, how can it be said that the seizure was properly made or that the shares are properly found within that bailiwick?

For this reason, I am of opinion that the attempted sale by the Sheriff was and is void.

The plaintiff contends, too, that the sale is void by reason of the arrangement come to between Hartman & Smiley and White to leave the settlement in abeyance; that the sale should have been postponed under the instructions to that effect which Mr. MacNamara says he gave the Sheriff; that the interest of the plaintiff Malouf in the agreement of the 29th March, 1910, was not saleable under execution; and that the defendants other than the Sheriff acted fraudulently and in collusion.

The sale of the 25,000 shares by the plaintiff Malouf to the plaintiff Kouri was a *bonâ fide* sale, without notice of the assignment to Hartman & Smiley; and, as between vendor and purchaser, Kouri, before the issue of the execution, became the owner of these shares, represented by certificate number 632. These shares were not saleable by the Sheriff.

The defendants E. K. Malouf (who was also the agent of the defendants the Malouf Realty Company) and the Gold Pyramid Company were aware of this sale to Kouri, and, with that knowledge, E. K. Malouf took an active part in having the execution issued and in bringing about the Sheriff's sale, and at the sale became the purchaser for the Malouf Realty Company; he and the secretary of the Gold Pyramid Company were parties to the calling of the meeting of directors held on the 18th October; and, with all this knowledge, the company sanctioned the transfer by the Sheriff and ordered entry thereof to be recorded in the company's books, and the plaintiff Malouf's certificates cancelled; and immediately the Malouf Realty Company purported to sell the whole 75,000 shares to Cahill, the brother-in-law of E. K. Malouf. These facts, considered with the telegram and other communications which passed between E. K. Malouf and the company, or its secretary, beginning on the 30th September, the very day the secretary says Kouri had presented the stock transfer for entry, the meeting between the defendants Labad and E. K. Malouf at North Bay (which I find difficulty in believing was accidental), and the close touch kept between E. K. Malouf and the company, or its secretary, during the proceedings leading up to and following the sale, convince me beyond doubt that the defendants, other than the Sheriff, acted in such a manner and with such knowledge as to give good grounds for holding that there was collusion such as makes it impossible to uphold the validity of the Sheriff's sale.

There will, therefore, be judgment setting aside the sale by the Sheriff and cancelling the entry made in the books of the defendants the Gold Pyramid Mining Company of Larder Lake Limited, of the transfer to the defendants the Malouf Realty Company of the 75,000 shares and other interests of the plaintiff Malouf, and directing that the certificate issued to the Malouf Realty Company for such shares be delivered up to be cancelled; that the plaintiff Kouri be entered in the books of the company as owner of the 25,000 shares represented by certificate number 632; and that a certificate for these shares be issued by the company and be delivered to him; that the plaintiff Malouf be entered in the books of the company as owner of the remaining 50,000 shares, and that certificates numbers 630 and 631, representing the 50,000 shares, be delivered to the plaintiff Malouf. The defendants the Malouf Realty Company are restrained from delivering over, transferring, selling, or otherwise dealing with

ONT
H. C. J.
1912
MALOUF
v.
LABAD.
Kelly, J.

the shares and interest purporting to have been sold to them by the Sheriff.

As against the defendants, other than the defendant Varin, the plaintiffs are entitled to their costs of action, including the costs of and incidental to the injunction. No costs against the defendant Varin.

Judgment for plaintiff.

IRISH v. SMITH.

ONT
C. A.
1912
Feb. 22.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. February 22, 1912.

1. MINES (§ I B—11)—WORKING AN UNPATENTED CLAIM—JOINT OWNERS—DEFAULT OF ONE—STATUTORY RIGHTS.

The provisions of sec. 81 of the Mining Act, 8 Edw. VII. ch. 21, that each of two or more persons holding an unpatented mining claim shall contribute proportionately to his interest, or as they may otherwise agree between themselves, in the work required to be done thereon by section 78 of the same Act in order to hold the claim, and that in case of default by any holder the mining commissioner upon the application of any other holder may make an order vesting the interest of the defaulters in the co-owners, does not apply where two owners of a mining claim instead of doing the work required or expending their own money to have it done, agreed to obtain subscriptions for stock in a company to be incorporated and with the money so obtained to develop the property, which was done, and the co-owner who secured all the subscriptions, the other doing nothing, is not entitled to an order of the mining commissioner vesting the interest of the other owner in him.

APPEAL by the plaintiffs from the judgment of a Divisional Court, *Irish* v. *Smith*, 2 O.W.N. 1302, reversing the order of the mining commissioner granting plaintiff's application to have the interest of his co-owner of a non-patented mining claim vested in him.

The appeal was dismissed.

E. S. Wigle, K.C., for the plaintiff.
A. B. Drake, for the defendant.

MOSS, C.J.O.:—I am of opinion that the order of the Divisional Court should be affirmed.

The real question, as it appears to me, is not whether the parties varied or agreed to vary the proportions in which they were answerable the one to the other for contribution to the work required to be done on their mining claims, but whether upon the facts and circumstances appearing Smith did not contribute to the work to the same extent and in the same manner as Irish. The theory of the claim was that Smith had agreed to contribute all that was required. But the learned mining commissioner did not so deal with the matter by the order he pro-

nounced. He dealt with it as if there was no agreement varying the proportions, but has found that Smith did not contribute any part of the money which went into the work. It is not pretended by Irish that the money which did go in was other than the money contributed by persons who were induced to do so upon an agreement or understanding that they were to be recouped out of the joint property either by shares in a company or out of the proceeds of a sale of the claims if one was made. Smith took an active part in forwarding the scheme agreed upon between him and Irish for thus procuring the funds, and it is not possible to separate by evidence of contributors the relative efficacy of the varying influences which led them to contribute their moneys. They knew of Smith's position with reference to the properties and they also knew that he was actively concerning himself with procuring their entry into the enterprise. The moneys provided in this way naturally went into Irish's hands as the owner who was to see the performance of the required work, but it did not thereby become his money. It was the money of all interested and so Smith's as much as Irish's. The latter ought not now to be permitted under pretence of being himself solely liable to the contributors to ask to be treated as the sole contributor to the work and that Smith be deemed a defaulter subject to the extreme penalty imposed by section 81 of the Mining Act of Ontario, 8 Ed. VII. ch. 21.

The appeal must be dismissed with costs.

GARROW, J.A.:—Appeal by the plaintiff against the judgment of a Divisional Court reversing an order of the Mining Commissioner, whereby he directed the defendant to pay $612.36 within thirty days, or in default that his interest in the three unpatented mining claims in the Larder Lake Mining District in which the plaintiff and defendant were jointly interested should be forfeited. The order was made under sec. 81 of the Mining Act, 8 Edw. VII. ch. 21, which provides: "Where two or more persons are the holders of an unpatented mining claim, each of them shall contribute proportionately to his interest, or as they may otherwise agree between themselves, in the work required to be done thereon. In case of default by any holder, the Commissioner, upon the application of any other holder, and upon notice to and after hearing all persons interested, or such of them as appear, may make an order vesting the interest of the defaulter in the other co-owners upon such terms and conditions and in such proportions as he may deem just." "The work required to be done," of course, refers to the compulsory work necessary to enable the claim to be held: see sec. 78.

The learned Mining Commissioner found in favour of the claimant, but was reversed by the Divisional Court, Middleton, J., delivering the judgment of the Court. The matter had, in another form, but upon practically the same evidence and the

ONT
C. A.
1912
IRISH
v.
SMITH.
Garrow, J.A.

same facts, been before the learned Judge upon the trial of the action brought by the claimant to set aside the transfer to the defendant, which was dismissed.

The questions involved are almost entirely questions of fact. I would have said, entirely so, but for the reference in the judgment of Middleton, J., to the "agreement," of which I may as well say what I have to say, at once.

The section, primâ facie, imposes the liability equally upon the holders of the several interests in proportion to their shares. But they may by agreement vary such proportions, in which case the agreement, and not the proportion fixed by statute, would govern. The statutory obligation and the statutory lien, however, would, even in that case, remain. So that a default in performing the proper share, as varied and apportioned by the agreement, would have the same result in leading to a forfeiture as would a default where no agreement had been made. But I see no evidence of any such agreement in this case. The only agreement spoken of was one which had for its object merely the mode of raising the money to be expended in doing the development work, and in no way altered or varied the proportion of such work which each co-owenr was by the statute compelled to do. The judgment of Middleton, J., however, does not, I think, depend to any extent upon his remarks respecting the agreement, but upon his conclusion upon the main question of fact—that is, whether the claimant had, with his own hands, or by the expenditure of his own money, done or had work done upon the claims in question in excess of his own proper statutory share. It was not asserted that the work had been personally done by the claimant. What he did assert was, that he had procured it to be done, and in so doing had expended his own money—an issue found against him by Middleton, J., who in his judgment in the Divisional Court says: "Neither owner has expended any money of his own, and both are accountable to subscribers for the money received."

This conclusion was based upon the evidence, which consisted chiefly of the testimony of the parties themselves, who are both described as unsatisfactory witnesses, an opinion of them which receives some confirmation in the judgment of the learned Commissioner, although he considered the "merits" to be with the claimant, and found in his favour. The only "merits" I can see in such a case is reasonable evidence of the facts which alone would create the special lien given by the statute. In the absence of such evidence, there can be no merits in the judicial sense, even with the aid of sec. 140, to which the learned Commissioner refers, which requires him to give his decision in matters coming before him "upon the real merits and substantial justice of the case."

Upon the whole, and for the reasons I have given, I agree

with the conclusion of the Divisional Court and think the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—I prefer the view of this case taken by the Mining Commissioner to that of the Divisional Court.

It is quite obvious that nothing agreed to between the parties to this action could absolve them from the performance of the work in question, which sec. 78 of the Mining Act of Ontario imposes, if forfeiture of the mining claim, under sec. 84, is to be avoided. Then, under sec. 81, each of the parties was and is bound to contribute "proportionately to his interest, or as they may otherwise agree among themselves" in the performance of that work. Why, then, the interest of each being a moiety, should the respondent not contribute one-half?

It is said, because the parties, not having the means, agreed between themselves that the money required for such work should be obtained, if possible, from prospective shareholders in a company to be formed to take over this mining property. But I am unable to understand why that should relieve the respondent altogether; why it should permit him to play the part of a drone. His obligation may perhaps be met with money procured by him in that way and applied in doing the required work; but, short of that, I cannot perceive how he can rightly escape altogether the statute-imposed obligation to do his share.

There is nothing in the literal meaning of the words of sec. 81 which helps the respondent's contention that he is relieved altogether from the obligation to contribute; it provides that each shall contribute to the work proportionately to his interest, or as they may otherwise agree among themselves, that is, agree as to contribution, and there can be no contribution when one, or other, or each, is to contribute nothing; and the Commissioner's ruling is quite in accord with "the real merits and substantial justice of the case"—sec. 140—whilst that of the Divisional Court is not. The case is one plainly within sec. 81, and the onus of bringing himself within the exception, or alternative, contained in it, rests upon him—and, to say the least of it, that has not been done.

In short, I can find nothing in any agreement between the parties relieving the respondent from his duty to contribute his moiety, if required to do so by his co-holder of the unpatented mining claim; even if, in such a case as this, he could be altogether so relieved; and it is quite plain that there was no intention on the part of either party that he should be relieved of all obligation in that respect.

I would restore the order of the Commissioner, whose great experience in mining matters gives much weight to his rulings.

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

QUE.

K. B.
1912

Mar. 15.

COCHENTHALER v. PAUZÉ.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll, and Gervais, JJ. March 15, 1912.

1. HIGHWAYS (§ II C—67)—OBSTRUCTION IN STREET AND SIDEWALK—CONSENT OF MUNICIPALITY.

A building contractor who in the course of building operations obstructs part of streets and sidewalks after he has obtained a municipal permit so to do is not liable in damages for the inconvenience and annoyance and even losses caused thereby to the public and neighbouring proprietors provided every precaution be taken to prevent the aggravation of this servitude, and the public and neighbouring occupants are bound to suffer such temporary interference with their rights.

APPEAL from a judgment of the Superior Court for the district of Montreal, Lafontaine, J., rendered on April 1st, 1911, dismissing with costs the action of the plaintiff against respondent and the city of Montreal for damages suffered as a result of loss of trade through the demolition and building operations of respondent, a building contractor.

Plaintiff inscribed in Appeal as against respondent Pauzé only. Argument was heard thereon at the January term, before Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ.

F. J. Bisaillon, K.C., for plaintiff, appellant:—There can be no question that plaintiff did actually suffer losses through the operations of respondent. His client had no longer access to his shop, a tobacco store, as the sidewalk was enclosed and "danger" signs placed thereon conspicuously, and he lost 35 per cent. of his trade. Respondent had three streets fronting on the building he was putting up, and he clearly abused his right, all the more so as appellant constantly protested against the way in which the operations were carried on. The mere fact that respondent had city permits did not justify him in so acting: Sourdat, De la responsabilité, No. 440, quater, C.C. 406; 6 Beaudry-Lacantinerie and Chauveau, Droit Civil, pp. 215 et *seq*;. 6 Laurent, Droit Civil Francais, 140 and *seq.*; Fuzier-Herman, Repertoire, Vo. Proprieté, Nos. 70, 71, 72, 85 and 99; *Chandler Electric Co.* v. *Fuller*, 21 Can. S.C.R. 337; *Gravel* v. *Gervais*, M.L.R. 7 S.C. 326; *Drysdale* v. *Dugas*, 26 Can. S.C.R. 20. And in any event, even under the city permits, respondent had no right to obstruct the sidewalk and entrance of appellant's store.

J. L. Perron, K.C., for respondent:—It is true these operations caused inconvenience, but this was unavoidable. The work was well done and carried out under the supervision of a municipal inspector. Appellant has not even suggested how the work could have been carried on so as to lessen the inconvenience. If the respondent was at fault in maintaining a common nuisance, then appellant should have applied for redress to the Recorder's

Court. The faster the building progressed, the less time is the public inconvenienced. Besides the Court has already decided this question in *City of Montreal* v. *Robillard*, R.J.Q. 5 K.B. 292, where the rule was laid down that there could be no liability in such cases unless "an unreasonable length of time were taken, or a defective mode adopted, in the performance of the work."

Bisaillon, replied.

March 15, 1912. Judgment was rendered for the majority of the Court by

GERVAIS, J.:—Appellant seeks the reversal of a judgment of the Superior Court for the district of Montreal, rendered on the first of April, 1911, whereby his action for $1,000 damages was dismissed.

This action was brought against respondent and the city of Montreal as joint and several defendants on the ground that they both violated the law; the city of Montreal in authorizing respondent to obstruct illegally, and respondent in obstructing illegally a portion of St. James street and of Place d'Armes hill, more particularly at the north-east corner of St. James street and Place d'Armes, and at the south-east corner of Place d'Armes hill and Fortification lane, during the demolition of the building of the Bank Nationale and of the Judah property and the rebuilding of the said bank building.

The action was served on August 19, 1909. The illegal acts charged are alleged to have occurred in the previous months, from and after May 1st, 1909.

By its plea the city of Montreal denied that it was responsible for the negligence of respondent, if any such negligence occurred, to act according to the by-laws of the city in so far as the demolition and reconstruction of the buildings were concerned; it also filed a demurrer which was continued to the hearing for final adjudication.

Respondent Pauzé, on the other hand, repudiated responsibility and averred that in demolishing and rebuilding he had followed the by-laws of the city of Montreal, and that he had acted with all due and necessary care.

The hearing took place on the contestation so joined.

Appellant's witnesses testified and he himself gave evidence on his behalf. He also examined one Bahen, a police inspector of the city, specially entrusted with the task of seeing that builders and contractors should carry out the by-laws of the city of Montreal.

Appellant and his clerks proved, in a general way, that he had suffered business losses during the months of May, June, July and August, 1909.

On the other side, respondent himself was heard, Mr. Marchand, architect; foremen Graton, Rondeau and Beauregard, and Inspector Bahen.

QUE.
K. B.
1912
COCHENTHALER
v.
PAUZÉ.
Gervais, J.

Inspector Bahen produced his original report, dated June 16th, 1909, on the manner in which respondent was meeting the requirements of the by-laws in question. The report reads as follows:—

Montreal, June 16, 1909.

John R. Barlow, Esq., City Surveyor.

Dear Sir,—Re claim of Simon Cochenthaler:—We beg to report that there is a good sidewalk around this work, permanent sidewalk is enclosed by a fence. It would be dangerous for pedestrians to pass too close to this building during the present operations, because they are taking out the foundations piece by piece. As for Place d'Armes hill, the old foundations were encroaching several feet on to the sidewalk and in consequence of taking out this foundation, sidewalk caved in on the night of the 30th May last, when it was well that sidewalk next to building was not open to pedestrians. We cannot see where Mr. Cochenthaler suffers any damages, because the public, on leaving the temporary sidewalk, would make straight to the sidewalk opposite Mr. Simon Cochenthaler's place of business.

Yours truly,

MICHAEL BAHEN,
Street Inspector.

Respondent Pauzé proved, in the first place, that he had at different times and during all the months in question, obtained permits to build and to deposit his material on one third of the parts of the streets affected, as shewn by a list of twelve permits filed of record by him.

On April 1st, 1911, the Superior Court dismissed this action with costs.

Should we reverse this judgment?

Let us note, first of all, that appellant appeals from this judgment only in so far as respondent Pauzé is concerned; he has not seen fit to appeal as against the city of Montreal.

In his factum, appellant claims that respondent obstructed negligently and without reason, that is to say, negligently, the portions of the streets in question for the purpose of demolishing and rebuilding.

On the other hand, respondent avers that in obstructing these streets he acted in strict compliance with the by-laws of the city, and in accordance with the absolute necessity required from the demolition and rebuilding of the said Banque Nationale building.

Is appellant in the right?

He quotes in support of his claim different judgments and decisions, and citations of authors to the effect that, although a real estate owner may enjoy, use and abuse of his property, yet he cannot do so in a way that would inconvenience or interfere with his neighbours.

We shall dispose at once of the relevancy of these citations by stating that we are not concerned here with the abuse of the

"tour d'échelle" by a mitoyen proprietor towards a neighbour. The Banque Nationale is not the neighbour of the Wilson estate on whose property appellant, its lessee, has his store.

This is an action in damages by a lessee against a third party who causes damages in violation of arts. 1052 and 1053, C.C., by making a deposit of materials under such circumstances as to inflict serious losses to appellant's business.

The jurisprudence on this point is quite settled, both here and in France, in virtue of arts. 1382 and 1383.

Did respondent voluntarily cause damages to appellant under such circumstances? Has respondent so made use of his things, his materials, as to cause appellant the damages claimed?

In France regulations as to the demolition of buildings, their reconstruction, the establishing of deposits of building materials, of galleries, of gates and gateways, of lighting appliances, have existed for centuries, and were completely and finally revised and consolidated about 1841.

It would have been sufficient for the city of Montreal, if I may say so, *"en passant,"* to copy the French ordinances word for word to obtain a perfect legislation on this subject.

Nevertheless, we may say that in Montreal, in virtue of by-law No. 107, sec. 9, and its nine paragraphs (adopted on April 5th, 1877), fairly serious measures have been enacted by the city council to ensure freedom and safety of passage around buildings in course of demolition or reconstruction.

In Montreal, as in the French cities, Paris especially, the police authorities have to supervise the carrying out of municipal by-laws governing the opening of streets, and the width they are to have, the construction of culverts, of drains, the building of ground floors, and especially the putting up of temporary structures for the protection of pedestrians during these operations.

In France it is admitted, and the same must be admitted here, that the observance of police regulations on these matters is a valid and sufficient defence against any claim for damages that the riparian owners may bring against those who carry on such works in the vicinity of their property or who obstruct the streets by placing their materials thereon or carrying on similar works.

In France, as here, it has been properly decided that the neighbours who are annoyed or inconvenienced by such deposits of materials, plaster, gravel, etc., have, as a rule, the right to have them removed by summoning the offending party before the Police Court or the civil Courts. But, on the other hand, it is admitted that the Court is the absolute Judge in each case of the necessity of the establishment of these deposits of materials. Of course, necessity should not be confused with reasons of mere convenience or tolerance.

QUE.
K. B.
1912
COCHEN-THALER v. PAUZÉ.
Gervais, J.

We could cite ten judgments of the Court of Cassation to this effect, the first being of November 23rd, 1841, Cassation, J.P., 1843, 2, 763, and the last of July 22nd, 1859, Cassation S.V., 1859-1-863.

These decisions are constantly reported in the digests, in Fremy-Ligueville, and Le Manuel des lois du Batiment, and in Rendu, Dict. des Constructions.

This jurisprudence is, besides, in conformity with the present ideas of modern society. Public interest calls for large cities of vast expanse, full of tall buildings. In order to achieve this it is of necessity imperative to place in the streets heavy beams, every imaginable kind of steel work, large amounts of stone, of brick, cement, sand, gravel, lime and other materials.

In the present case, the fact of putting up in a few months a building eight storeys high at the north-east and south-east corners of St. James street, Place d'Armes hill and Fortification lane, naturally put passers-by, the neighbouring owners and the public in general, to a certain amount of inconvenience, to annoyance, and even may have resulted in damages more or less direct, but this constituted neither a *delict* nor a *quasi-delict* within the meaning of the civil law; the neighbouring proprietors and the respondents had to undergo a social constraint according to the civil law and the by-laws of the city of Montreal.

We must, therefore, come to the conclusion that respondent was guilty of no negligence.

Did respondent allow his materials to cause damage to appellant? We must again reply in the negative. Could respondent have taken more precautions than he did to prevent these damages to appellant? Respondent and all his witnesses say, no; appellant and his witnesses say, yes. But in order to arrive at a just conclusion we think we should give a great deal of weight to the evidence of Mr. Marchand, the well-known architect, and to that of Inspector Bahen, who swore positively and clearly, on repeated occasions, that respondent did all he could to avoid causing to appellant the damages which he now claims. Thus Inspector Bahen says:—

"Q. Have you in your capacity as street inspector to see that the by-laws are complied with in every respect; in case they are not complied with in every respect, what are you supposed to do?

"A. Well, I make report right away to Mr. Barlow (the city engineer).

"Q. So far as I can see by exhibit p. 7, which you have filed, at that date everything was satisfactory?

"A. Yes, at that date everything was satisfactory.

"Q. As a matter of fact it was a very limited space he had for such a purpose?

"A. Yes, it was a very limited space for a building of that size.

"Q. And were you satisfied with the way in which the work was being carried on?

"A. Yes."

At page 56 the witness says: "That he could not see any obstruction on the street worth speaking."

And again, he adds that he kept the street "as clear as it could be under the circumstances."

And then it must be remembered that by hurrying the building of the Banque Nationale and finishing the walls within three or four months, a very short space of time indeed considering the difficulties of demolition and reconstruction, respondent was curtailing by so much the inconvenience and perhaps the prejudice real but necessary resulting to appellant from such work.

In our opinion respondent acted with all possible precaution in the work necessary for putting up this building.

The judgment of the Court below absolved him from all responsibility and the majority of this Court is of opinion that this judgment is well founded.

TRENHOLME, J., dissented. He was of opinion that the old rule is good which makes everybody causing damages responsible therefor. Modern construction works greatly increase the servitudes. In this case the contractor used three streets for his materials. It was more than an inconvenience to which Cochenthaler was subject; it was practically a deprivation of his shop and the destruction of his business. The building operations were carried on beyond the limit required of good neighborhood obligations. Besides, a party obtaining a city permit should comply strictly therewith. In the present case for several months operations were carried on without any permit at all and then signs of "danger" were put up entirely prohibiting passenger traffic on Place d'Armes hill. Respondent should have fixed things so as to allow traffic without danger. He would allow the appeal.

Appeal dismissed with costs.

QUE.
K. B.
1912
COCHENTHALER v. PAUZÉ.
Gervais, J.

ALEXANDER v. HERMAN.

Ontario High Court. Trial before Latchford, J. February 22, 1912.

ONT
H. C. J.
1912
Feb. 22.

1. JUDGMENT (§ II E—162)—EFFECT AND CONCLUSIVENESS—EQUITABLE OWNER.

Where final judgment was rendered against the purchaser in a land contract in an action brought by him for possession or for other relief against a lessee of the property contracted to be purchased, a suit involving the same issues afterwards brought by the vendor in the contract in which the purchaser was joined as plaintiff must be dismissed as to the latter.

ONT

H. C. J.
1912

ALEXANDER
v.
HERMAN.

2. JUDGMENT (§ II E—154)—CONCLUSIVENESS AGAINST VENDOR—PRIOR ACTION DISMISSED AS AGAINST EQUITABLE OWNER—RES JUDICATA.

In an action against the lessee of certain land for possession or other relief, brought by both parties to a contract for the sale thereof, the legal estate being still in the vendor and constituting a substantial interest in the land the defence of *res judicata* fails as to the vendor, though judgment had been registered against his co-plaintiff in a former action brought by the latter against the same defendant, and involving the same issues, and though the vendor on his examination for discovery disclaim any interest in the property.

3. ESTOPPEL (§ III E—79)—ACCEPTANCE OF RENT—ACTION FOR POSSESSION.

If a lessor of land who, after beginning suit against his lessee for possession, accepts rent from the lessee he thereby recognizes the latter as his tenant and his claim for possession must fail.

4. LANDLORD AND TENANT (§ II C—24)—RENEWAL PROVISION—COVENANT—PERSONAL CONTRACT.

A provision in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do," is not a covenant and does not bind the land or the heirs, assignees or personal representatives of either party, and is but a personal contract binding the parties alone.

5. LANDLORD AND TENANT (§ II C—24)—RENEWAL SETTING ASIDE—DEFINITENESS.

The provisions in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do" is not so indefinite as to call for the setting aside of the lease.

6. LANDLORD AND TENANT (§ II C—24)—RENEWAL OF LEASE.

A lease is not void because it provides for perpetual renewal.

[*Baynham* v. *Guy's Hospital*, 3 Ves. 294, and *Clinch* v. *Pernette*, 24 Can. S.C.R. 385, specially referred to.]

7. LANDLORD AND TENANT (§ II C—24)—PERPETUAL RENEWAL—LIMITATION.

The provision in a lease giving the lessee the privilege of renewal "from year to year at the expiration of any year so long as he may care so to do" does not make the lease renewable perpetually since the right can only continue while the lessee personally "cares so to do" and can be exercised only while the lessor lives and continues to own the property.

AN action by two plaintiffs, Alexander and Johnston, for possession of a portion of a building now occupied by the defendant, or to have a certain lease made to the defendant reformed or set aside as having been obtained by misrepresentation, and on the ground that it is too indefinite, in that the term is not specified.

The action was dismissed.

J. W. Hanna, K.C., for the plaintiffs.

S. C. Smoke, K.C., for the defendant.

LATCHFORD, J.:—At the trial I found that the lease in question in this action was not obtained by fraud or misrepresentation, as the plaintiffs allege.

Alexander, like Herman, resided in Detroit, and there carried on, in partnership with his son, a combined dry-goods and

grocery business. He was the owner of a property in Windsor known as "The Old City Hall." Herman, under the name of "The Diamond Power Specialty Company," was a manufacturer of labour-saving and fuel-saving devices; and, desiring to establish a branch in Ontario, he applied to Alexander for a lease of the latter's property in Windsor. Herman desired to obtain a lease for three years. This Alexander refused. The negotiations ended, according to Alexander, in an agreement that a lease was to be made for one year certain, with right of renewal for another year, "if the property was not sold."

The defendant's brother, who conducted most of the negotiations with Alexander, says the arrangement was, "we were to have the privilege of renewing as long as we desired," and his evidence is corroborated by the defendant himself. The preparation of the lease was wholly in the hands of the defendant and his brother.

Alexander says: "They brought the lease to my place, I signed it, and they took it away." It was made in duplicate, but a part was not left with the lessor. Ten days later, he wrote to Herman for what he called "a copy," and was sent one of the parts.

The lease, while expressed to be made in pursuance of the Act respecting Short Forms of Leases—R.S.O. 1897 ch. 125—is not in fact made pursuant to that Act. It is not under seal; and the Act has application only to leases that are under seal (sec. 1). It purports to demise and lease to Herman "The Old City Hall," with its appurtenances, for a term of one year—from the 1st July, 1908, to the 1st July, 1909—at a monthly rental of $25. There are two clauses regarding renewals. The first, which is not questioned—though not limited to the event of a sale—is as follows: "And it is further agreed that, if the said lessee so desires, at the end of the said term of one year, he shall have the privilege of renewing the said lease for a period of one year from the said date, at the same rental and on the same terms and conditions as the present lease." Then follows this provision: "The lessee shall have the privilege of renewing the said lease from year to year at the expiration of any year, so long as he may care so to do."

Alexander alleges that this clause is contrary to what was agreed to between him and the defendant; that he executed the lease without knowledge that it contained this provision; and that it came to his knowledge only after he had agreed to sell the property to his co-plaintiff Johnston.

Herman entered into possession in July, 1908. On the 12th February, 1909, he sublet a part of the building to Johnston for a term of one year from that date, at $20 per month, with a right of renewal, if desired, for a further term of five months.

ONT.

H. C. J. 1912

ALEXANDER v. HERMAN.

Latchford, J.

During the term of the original lease, on the 1st April, 1909, Johnston agreed to purchase and Alexander to sell the property. The agreement is in writing, and is expressly subject to the lease to the defendant. On the same day, a formal assignment to Johnston was indorsed upon the duplicate lease in the possession of Alexander, and duly executed.

It, therefore, appears that Johnston agreed to purchase the premises, with notice of the terms of the lease. He swears that he was not aware of the clause regarding renewals until two or three days after he agreed to purchase. This I regard as improbable. The evidence on the point is unsatisfactory. It may be that he did not consider the right of renewal to be binding on a grantee from Alexander. But that Johnston thought a renewal might be had for a third year from the date of the lease is indicated by the fact that in his sublease from Herman he himself obtained a right of renewal which, if exercised—and it was exercised—extended his term twelve days beyond the end of the year covered by the first renewal clause.

In May, 1909, there was correspondence between the defendant and Alexander in regard to a renewal. Alexander did not disclose the fact that he had in April entered into a formal agreement to sell the property to Herman's sub-tenant Johnston. Ultimately, however, Alexander — notwithstandin his agreement with Johnston—agreed by his letters of the 16th and 31st May to renew for one year. This the defendant ratified by his letter of the 2nd June, adding, "This does not thereby affect my privilege at the end of next year or any subsequent year." No formal lease was executed.

In January, 1910, notice of the defendant's desire to renew for a year, under the second renewal clause of the lease, was given to Alexander. No formal assent was given to this; but, after the third year began, Alexander continued to accept rent from the defendant, and thereby recognised, as existing, the relation of landlord and tenant. Johnston continued in occupation of part of the premises, and paid rent therefor to the defendant.

On the 5th October, 1910, Johnston, while still a tenant of the defendant, issued a writ from a County Court against the defendant, claiming, as grantee from Alexander, that the lease should be set aside as too indefinite, and asking for possession—the precise issues in the present case.

The action was tried on the 4th April, 1911, and dismissed with costs. No reason is stated for the decision. The judgment was not appealed from, and it is pleaded in the present case as a bar to Johnston's right to maintain the action. The County Court is a Court of record, and a judgment entered in it determines once for all the issues between the parties to a suit. The County Court action was against the Diamond Power Specialty

Company; while in this case that company and Herman are made defendants. Upon the evidence, the company is but Herman's business name, and both actions are against the same defendant. Johnston asserts now no claim that he did not assert then; and his suit herein fails and must be dismissed.

I do not adopt the contention that his co-plaintiff Alexander is in the same position; although upon his examination for discovery an answer was elicited from him that he had no interest in the property. Such an answer should be considered in the light of the circumstances under which it was made; and where, as here, it expresses merely the assent of a dull or clouded mind to a question cleverly put by able counsel, it should not, in my opinion, be regarded as of any great weight, especially when it is, as here, contradicted by documentary evidence.

Alexander, when he brought the action, was the owner of the legal estate in the land. That estate has not been conveyed to Johnston. It constitutes a substantial interest in the land, and continues until ended by a proper conveyance or by operation of law. Manifestly, when Alexander said he had no interest in the land, he was under a misconception as to his rights, or answered the question without understanding it.

Nothing that Johnston did can, I think, operate as an estoppel against Alexander; and, as Alexander was neither party nor privy to the action in the County Court between Johnston and the defendant, the defence of *res judicata* as against Alexander fails.

But Alexander, by his acceptance of rent, even after he had issued the writ in this action, unequivocally recognised, according to well-settled law, that the defendant was his tenant—at least for the year from the 1st July, 1910, to the 1st July, 1911; and his claim for possession must, therefore, fail.

There remains only the contention that the lease should be set aside on the ground that the second clause providing for renewals is too indefinite.

The agreement contained in this clause derives no strength from the Act respecting Short Forms of Lease. It is not a covenant, and does not bind the land. It is not expressed to bind—and does not, I think, bind—the heirs, assigns, or personal representatives of the lessor. I also think that it confers no rights on the heirs, assigns, or personal representatives of the lessee. It is a simple contract between Alexander and Herman by which Alexander gives to Herman the privilege of renewing the lease from year to year so long as Herman may desire. The lessee's desire must, of course, be signified to the lessor: *Brewer* v. *Conger*, 27 A.R. 10 at p. 14. When that is done, the only uncertain element in the agreement is made certain.

It is argued that the lease is void because it provides for renewals *in perpetuo*. Even if it provided for perpetual renewal,

ONT.

H. C. J. 1912

ALEXANDER v. HERMAN.

Latchford, J.

it would not necessarily be void. The Courts lean against such renewals, but recognize them when properly expressed: *Baynham* v. *Guy's Hospital*, 3 Ves. 294. In *Clinch* v. *Pernette*, 24 Can. S.C.R. 385, it was held that the lease in question in that case was renewable in perpetuity.

But the lease between Alexander and Herman is not renewable in perpetuity. It can, in my opinion, be renewed only while Herman personally, and not any one claiming by, through, or under him, "cares so to do;" and the right may be exercised only while Alexander lives and continues to own the property. Alexander has already passed the age which few survive, and he may dispose of the property at any time. He could admittedly have given a right to renew during his lifetime, and has in fact done no more.

The action fails on all grounds, and must be dismissed with costs.

Action dismissed.

CITY OF LONDON v. TOWN OF NEWMARKET.

Ontario High Court, Middleton, J. January 16, 1912.

ONT.

H. C. J. 1912

Jan. 6.

1. INJUNCTION (§ I J—83)—BY-LAW—RIGHT OF COURT TO INTERFERE WITH MUNICIPAL COUNCIL.

Injunction will not lie to prevent the passing of a town by-law after it had been carried by a majority of the ratepayers when there is an appropriate remedy in a motion to quash the by-law.

[*Little* v. *McCartney*, 18 Man. L.R. 323, 9 W.L.R. 449, *King* v. *Toronto*, 5 O.L.R. 163, and *Re Sawyer*, 124 U.S. 200, specially referred to.]

MOTION by the plaintiffs to continue an *ex parte* interim injunction, by consent turned into a motion for judgment, in an action by the Corporation of the City of London to restrain the Corporation of the Town of Newmarket from passing a bonus by-law, because, it was said, and not seriously denied, that the by-law was in conflict with the provisions of sec. 591 (12)(e) of the Municipal Act, 1903, because the bonus was to an industry already established in London.

The motion and action were dismissed.

E. C. Cattanach, for the plaintiffs.

H. E. Choppin, for the defendants.

MIDDLETON, J.:—The by-law was submitted to the ratepayers of Newmarket on the 20th November, 1911, and was carried by a vote of 530 out of a total vote cast of 544. It is not shewn whether this is sufficient under sec. 366 of the Municipal Act, but the case was argued upon the assumption that it is. The writ was issued on the 26th December—it is said, without any notice to the defendants. In the meantime, it is said, the defendants had considered the situation, and had been advised not to pass the by-law; and, although they knew that the plain-

tiffs contemplated attacking the proceedings, they gave no indication of their change of heart. So on the aspect of the case based upon courtesy rather than right, the parties are upon an equality.

The plaintiffs allege that, the by-law having been passed by the electorate, the council is bound to give it its third reading.

The defendants rely upon *Canada Atlantic R. Co.* v. *City of Ottawa*, 12 Can. S.C.R. 365, as shewing that, notwithstanding the voice of the electorate, the council has a discretion to defeat the by-law on the third reading.

There is a conflict of judicial opinion as to the meaning of the statute in its present form: see *Re Dewar and Township of East Williams*, 10 O.L.R. 463. I do not find it necessary to express an opinion upon this question, because, in my view, an injunction should not be granted to restrain the passing of a by-law. I do not think the Court has any right to interfere with the action of the municipal council at this stage. An injunction is an extraordinary remedy, and ought not to be resorted to when there is an appropriate remedy in a motion to quash. No doubt, an injunction can be obtained to prevent acting under an invalid by-law, but this is very different from what is now sought.

In *Helm* v. *Town of Port Hope*, 22 Gr. 273, the Court restrained the submission of a matter to the ratepayers—a proceeding which was not merely ultra vires but which was being taken for an entirely improper purpose. In *Vickers* v. *Municipality of Shuniah*, 22 Gr. 410, this case was not extended to cover a case which was *intra vires*. It was said that the attack on the by-law before it had been voted on was premature.

In *Darby* v. *City of Toronto*, 17 O.R. 554, and *King* v. *City of Toronto*, 5 O.L.R. 163, the Court restrained a plebiscite upon a question with which the municipal council was itself bound to deal.

I think these cases are well explained and distinguished in *Little* v. *McCartney*, 9 W.L.R. 449, 18 Man. L.R. 323; and that the motion and action should be dismissed

The judgment of Mr. Justice Gray in *Re Sawyer*, 124 U.S. 200, contains a valuable explanation of the limitations of the power of a Court of Equity to interfere by injunction.

There should be no costs. The plaintiffs are premature and have mistaken their remedy. The defendants are wrong in substance, and their action provoked attack.

Action dismissed.

ONT.

H. C. J.
1912

Mar. 8.

MUNN v. VIGEON.

Ontario High Court, Britton, J. March 8, 1912.

1. CONTRACTS (§ V C—397)—OPTION—CONDITIONS—RESTORING BENEFITS—CONSTRUCTION.

An option for the purchase of property providing that a specified sum of money deposited by the person to whom the option was given, should be returned to him "if contract not complete" calls for a return of such sum to the person who furnished the money and for whom the person who secured the option was acting, where no further steps were taken to carry out the contract except the writing of a lettter by the vendor authorizing its agent and the agent of the purchaser to insert in the option the name or names of the persons for whom the latter assumed to act.

ACTION for the recovery of $5,000, which sum, as the plaintiff alleged, was furnished by him to the defendant Vigeon, and by the defendant Vigeon deposited in the Imperial Bank of Canada for the purpose of securing an option for the purchase of certain timber limits and assets of the defendant company, and which sum was so given by the plaintiff upon the express understanding that, if the option to purchase was not exercised by him, it was to be returned to him.

There was judgment for the plaintiff for $5,000 against the defendants, the Ontario Lumber Co. The action was dismissed as to the defendant Vigeon.

Leighton McCarthy, K.C., for the plaintiff.

C. A. Moss, for the defendant Vigeon.

James Bicknell, K.C., for the defendants the Ontario Lumber Company.

BRITTON, J.:—The defendant company, on the 5th July, 1911, in consideration of $5,000 paid to them by James Bicknell, gave to him an option for the period of 60 days from that date to purchase "all the assets, consisting of limits, mills, dock, plant, etc., but not including the stock in trade in the store at French River nor any lumber . . . piled or stored at the mill at French River or in the yard at Point Edward, or accounts receivable," for the sum of $400,000, payable as follows: $95,000, being the balance of the first payment of $100,000, on or before the expiration of 60 days, and the remainder or balance of $300,000 on completion of transfer. The titles to be free from incumbrance, and the purchase to be completed at Mr. Bicknell's office on or before the 15th September, 1911. If the option were not exercised on or before the 5th September, 1911, the same was to be void, and the sum of $5,000 paid to the company was to be the absolute property of the company. . . .

The persons behind Mr. Bicknell, and for whom he was acting, having made such inquiries and acquired such information about the property as they deemed necessary, did not desire that the purchase should be made; so the option lapsed.

The plaintiff, then, acting for himself, although no doubt he intended to interest others in a purchase from the company, if a purchase could be made, employed the defendant Vigeon to act for him.

On the 14th September, Vigeon wrote to the company, asking them to reconsider the price, with a view to resubmitting the option for the price of $350,000, cash or part cash, and satisfactory terms. On the same day the company replied, stating that they were not prepared to entertain a proposal at the price named. They stated that it would oblige them very much if the parties interested would let the company know their position and release their rights under the existing option, as they had other persons waiting the outcome of these negotiations and prepared to negotiate for a substantial increase on the amount mentioned in Mr. Bicknell's option. They add: "We cannot emphasise too much that it will be useless for the interested parties to expect to negotiate on a reduced basis."

Notwithstanding this peremptory statement to Mr. Vigeon, which was communicated to the plaintiff, the plaintiff desired to get an option for a few days, but at the price of $350,000. The plaintiff asked Mr. Vigeon to try to get this.

After some communication by telephone between the plaintiff and Vigeon, and between Vigeon and Lawrence, who was acting for the company, the plaintiff and Vigeon met on the 5th October. They met Mr. Lawrence on that day.

I find that it was distinctly understood that day between these three persons, that Vigeon was to have the option for 10 days of purchasing at $350,000, if he—Vigeon—would put up $5,000, which sum, in the event of the option not being accepted, was to be returned. Mr. Lawrence drew up what was called the form. He said that was the only form the lumber company would sign. Vigeon, upon the understanding with Lawrence, acting for the company, that what he—Vigeon—was to sign was for an option, and was not a contract for purchase, signed, at the request of the plaintiff and acting for the plaintiff.

I find that the plaintiff, when he authorised Vigeon to sign the paper, did so believing that it was for an option, and that Mr. Lawrence, in drawing up the paper, understood that the plaintiff thought it for an option, and that, in putting up $5,000, he—Vigeon—was entitled to have that sum returned if the option was not exercised by Vigeon on the plaintiff's behalf, or on behalf of whom it might concern.

The document was drawn by Mr. Lawrence at his own office, neither Vigeon nor the plaintiff being present. It is in form an offer to purchase, but, in my opinion, it is not an unqualified offer—so that the sum of $5,000, represented by the plaintiff's cheque, can be applied as on account of purchase-money, or be forfeited, if purchase not carried out. The document compels

ONT.

H. C. J. 1912

MUNN v. VIGEON.

Britton, J.

the return of the $5,000 "if contract not completed." I must interpret these words "not completed" as if the words were "not carried out." The document now in question, and relied on by the company, makes very clear the distinction between the way of treating the $5,000 paid under option to Bicknell, and the $5,000 deposited by the plaintiff.

The first $5,000 had been forfeited and was to remain forfeited; but the $5,000 put up by the plaintiff, and now in question, was "to be returned, without interest, if contract not completed." If by the completion of the contract was meant getting the company to accept the plaintiff's so-called offer, there was no reason for anything in regard to the return of that money. If the meaning was, that the plaintiff should go on and carry out a purchase under an already completed written contract, then, if the plaintiff failed, he would have no right to a return of this money; but, if the company failed to make title, or if from any cause they failed to carry out their part of the contract through no fault on the part of the plaintiff, then the plaintiff would be entitled, as of right, to a return of the deposit. The return of the money mentioned in the writing does not refer to any such case. As I view this transaction, the money was put up to satisfy Mr. Lawrence that the defendant Vigeon was acting for a person or persons of substance—not men of straw. The return provided for is a return in case the contract is not completed by an actual purchase by Vigeon or persons for whom he was acting, and sale by the defendant company of the property mentioned, upon the terms set out in full. Even if the document is not a mere option, it is at most an executory contract, containing a term or proviso which should be interpreted to mean that, if Vigeon or the plaintiff was not prepared on or before the 20th October, 1911, to proceed further, he was at liberty to retire, and was entitled to the money he deposited. The deposit of the plaintiff's cheque for $5,000 was made with the Imperial Bank of Canada to a special account. In the body of the cheque, in the plaintiff's writing, are the words "a/c option O.L.Co."

About the 19th October, Mr. Lawrence apparently made up his mind to attempt to force a sale upon Vigeon or the plaintiff, and so wrote to O. F. Rice, manager of the Imperial Bank at Toronto, advising that this money ($5,000) was not to be paid out to any one without the authority and consent of the Ontario Lumber Company.

Mr. Lawrence asserted that Mr. Vigeon was acting for Mr. Sheppard and Mr. Tudhope. Mr. Vigeon denied that he had ever told Mr. Lawrence that he—Vigeon—was acting in this matter for either Sheppard or Tudhope. Vigeon told Mr. Lawrence that he was acting only for the plaintiff.

On the 20th October, Mr. Lawrence had prepared the docu-

ment called "letter of authority." This is signed and sealed by the company, and is addressed to Vigeon and to Lawrence, authorising them to insert the name or names of persons for whom Vigeon assumed to act as purchasers. I cannot think that the writing of this letter to Mr. Rice and preparation of this authority were in accordance with the real transaction.

To me it appears as if these were written as preparing for a law-suit, not so much to compel a purchase, as to prevent the repayment of the $5,000 to Vigeon or the plaintiff.

I may add that, in my opinion, the insertion in the so-called offer of Vigeon, of the clause in reference to the forfeit of $5,000 paid under the Bicknell option, and which had then already been forfeited to the company, was entirely unnecessary. Giving credit to Vigeon, or assuming to do so, for this $5,000, thus reducing the real price to $345,000, was voluntary on the part of Mr. Lawrence. This was, I think, calculated to mislead the plaintiff and Vigeon.

If the writing in question does not bear the construction I have placed upon it, the plaintiff and Vigeon were, in my opinion, "in essential error" as to the import and effect of it. The plaintiff was induced to have it signed by Vigeon upon representations made by Lawrence acting for the company. The company seek to get the advantage of what Mr. Lawrence did.

If the plaintiff is not, by the terms of the writing itself, entitled to a return of his $5,000, there should be a reformation of these writings to make them conform to the real transaction between the parties.

As to the form of the action, I see no objection to the plaintiff suing in his own name. All the necessary parties are before the Court. The money deposited belonged to the plaintiff, was received by the defendant Vigeon from the plaintiff, and deposited for the plaintiff with the Imperial Bank, where the money still is, on special deposit. The money would have been returned but for the objection of the defendant company. The defendant company treat the action as if by Vigeon, acting as agent for the plaintiff.

The defendant Vigeon admits that the plaintiff is entitled to the money, and consents to its being paid to him. There is no cause of action shewn against Vigeon, so there will be judgment for him, dismissing the action as against him; and I see no reason for withholding costs.

There will be judgment for the plaintiff against the defendant company for $5,000 with interest at 5 per cent. per annum from the 28th November, 1911, and with costs.

There will be a declaration that the $5,000 received by the Imperial Bank of Canada, as the proceeds of the plaintiff's cheque, and interest thereon, if any, and now on deposit with that bank, is the property of the plaintiff. If that money or any

ONT.

H. C. J.
1912

MUNN
v.
VIGEON.

Britton, J.

part of it is paid to the plaintiff, it will be pro tanto in satisfaction of the plaintiff's judgment herein; if the defendant company pay and satisfy this judgment outside of and apart from the money in the bank on special deposit, as above-mentioned, then that money will belong to the defendant company.

Judgment for plaintiff.

CANADIAN BANK OF COMMERCE v. GILLIS.

ONT.

D. C.
1912

Feb. 8.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. February 8, 1912.

1. BILLS AND NOTES (§ V A—112)—RESTRICTIVE INDORSEMENT—RIGHTS AND LIABILITIES OF TRANSFEREE—FRAUD.

The holder of a note to whom it was transferred in breach of a condition written on its back that it would be held by the secretary of the payee until due, occupies no superior position to that of the payee and cannot inforce payment of the note if it was fraudulently obtained from the maker.

[*Canadian Bank of Commerce* v. *Gillis*, 3 O.W.N. 359, affirmed on appeal.]

APPEAL by the plaintiff from the judgment of Britton, J., *Canadian Bank of Commerce* v. *Gillis*, 3 O.W.N. 359, dismissing an action on a note executed by the defendant to the International Snow Plough Manufacturing Co.

The appeal was dismissed.

Glyn Osler, for the plaintiffs.

J. C. Makins, K.C., for the defendant.

The judgment of the Court was delivered by BOYD, C.:—The note sued on was taken by the International Snow Plough Manufacturing Company upon the condition, written upon the back of the note, that it was to be held by Lett, the secretary of the company, till it was due. In breach of this, it was hypothecated to the plaintiffs' bank, who must be affected with notice of the condition written upon the note; so that the position of the bank is that of holding the note subject to all the equities that might attach to it if taken when it was overdue. The position of the plaintiffs is, therefore, not superior to that of the payee; and, upon the evidence, it is clear that the note was obtained from the maker by means of a series of fraudulent misrepresentations of material matters which effectually vitiated the transaction as between the original parties to the note. It would be a futile attempt for the Snow Plough Company to seek the intervention of a Court to enforce payment from the deceived person, and the bank occupies, in the circumstances, no superior position; so that I would entirely agree in the judgment in appeal. It should be affirmed with costs.

ONT.

D. C. 1912

CANADIAN BANK OF COMMERCE v. GILLIS.

The foreign company licensed to do business in Ontario has not the same name as the company to whom this note was given, but it is not necessary to deal with the possible effect of that upon this transaction, taking the view we do of this appeal.

Judgment affirmed.

SMITH v. GRAND TRUNK R. CO.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. February 10, 1912.

ONT.

D. C. 1912

Feb. 10.

1. MASTER AND SERVANT (§ III A 4—89)—RAILWAY SWING BRIDGE—NEGLIGENCE.

Where a locomotive driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine, when he signalled the conductor, who, by a rule of the company, had entire control of the train, that he was ready to go ahead and he ran on to a swing bridge which was then being opened to let a tug pass and the engine ran off into the water and the engineer was drowned, his death was due to the negligence of the conductor and not to his own, his act of negligence in passing the semaphore having expended itself when the train stopped at the water tank.

2. MASTER AND SERVANT (§ III A 4—89)—SWING BRIDGE ON RAILWAY—SEMAPHORE AND BRIDGE LIGHTS.

The exception to a rule of a railway company that its trains are entirely under the control of the conductors and that their orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable, does not apply where an engine driver passed a semaphore which was against his train proceeding and stopped at a water tank until he had filled his engine when he signalled to the conductor that he was ready to go ahead and the conductor signalled to him to go ahead and he ran on to an open bridge which was near the tank and the engine ran off into the water and the engineer was drowned and where the jury found that the engineer acted reasonably and with proper precaution when he saw that the lights of the bridge indicated that all was right to go across and that he went ahead upon being signalled by the conductor to do so.

[*Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 279, reversed.]

APPEAL by the plaintiff from the judgment of Britton, J., *Smith* v. *Grand Trunk R. Co.*, 3 O.W.N. 279, dismissing an action to recover for the death of the plaintiff's deceased husband, a locomotive engineer in the employ of the defendants.

The appeal was allowed.

The defendant's Rule 22, referred to in the following judgment, puts the train entirely under the control of the conductor, and his orders must be obeyed except when they are in conflict with the rules and regulations or plainly involve any risk or hazard to life or property, in either of which cases all participating will be held alike accountable.

At the trial the following questions were submitted to and answered as follows by the jury:—

ONT.

D. C.
1912

SMITH
v.
GRAND
TRUNK
R. Co.

Statement.

(1) Was the conductor, McNamara, who was in charge of the train, on the engine of which the deceased C. F. Smith was engineer, guilty of any negligence by reason of which C. F. Smith lost his life? A. Yes.

(2) If so, what was that negligence? Answer fully. A. Having passed the semaphore, if the conductor had full authority in the running of the train, he, Mr. McNamara, should have signalled the engineer to back up the train again, until the semaphore was lowered.

(3) Was the deceased, the engineer, guilty of contributory negligence, that is, could the engineer, by the exercise of reasonable care, have avoided the accident? A. Yes.

(4) If so, in what respect was the engineer so guilty? A. For passing the semaphore without permission.

(5) Apart from what may be said of negligence on the part of the conductor or engineer, was there any other negligence on the part of the defendants which occasioned the death of the engineer? A. No.

The jury assessed the damages at $1,800.

J. R. Logan, for the plaintiff.

W. E. Foster, for the defendants.

The judgment of the Court was delivered by BOYD, C.:—Upon the answers given by the jury, I would direct a verdict to be entered for the plaintiff for the damages assessed at $1,800.

The first answer declares that the engineer (represented by the plaintiff) lost his life by the negligence of the conductor of the train; and the details are given in the second answer, that the conductor should have signalled the engineer to back up the train again (*i.e.*, from the water-tank, to which point the engineer had taken the train) until the semaphore (which the engineer had passed) was lowered.

They next find that the engineer was guilty of contributory negligence because of his passing the semaphore without permission. But this last finding was clearly wrongly styled contributory negligence. It was a primary act of negligence which had expended itself when the fore part of the train reached and stopped at the water-tank. There came an interval of several minutes when the train was at a stand-still. Next and finally the train was set in motion by the engineer, in response to the conductor's signal to go ahead, when he saw that the semaphore was against him. The engineer had signalled the conductor that he was all ready (*i.e.*, that sufficient water had been taken), and thereupon came the conductor's signal to go ahead, which he obeyed to his own destruction. But the jury have exculpated him from blame in so going forward, and have put all the responsibility for that act on the conductor.

I think the learned Judge erred in applying the company's rule 22 as absolutely fixing equal responsibility on the two officers, conductor and engineer. This involves finding that

ONT.

D. C.
1912

SMITH
v.
GRAND
TRUNK
R. Co.

Boyd, C.

the engineer should have seen the danger and refused to obey the signal to go: but, this aspect of the case was laid before the jury, and they have found that the engineer acted reasonably and with proper precaution when he saw the green lights of the bridge (which indicated all was right to go across), and then went ahead after the signal from the rear given by the conductor. The duty of the engineer is to obey the orders of the conductor; and this the jury find that the engineer rightly did at the critical moment, and thus in effect find that he did not violate the terms of the rule of the company. It cannot be said that this finding is contrary to the evidence; and, therefore, I do not think the strict letter of the rule can be invoked to neutralise the decision of the jury on the facts. The duty of the engineer is to obey the orders of the conductor; and this, the jury find, he rightly did.

The appeal should be allowed and judgment entered for $1,800 with costs of action and of appeal.

Appeal allowed.

CAN.

S. C.
1912

Mar. 21.

THE CITY OF VANCOUVER (defendant, appellant) v. **WILLIAM CUMMINGS** (plaintiff, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Anglin, and Brodeur, JJ. March 21, 1912.

1. HIGHWAYS (§ IV A 2—154 (*a*))—DEFECTS—GAS COMPANY—OPENING UP DRAIN—STATUTORY AUTHORITY—LIABILITY.

Where personal injury results from negligent protection of a drain in a municipal corporation highway, opened by a gas company, the municipality is not relieved from liability for the injury resulting from breach of a statutory obligation to maintain them in a safe condition, by setting up that the authority to open the streets was given to the gas or water company by the legislature, since that authority was subject to the consent of the municipality, nor by setting up that the municipality did not consent to the making of the excavation.

[*Cummings* v. *City of Vancouver*, 19 W.L.R. 322, affirmed on appeal.]

2. HIGHWAYS (§ IV D 1—232)—DEFECTS—IMPLIED NOTICE OF—FAILURE TO REPORT—NEGLIGENCE.

Where a hole has been opened in a municipal street, a Court may infer that it would attract the attention or notice of municipal officials entrusted with the oversight or guarding of the street, and further, that the failure of such an official to report the existence of the hole, was in itself a breach of duty by said official for which the municipal corporation is liable.

[*McClelland* v. *Manchester*, [1912] 1 K.B. 118, followed.]

3. MUNICIPAL CORPORATION (§ II G—205)—STATUTORY DUTY—NON-REPAIR OF STREET—DEFENCE OF WANT OF KNOWLEDGE—LIABILITY.

Where the municipal charter imposes a duty to keep its streets in repair, and the facts demonstrate an actual want of repair causing damage, an action is *primâ facie* shewn to be well founded, and the defaulting municipality is called upon for excuse.

[*Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, specially referred to.]

CAN.
S. C.
1912
THE CITY OF VANCOUVER v. CUMMINGS.

4. NOTICE (§ II A—24)—IMPUTED BY KNOWLEDGE OF OFFICER—NON-REPAIR OF HIGHWAY—REASONABLE CARE.

The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to learn the actual conditions of the streets which, by statute, it is under a duty to repair and cannot successfully set up want of knowledge as an excuse for non-repair if the knowledge might have been obtained by the exercise of reasonable precautionary measures.

APPEAL by the defendant from the judgment of the British Columbia Court of Appeal: *Cummings* v. *City of Vancouver*, 19 W.L.R. 322, affirming the judgment of Murphy, J., at the trial of the action which was for personal injuries resulting to the plaintiff from his stepping into a hole in the sidewalk of one of the defendants' streets.

The appeal was dismissed.

C. W. Craig, for appellant.

J. E. Bird, for respondent.

SIR CHARLES FITZPATRICK, C.J.:—I agree with Mr. Justice Idington. The highway was under the control of the appellant corporation subject to a statutory duty to keep it in repair: *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194. It was for the jury to say whether that highway was out of repair by reason of some positive act done by the corporation, its officers and servants and others acting under its authority and if the corporation was negligent. There was evidence upon which the case could be left to the jury upon both points. Assuming, as argued here, that the hole which caused the accident might have been made without the knowledge or consent of the city, in view of the duty to repair which is imposed in absolute terms by the statute the burden of explanation was on the appellants and they have not in any way attempted to meet it. I cannot think, in any event, that any authority given by the Legislature to the gas or water company to break up the streets was intended to relieve the municipality from the obligation to maintain them in a safe condition. The right of the company to open the streets was subject to the consent of the corporation and the latter was responsible for any act of the company which might cause the streets to be out of repair.

It is not necessary to say whether the company might not also be made liable. But there is nothing in the Acts to which my attention has been drawn which relieves the municipality from the obligation to fulfil its duty with respect to the maintainance of the highways in a proper state of repair.

I would dismiss this appeal with costs.

IDINGTON, J.:—Each of the parties hereto seems to have been desirous of trying how little evidence may consistently, with success, on either side, be given in an accident case founded on the liability of the appellant, as a municipal corporation, for the repair of its streets.

It is beyond dispute that the accident in question took place in clear sunlight, at four o'clock in the afternoon, on the cement sidewalk in a very busy part of the busiest street in the city, by reason of the respondent's foot getting caught in a hole in the sidewalk and that as the result thereof the respondent has been rendered a cripple.

It is quite clear that at a point two feet four inches from the curb the hole had been cut of fourteen inches square to enable someone to set in place therein a metal fixture of some kind, probably to connect with some gas or water system as a means of shutting off or letting on the gas or water to an adjacent building.

This fixture as described was of that nature, and not big enough to fill the hole as cut, but when set therein left a space large enough to so receive respondent's foot, that he got caught, tripped up, and had some bones broken.

This space, it can clearly be inferred from the evidence, had been partly refilled with clay and odd bits of broken cement by the party who had done the job. The packing had (as we learn because *res ipsa loquitur* and we can well believe it) never been properly done and the street restored by re-cementing it to a safe condition for travelling thereon. Indeed it was palpably an unfenced trap.

There is no direct evidence when or by whom or whose direction or authorization it was done.

It is urged for appellant that it is not shewn to have had notice or knowledge of what had been done.

It may, however, be fairly inferred from what we are told, that it would have been quite impossible to have done the job during that day without attracting the attention of those entrusted, or who should have been entrusted, by the appellant, with the police and other official oversight guarding that street, in the way that must, in such regards, be established in such communities to enforce the law and protect the public and the municipality's own property.

In a less degree it may also be a fair inference to draw that these officials, or some of them, could not have discharged their duty without observing and calling attention to the matter if the job had been done the night before and so left unguarded all the day of the accident up to four p.m.

This statute (the city charter) as it stood when the accident which gave rise to the case of *McPhalen* v. *Vancouver*, 45 Can. S.C.R. 194, has been so amended since that case, and now reads, so that no doubt can exist of the intention of the legislature to give a right of action to those suffering from the municipality's default respecting its duty to repair.

I need not repeat here all I said in that case relative to the liability of a party neglecting an imperative duty imposed

CAN.

S. C.
1912

THE CITY OF VANCOUVER v. CUMMINGS.

Idington, J.

upon him by any statute intended to protect and give cause of action to anyone suffering by reason of such default. I may refer to the judgment of Mr. Justice Lush, in *McClelland* v. *Manchester*, [1912] K.B. 118, at 133, of which report has reached here since, as to a large extent bearing out the view we had taken.

Referring to the views I and others expressed in the *McPhalen* case, 45 Can. S.C.R. 194, and applying the principles set forth therein, and the amendment to the statute, is it not clear that, on such a statute as amended, when the facts demonstrate an actual want of repair, causing damage, an action is *primâ facie* of necessity shewn to be well founded, because the statute has not been duly observed or complied with and hence the party in default called upon to offer some excuse?

Primâ facie the duty is imperatively obligatory and its consequences can only be got rid of by some valid excuse for a failure to discharge the duty so imposed.

This statute is just the same as any other in that regard. The obligation is not qualified by the statute itself in any way. The same principles of law must be adhered to in applying it as in applying other statutes imposing any like duty to repair.

Notice to, or knowledge on the part of, the authorities of a want of repair never formed part of the statute.

American and Ontario cases are cited to shew that some such notice or knowledge of non-repair must be proven by a plaintiff claiming to recover by virtue of the statute.

I do not say that no such cases exist as would carry the doctrine of notice or knowledge thus far, for there has been a good deal of confusion of thought in that regard, but no case cited to us from the Ontario authorities in fact carries it so far. Numerous dicta can be found apparently doing so. I think we must discard them and also such cases, if any, as carry the doctrine so far.

I will presently consider the question where I think notice or knowledge may become an operative factor in these accident cases. Beyond the line I will indicate I think the doctrine questionable, and, as the late Mr. Beven pointed out, had not found a place in English decisions. Its history helps to shew how it came about in the United States and Ontario so far as really existent.

When the road making and the road repairing duties in America were imposed on municipalities the very conditions of the country required that, in measuring the extent of that duty, due regard should be had thereto, and the variations, especially as to the kind of road, the state of repair, and the superintendence which might be necessary in one place and could not be expected or exacted in another under entirely different conditions.

I suspect the element of notice came to be introduced in connection therewith. Indeed we find the statutes of Maine and Massachusetts, and probably other States expressly required that municipalities so charged with the duty, should as a condition of liability have had reasonable notice of the condition complained of; and that notice was by the Courts imputed to them occasionally from very slight circumstances.

In Old Canada (as to that part known as Upper Canada, now Ontario) the first step taken to render municipalities therein responsible, was by 12 Vict. ch. 81, sec. 190, transferring the powers and duties of justices in sessions with respect to highways, to the municipal councils of the county.

The next session 13 and 14 Vict. ch. 15, sec. 1, cities and towns were expressly charged with the duty to repair and rendered liable criminally as well as civilly for default.

The latter enactment (in one section, indeed, in one sentence, which applied to all municipalities) that the non-observance of the duty to repair legislatively created thereby, should be held to be a misdemeanour punishable by fine and further render the municipality responsible for all damages sustained by any person by reason of such default, tended to make Courts look at the criminal law liability as the boundary of the civil liability.

Though this was not uniformly agreed to and the statute later on modified, I suspect the idea of notice or knowledge as part of what might reasonably be required to found a criminal prosecution, became the more readily importable into cases involving only civil liability, than it would have been had the statute been originally framed as the one in question here without expressly giving any remedy.

For a long time the Ontario Courts had thus a statute to interpret which is capable of being looked at from a point of view that does not need to be taken relative to this one.

Then again the question constantly arose as to whether or not there was a common law liability independently of the statute, and in seeking for such principles of common law as might create a liability on the part of the municipality as the owner of the road or having jurisdiction over it, in settling the relations thereby created between the municipality and persons it had invited, as it were, to use the road, the questions of notice and knowledge became more closely relevant to the consideration of what should determine the question of liability, than in relation to the simpler question of whether or not a plain statute had been violated and its duties neglected.

So far as the Ontario cases have any bearing on the question I think this history and these several considerations must be borne in mind in using such cases. It has been usual also for

CAN.
S. C.
1912
THE CITY OF VANCOUVER v. CUMMINGS.
Idington, J.

the purpose of emphasizing the claim and possibly affecting damages to shew gross negligence by giving evidence of long existence of the non-repair. Such prudence, however, is not to be confounded with the question of notice. I may say, however, that the Ontario cases cited to us do not go the length which is contended for herein.

The case of *Castor* v. *Uxbridge*, 39 U.C.R. 113, relied on is no authority for the proposition. It was disposed of on the ground of contributory negligence of the plaintiff. No case is an authority binding anyone but for, or in respect of, the point of law necessarily decided for the determination of the case.

True, the late Chief Justice Harrison who was a great authority in municipal law, made, as was his wont, in his opinion in that case, an exhaustive collection of all the cases bearing upon every possible view that the case suggested. In this examination relying upon American authorities alone, he seems to lay down at foot of page 127, that there is no presumption.

It is observed that the case was one arising out of the clear wrongdoing of someone who had no official relation with the municipality or colour of right to do what he had done. It was because the case was of that class and had never, till then, arisen for decision in a superior Court that the Chief Justice took such pains.

It is, if I may be permitted to say so, that kind of case alone which can properly give rise to the question of notice. When it is sought to apply the doctrine to the cases where the road had merely worn out of repair, I think it is entirely misplaced.

No one would think of saying that when the forces of nature have suddenly destroyed or put out of repair a road, or someone has maliciously and negligently wrought the same result, and an accident has taken place as a result thereof, that the municipality must be held as insurers and so, regardless of all opportunity to have repaired the road so destroyed, be cast in damages.

It generally happens in the stating of such a case to any Court, that this is its nature and the question of notice or knowledge or opportunity thereof incidentally arises.

I am, despite dicta to the contrary, prepared to hold that, unless in some case as I have suggested, the question of notice or knowledge does not arise, and that in all cases where the accident has arisen from the mere wearing out, or apparent wearing out, or imperfect repair of the road, there arises upon evidence of accident caused thereby, a presumption without evidence of notice that the duty relative to repair has been neglected.

The municipality is bound to take every reasonable means through its overseeing officers and otherwise, to become ac-

quainted with such possible occurrences, and if it has done so can possibly answer the presumption.

It is beyond my province here to further define the limits of that presumption; I am only concerned with giving due consideration to arguments pressed upon us and rested upon the authorities which I have referred to.

In the case of *Kearney* v. *London, Brighton and South Coast R. Co.*, L.R. 5 Q.B. 411 [affirmed in L.R. 6 Q.B. 759] where a railway company was in duty bound to keep in repair a bridge over a highway, a brick fell from it on a passenger below just after a train has passed, and he was held entitled to damages and had no need to shew more than these facts. The decision was upheld in the Exchequer Chamber. The duty was merely to keep in repair. *Res ipsa loquitur* was applied. Why should there be one rule of law as to the evidence needed or presumption arising from evidence in one class of cases involving a breach of duty to repair and another rule for other classes? One would suppose it would if anything be more stringently applied in the case of a breach of a plain statutory duty than in the other. I see no difference. I do, however, see how as a case develops and becomes complicated, other considerations may arise.

In this case the sidewalk was found in the condition described. It clearly was not the result of malice but of work, for a useful purpose, presumably, done by the appellant or someone acting under its express authority.

The charter of appellant contains the following clause:—

> 218. Every public street, road, square, lane, bridge or other highway in the city shall be vested in the city (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may be reserved), and such public street, road, square, lane or highway shall not be interfered with in any way or manner whatsoever, by excavation or otherwise, by any street railway, gas or waterworks company, or any companies or by any company or companies that may hereafter be incorporated, or any other person or persons whomsoever, except having first made application and received the permission of the city engineer in writing.

Let it be observed that there is not a word of evidence shewing either gas or waterworks to exist in or operated in the city. All the reference to such works is that the fixture set in the walk had the appearance of being something put there "for waterworks or gas or whatever it is."

For aught we know the city may own and have in operation both classes of such works.

We are referred to an Act incorporating a gas company many years before but whether it ever got organized or did anything or appeared any place but upon paper we are not told in evidence. What right could the Court have before submitting the case to the jury to presume such existed?

In the face of the above quoted stringent provisions of

CAN.

S. C.
1912

THE CITY OF VANCOUVER v. CUMMINGS.

Idington, J.

section 218, is it not asking too much to permit the imagination such free scope as to allow it to construct some basis for the theories as to others being liable for damages?

Sweep aside these products of the imagination and there is nothing to be fairly inferred from the facts save that the city may have placed the fixture where placed.

Even if there had been evidence of some such gas works, as provided in the charter got to establish such, I do not see how it could operate without the co-operation of the city authorities. And when so subject to the control of the city as above section 218 implies, it must be, it became the duty of the city to protect its walks and those travelling thereon just as much and as efficiently in that regard as if it possessed the works. If it failed to make such stringent regulations and provide for such supervision by its own officers thereof, so as to protect the public and keep itself well informed of all that was being done, then it was, and on this evidence may well be inferred to have been, negligent. It was for the jury to say.

In this connection regard may be had to the rule to be applied herein, laid down in the judgment of Blackburn, J., in delivering the opinion of the Judges in the *Mersey Docks* v. *Gibbs Case*, L.R. 1 H.L. 93. In one of the cases and issues raised for consideration therein the contest was relative to the charge delivered to the jury which according to the bill of exceptions tendered, raised this very issue of non-liability in the absence of knowledge on the part of the defendants there.

The Lord Chief Baron had charged the jury in effect that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks and that proof that the defendants by their servants had the means of knowledge and were negligently ignorant of it, would entitle the plaintiffs to the verdict.

Do we need, even if knowledge or notice is to be an element, anything more in disposing of this case?

Indeed when the duty to know is considered and what the Lord Chancellor said, at page 122 of that case, holding that, "they must be held equally responsible if it was only through their culpable negligence that its existence was not known to them," is fully appreciated, then the field for notice and knowledge to become an operative factor in these cases is an exceedingly narrow one. In any way I can look at this case I see no ground to support the appeal.

I think the Court below right in finding a case to submit to the jury that there had arisen a presumption on the evidence and inferences fairly deducible therefrom, which entitle the respondent to recover upon the statute if the jury chose to draw such inferences.

The appeal I think should be dismissed with costs.

ANGLIN, J. (dissenting:—The plaintiff (respondent) was injured as the result of stepping into a hole in a concrete sidewalk in Hastings street, which is said to be a principal thoroughfare in the city of Vancouver. The hole, which was of such a character that it is clear that it had been purposely cut in the concrete, was about 12 x 14 inches in size and of a depth of two or three feet. In it, extending from the bottom to the surface, was an iron pipe covered by a steel plate apparently about seven or eight inches square and level with the surface of the sidewalk. This steel plate appears not to have been in the centre of the hole. The plaintiff in testifying says that the space left on one side was greater than on the other. He adds that after the accident he noticed that the hole was filled up around the iron pipe with rough broken concrete and clay to within from five to seven inches of the sidewalk. There are also the following questions and answers in his evidence:—

Q. Now around this aperture or hole which was covered by this steel plate, there had been earth and rough pieces of concrete as you said thrown in there, tramped?

A. Yes.

Q. Now, what did you see within the next—a short time after this accident? A. I saw a gang of men working there across, taking up the pavement on the street going across to that iron structure they were building alongside the Woods Hotel.

Q. What were they doing with relation to this hole, what connection had it to the hole? A. It was running from whatever this plate was *for, gas or water*, they were running from this plate across the street, had the blocks of cement up and digging down somewhere about two weeks later.

That its charter imposes upon the city of Vancouver a duty to maintain its streets in repair, a breach of which renders the city civilly liable to persons injured as a result thereof, while lawfully using such streets has been settled by this Court in *Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194. We are now called upon to determine whether evidence of the facts above stated made a case sufficient to submit to a jury upon issues whether there was (*a*) misfeasance on the part of the city rendering it civilly liable to the plaintiff, or (*b*) a breach of the city's duty to repair which entailed such liability.

The only reasonable inference upon the facts in evidence is that the hole in question was cut for the purpose of placing in it the iron pipe which was there at the time the plaintiff was injured. Upon the plaintiff's own evidence this pipe may have been either a gas pipe or a water pipe. The Vancouver Gas Company incorporated in 1886 has a statutory right to open up the streets of the city for the purpose of placing its pipes in and under them. While wrong-doing is never to be assumed, and therefore, the cutting of the hole in question should not, in the absence of any evidence warranting such a conclusion, be

CAN.
S. C.
1912
THE CITY OF VANCOUVER v. CUMMINGS.
Anglin, J.

ascribed to the act of a wrong-doer, there is no sound basis on which a jury could say that it was cut by the municipal corporation or its servants and not by the gas company or its employees. It seems to me impossible to say that a case was made for submission to a jury on the ground of misfeasance.

If then, in order to succeed, the plaintiff must make out such a case as would render the city of Vancouver liable, although the hole had been cut by the gas company—and that, I think, is his situation—he must prove facts which at least *primâ facie* warrant an inference that the city neglected its duty to maintain the sidewalk in question in repair. The duty of repair is imposed by the statute in absolute terms. But, as is pointed out by Irving, J.A., citing from Comyn's Digest, vol. 1, p. 405 (*b*), "an action upon the case does not lie where a man has not sufficient notice of his duty." The duty to repair comes into existence only when a state of disrepair exists, and I find it very difficult, without holding the municipal corporation subject to the liability of an insurer, which the statute, in my opinion, was not intended to impose, *Mersey Docks* v. *Gibbs*, L.R. 1 H.L. 93, 123-4, to reach the conclusion that in the absence of proof of notice or of circumstances such that notice to the municipal corporation should be imputed, *ibid.* at pp. 121-2, there has been neglect or breach of its duty to repair. There being no evidence of actual notice, the point for consideration seems to be whether such facts are disclosed as would warrant the trial Judge in leaving it to a jury to say whether notice of the existence of the hole in question should be imputed to the defendants. From the fact that shortly afterwards the sidewalk was opened up for the purpose of making a connection with the pipe placed in the hole at which the plaintiff was injured, the reasonable inference would seem to be that the hole itself had been recently made rather than that it had existed for some time. From the evidence that "there had been earth and rough pieces of concrete thrown in there, tamped," it would also appear to be a reasonable inference that after the hole had been cut and the pipe placed in position, it had been filled up with this material to the surface, because otherwise it could scarcely have been "tamped." This would appear to have been a temporary filling, inasmuch as the street was shortly afterwards again opened up for the purpose of making the connection to which the plaintiff refers. It is a well-known fact that, when a hole has been cut and filled up in this manner, the filling may appear to be, when first put in position, perfectly firm and solid; and yet, unless it has been exceedingly well packed or tamped, action of water will soon cause a sinking of the material below the surface. The surface itself may remain intact for a time, but eventually the arch which it forms will give way and the surface itself cave in. That this may have

happened, and in all probability did happen in the present case, seems to me to be a fair conclusion from the evidence before us. There is nothing to shew that the filling in was negligently done; still less that any municipal inspector looking at the hole after it had been filled in would or should know that the surface would collapse before the work of connection should be proceeded with. While, therefore, it is true that under the amended charter of the city the gas company could probably open up the streets only with the permission of the city engineer, so that the latter would have notice of any such opening to be made, and assuming that it would be his duty, or that of civic officials under him, to see that any opening so made was properly closed up, I find nothing in the evidence which would warrant a finding of neglect of that duty. It is entirely consistent with the evidence that the filling of the hole may have fallen in only immediately before the plaintiff was injured, or it may be that it gave way under the pressure of his foot-step and that up to that moment there was nothing to indicate that the hole as filled in constituted a source of danger to pedestrians. Neither is it possible to say that the temporary filling in of such a hole, (pending the connection within a few days of the pipe which it contained with the other works contemplated and which would necessitate the re-opening of the hole) with rough concrete and clay properly packed and tamped would be a negligent or improper thing. The duty of the municipality to maintain its streets in repair must receive a reasonable construction. It does not subject the city to the liabilities of an insurer. The duty of the city engineer who has notice of an opening being made by the gas company, must also be dealt with reasonably. It does not, in my opinion, require him to keep an inspector constantly on watch while such an opening is being made and filled in. Upon the evidence, it is a fair inference that this hole was filled in, as would be the duty of the gas company if it had cut the hole, and that the filling had been carried to the surface and had been "tamped." There is no evidence which would warrant an inference that upon a proper inspection, an official of the city engineer's department would have discovered that the filling was insufficient and that the hole as kept, constituted a menace to pedestrians: *Sanitary Commissioners* v. *Orfila*, 15 A.C. 400, 411, 413.

We were much pressed by counsel for the respondents with the argument that, inasmuch as it was peculiarly within the knowledge of the municipality whether the hole in the sidewalk had or had not been cut by its officials or contractors, and how long it had existed as a source of danger to pedestrians, upon the plaintiff shewing that he had been injured by stepping into the hole, the burden was shifted to the defendant to prove facts and circumstances which would exonerate it from

CAN.

S. C.
1912

THE CITY OF VANCOUVER v. CUMMINGS.

Anglin, J.

responsibility, and that, in default of its producing such evidence, it should be presumed that facts and circumstances existed which rendered it liable. This argument simply means that proof of the existence of a hole establishes a case of *prima facie* liability without any proof of neglect or duty, or of facts from which an inference might fairly be drawn of neglect of duty on the part of the municipal corporation. I am unable to accede to that contention. This is not a case of *res ipsa loquitur*. Moreover, the plaintiff could readily have shewn the character of the pipe in question and have thus cleared up the issue as to misfeasance. He was, in my opinion, bound to do so. Assuming that, in the absence of such evidence, the case must be dealt with on the basis that the hole was not cut by the municipality, the plaintiff would probably have experienced no serious difficulty in adducing some evidence—very little would have sufficed in view of the situation of the hole—to shew that it had been in a dangerous condition long enough, if that were the fact, to warrant a jury imputing notice to the defendant. At all events *ei qui affirmat, non ei qui negat, incumbit probatio*. In the absence of any evidence of the existence of facts or circumstances warranting an inference of negligence on the part of the defendant, it should not be called upon to prove the negative, viz., the non-existence of such facts or circumstances.

For the foregoing reasons, I am, with great respect for the views of the majority of the Court of Appeal of British Columbia, and of those of my learned brothers, who have reached the contrary conclusion, of the opinion that a case had not been made proper for submission to a jury and that the plaintiff's action should have been dismissed. I would allow this appeal with costs in this Court and in the Court of Appeal and would dismiss the action with costs.

DAVIES, J., agreed with ANGLIN, J.

BRODEUR, J.:—I am of the opinion that this appeal should be dismissed, and I concur with the opinion of Mr. Justice Idington.

Appeal dismissed.

BROWN v. BANNATYNE SCHOOL DISTRICT.

MAN.

K. B.
1912

Mar. 19.

Manitoba King's Bench. Mathers, C.J. March 19, 1912.

1. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—ARCHITECT'S CERTIFICATE—FINALITY.

A contract for the erection of a building authorizing the architect, if there was any part of the work remaining uncompleted for reasons not within the contractor's control, to deduct the value of the incomplete portions from the contract price and to issue a final certificate that the works were completed, gives the architect no power to accept the contractor's guarantee that he will complete the uncompleted portions of the work in lieu of the deduction required by the contract and a certificate by the architect to that effect is not a final one.

2. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—SUFFICIENCY OF CERTIFICATE.

Under a contract for the construction of a building which stipulated that the work was to be performed "to the satisfaction of" the architect and authorizing him to give a final certificate that the work was completed as a pre-requisite to the final payment therefor, a final certificate stating that the contractor was entitled to final payment on his contract is sufficient though it fails to certify in terms that the work was "completed" in accordance with the contract.

[Accord, 3 Halsbury's Laws of England, p. 214, sec. 429, 1 Hudson on Building Contracts, 3rd ed., 383.]

3. CONTRACTS (§ IV D—363)—CONDITION—CERTIFICATE OF PERFORMANCE.

Where a contract for the erection of a building authorized the architect to give a final certificate that the work was completed, or if incomplete to state in writing in what particulars, and in the next sentence it was stipulated that, if any part of the work remained incomplete for reasons not within the contractor's control, the architect should deduct the value of the incomplete portions from the contract price and that he should be the judge of the propriety of such deduction and its amount, a certificate stating that a specified sum should be deducted for work not complete is not objectionable because it fails to shew that the work for which the deduction was made could not then have been readily completed.

[*Richards* v. *May*, 10 Q.B.D. 400, specially referred to.]

4. CONTRACTS (§ IV D—364)—APPLICATION TO ARCHITECT FOR CERTIFICATE—NOTICE.

It is no defence to an action for the balance due for the erection of a building that no notice was given the owners of the contractor's application to the architect for a final certificate where the contract was silent in that regard and required the architect upon notice from the contractor that the latter considers the work complete, to issue a final certificate and to make deductions from the price for unfinished work.

5. CONTRACTS (§ IV C—347)—INCOMPLETE PERFORMANCE—ARCHITECT'S DEDUCTION.

A provision in a building contract for an architect's certificate as to the completion of the work, that if the work is incomplete but may be readily completed by the contractors, to state in what particulars, being for the benefit of the contractor, so that he may then complete the work if in his power, does not call for the architect to set out, in his certificate, the particulars of the deductions made if the incomplete part of the work cannot then be readily finished and the certificate is a final one directing the deduction of the value thereof in pursuance of an alternative power reserved to the architect to deduct such value, together with a fixed percentage thereof, if the work cannot readily be completed for reasons beyond the contractor's control.

6. PLEADING (§ III B—319*a*)—NECESSITY OF PLEADING—WANT OF NOTICE.

In an action on a building contract, where it is claimed that under the contract notice should have been given to the owners by the contractor of the latter's application to the architect for a final certificate, such lack of notice must be pleaded or it cannot be raised at the trial.

7. PLEADING (§ I N—113)—AMENDMENT AT TRIAL—UNFOUNDED CLAIM.

Leave to amend a pleading will be refused if the claim or objection sought to be added does not appear to be well founded.

ACTION to recover from the defendants, a school district, the balance due on a contract for the erection of a public school building. The amount sought to be recovered was $11,877.60 as balance of the contract price and $2,403.10 deposited by the

MAN.

K. B.
1912

BROWN
v.
BANNATYNE
SCHOOL
DISTRICT.

Statement.

plaintiffs with the defendants as security. The plaintiffs also asked for a mechanic's lien, but as no evidence was given in support of that portion of the claim, it was treated as abandoned.

The defendants admitted the contract, but denied that the plaintiffs had substantially completed the building, or that they had complied with the conditions of the contract entitling them to payment, in that they had not obtained a final certificate from the architect or produced satisfactory, or any, evidence that no mechanics' liens other than their own, or those for which they held discharges, exist. They also set up that a substantial portion of the work was incomplete, and might have been readily completed before the action, and they countercharged for damages for non-completion in time.

Messrs. *C. P. Fullerton*, K.C., and *J. P. Foley*, for plaintiffs.
Messrs. *J. B. Coyne* and *A. W. Morley*, for defendants.

MATHERS, C.J.:—The contract is dated the 15th of April, 1911. By article 1 the work is to be performed "under the direction and to the satisfaction of J. N. Semmens, architect, acting for the purposes of this contract as agent of the owner." By article 6 it provides that the work shall be completed by the 15th of November, 1911, and that the contractor shall complete two rooms ready for occupancy by the 1st day of September, 1911, and an additional room by the 15th day of September, 1911. The contract price is $48,062.

By article 9:—

> The final payment shall be made within twenty days after the contractor has substantially fulfilled this contract, if the contractor shall have given satisfactory evidence that no mechanics' lien other than his own, or liens of which he holds discharges, exist in respect of the said works; otherwise the final payment shall be made within two days after the time for filing mechanics' lien has elapsed. The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respects the works are incomplete, and his decision should be final, subject to arbitration as hereinafter provided. If the portion of the said work then remaining incomplete may be then readily completed by the contractor, the same shall be done before he is entitled to ask for his final certificate, but if for reasons not within the contractor's control he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions, together with fifty per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge, subject to arbitration as herein provided) from the contract price and issue a final certificate that the works are completed and the last payment due, and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractors within the meaning hereof.

At the trial the plaintiffs put in two certificates by the architect, the first of which, dated the 21st December, 1911, and addressed to the secretary-treasurer of the school board, is as follows:—

> Dear Sir,—I have made my final inspection of the Bannatyne public school, and except for a few minor items I find that the building is completed. I hold guarantees from the Brown Construction Co. for a number of items which cannot very well be completed this fall but will have to be held over till the spring, when the mild weather will allow of their completion.
>
> I understand that the board are willing to abide by my decision in the question of the floors. As my only reason for condemning them was that they were not strictly in accordance with the specifications in the matter of colour, but were in every way up to the standard in the matter of durability, I feel that the board will lose nothing by accepting these floors.
>
> Yours respectfully, J. N. SEMMENS.

On the 26th January, 1912, the plaintiffs wrote the architect a letter from which the following is an extract:—

> While we gave you a guarantee to complete one small item which cannot be completed until the weather gets warmer, we think it possible that the school board may urge that the value of this painting, together with 50% thereon, should be deducted from the contract price in strict accordance with the words of the contract and final certificate issued for the amount due us. We would therefore ask you to carry out the terms of the contract and issue a final certificate that the works are completed and the last payment due, and indicating the amount thereof. Please let us have this final certificate immediately.

In response to the above-mentioned letter, the architect on the 10th February, 1912, gave another certificate in the form of a letter addressed to the secretary-treasurer of the school board as follows:—

> Dear Sir,—The Brown Construction Co., contractors for the Bannatyne public school, are entitled to the final payment on their contract, deducting $1,200 for work not completed as authorized under article 9 of the contract. I hold waiver of liens from the Brown Construction Co. to protect the board against liens. I understand that the last certificate, amounting to $5,832.25, was not paid, leaving the previous payments at a total of $37,625. This makes the amount due for final payment $11,877.60.
>
> Yours respectfully, J. N. SEMMENS.

Below the following memorandum was written at the bottom of the letter:—

Amount of contract	$48,062 00
Marked cheque	2,403 10
Extra No. 1	100 00
Extra No. 2	125 00
Extra No. 3	12 50
Total	$50,702 60

MAN.

K. B.
1912

BROWN
v.
BANNATYNE
SCHOOL
DISTRICT.

Mathers, C.J.

Amount retained	$ 1,200 00
Previous payments	37,625 00
Amount due	11,877 60
	$50,702 60

The defendants proposed to give evidence tending to shew that the contract had not been substantially fulfilled. The admission of this evidence was objected to on the ground that the architect's certificate is final and conclusive, subject to an appeal to arbitration.

As it appeared that this was the real determining point in the case, I took time to consider it and adjourned the further hearing *sine die*.

It was admitted, and I think properly so, that the certificate of the 21st December, 1911, is not a final certificate within the meaning of the contract. I think it quite clear that the architect had no power to accept the contractor's guarantee as to any portions of the work not complete and that a certificate shewing that he had done so is not a final certificate.

The objections raised to the certificate of the 10th of February, 1912, are as follows:—

1. That it does not certify that the works are completed as required by the contract.

2. That there is no evidence that the work for which the architect makes a deduction from the price could not then have been readily completed.

3. That it should have contained a statement shewing in what respects the work is incomplete.

4. That the defendants should have been given notice of the plaintiffs' application for a final certificate, and that the architect had no power to give a final certificate until such notice was given.

As to the first objection the authorities are against the defendants' contention. In 1 Hudson on Building Contracts, 3rd ed., at 383, it is stated that if a certificate of payment and satisfaction is required, a certificate for payment will imply a certificate of satisfaction. The law is similarly laid down in 3 Halsbury's Laws of England, sec. 429. In *Wycliff* v. *Myers*, 44 N.Y. 143, a building contract provided that the last instalment should be paid when all the work was completely finished and certified to that effect by the architects. The architects certified that the last payment was due and the Court held this to be clearly the same in effect as if the architects had certified that the work was all completely done. In *Clarke* v. *Murray*, 11 V.L.R. 817, the contract provided for payment when the whole work was completed to the satisfaction of the architect and his certificate given to that effect. The architect certified that the contractor was entitled to receive a sum named "being the final

certificate in full of all demands." The Court held this a sufficient certificate that the whole work was completed to the satisfaction of the architect. Apparently the same was held in *Harmon* v. *Scott*, 2 Johnst. N.Z.R. In my opinion the first objection fails.

As to the second objection that there is no evidence that the incomplete work for which a deduction of $1,200 is made could not have been readily completed before action, the contract makes the propriety of such deduction and the amount thereof a matter concerning which the architect shall be sole judge subject to arbitration. The architect having decided to make the deduction, I think the contract makes his decision final both as to the amount of the deduction and the propriety of it, and involves a finding that the work could not be readily performed at that time: *Richards* v. *May*, 10 Q.B.D. 400.

Article 9 of the contract provides that the contractor may, when he considers he has completed the works, notify the architect in writing to that effect and requiring the architect within 72 hours to issue a final certificate that the works are completed and the last payment due, or state in writing in what respects the works are incomplete. This last requirement seems to be for the benefit of the contractor so that he may go on and complete if he can then do so. If, however, the part of the work then remaining incomplete cannot be readily completed and the architect proceeds to deduct its value plus 50 per cent. thereof, the necessity for setting out the particulars does not exist. The contract does not require the architect to set out in his certificate the particulars of the deductions made. Under these circumstances and *expressio unius est exclusio alterius*, I think the certificate sufficient, although the amount of the deduction only is stated. The third objection to the certificate therefore fails.

As to the fourth objection, I do not think the pleadings permit the defendants to raise the objection that notice to them of the application for a final certificate was necessary. Moreover, I do not think it would be a good defence if it were pleaded. I must not only hold against the objection but, under the circumstances, I refuse the defendants' application to amend.

In my opinion the certificate is final and conclusive and the evidence tendered is not admissible.

Plaintiffs' objection overruled and further hearing postponed.

SASK.

S. C.

1912

April 4.

ONTARIO WIND ENGINE AND PUMP CO., LIMITED v. ELDRED.

Saskatchewan Supreme Court. Trial before Wetmore, C.J. April 4, 1912

1. PLEADING (§ II B—176)—CAPACITY TO SUE—FOREIGN CORPORATION.

Under Rule 219 of the Saskatchewan Supreme Court Rules, 1911, giving any party the right to raise by his pleading any point of law and providing for its disposition by the Judge before, at or after the trial, the defendant, though he failed to raise the question in his pleading, is entitled to a decision as to whether the plaintiff could succeed in the action if the statement of claim merely alleged that the plaintiff was an incorporated company carrying on business in another Province, but failed to allege that it had registered under the Saskatchewan Foreign Companies Act or other facts to establish its status to sue in Saskatchewan.

[*Stokes* v. *Grant*, 4 C.P.D. 25, applied; and see Odgers on Pleading, 7th ed., pp. 169, 175.]

2. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN COMPANY—RIGHT TO SUE.

Section 3 of the Saskatchewan Foreign Companies Act, forbidding a foreign company having gain for its object from carrying on any part of its business in the Province unless it is duly registered, cannot be relied upon to defeat an action on notes given by the defendant to the plaintiff company for the price of certain goods sold by the latter to the former on the ground that the company's statement of claim, while alleging that it was an incorporated company carrying on business in another Province, failed to allege that it was registered under the above Act, where it was shewn that the goods had originally been sold to another, from whom the defendant purchased them with the consent of the company who took the notes for the price in substitution for those given by the first purchaser, and no evidence was offered as to the place of the original contract of sale and there was no allegation that the plaintiff was such a company as to require registration under the Foreign Companies Act.

[*Bank of Montreal* v. *Bethune*, 4 U.C.Q.B. (O.S.) 341, disapproved; *Canadian Pacific R. Co.* v. *Western Union T. Co.*, 17 Can. S.C.R. 151, applied.]

3. CORPORATIONS AND COMPANIES (§ VII C—377)—LICENSING OF FOREIGN COMPANY—PENALTY FOR OPERATING WITHOUT LICENSE.

Where no evidence is given as to the place at which a contract for the sale of goods by an unregistered foreign company was made, the fact that the goods were afterwards purchased from the original buyer within Saskatchewan, and that his contract with the company selling the machines was, with its consent, assumed by the new purchaser, who gave his own notes for the price in place of the original buyer's notes, shews no violation of Saskatchewan Foreign Companies Act, sec. 3, imposing a fine upon foreign companies doing business for gain within the Province if they fail to register.

4. SALE (§ II E—44)—TEST AND DEMONSTRATION—COLLATERAL CONTRACT.

The purchaser of a drill outfit cannot escape liability on notes given for the price thereof by shewing that a verbal agreement had not been carried out whereby the seller was to send him an expert driller at its expense to assist in digging the first well, and to remain until the first well was completed, and that, if such were not done, the notes were to be void.

ACTION on four lien notes executed by the defendant to the plaintiffs.

F. F. MacDermid, for plaintiffs.

Messrs. *H. Y. MacDonald* and *J. N. Crerar*, for defendant.

WETMORE, C. J.:—This action is brought to recover the amount claimed to be due on four lien notes made by the defend-

ant in favour of the plaintiffs. The first paragraph of the statement of claim alleges that "the plaintiff is an incorporated company carrying on business in the Province of Manitoba with an office at the city of Winnipeg in the said Province, and the defendant is a farmer residing near the postoffice of Guernsey in the Province of Saskatchewan," and it then goes on to set out the notes and the presentment of them in the usual manner. The first paragraph of the claim was neither admitted nor denied in the statement of defence, and no question of law was raised in the pleading either with respect to the right of the plaintiff company to sue nor was any plea pleaded setting forth that they had no right or authority to sue in the Courts of this Province. No attention whatever was given to the first paragraph of the claim. The only defence set up was that the notes were given for a well-drilling outfit, and that at the time the defendant gave such notes he knew nothing about working such an outfit, and that he gave the notes upon the condition that the plaintiff would furnish and procure for him an expert well-driller to work with, assist and shew the defendant how to work such drilling outfit and complete the well during the drilling and until the completion of the first well drilled by the defendants with the outfit during the summer of 1909; and that if the plaintiffs did not do as so set forth, the defendant would not be required or compelled to pay the notes or any part thereof and would be released and discharged from all obligations in respect thereof; and that the plaintiff has not furnished or procured for the defendant the expert well-driller or any well-driller as agreed, and claims therefore that the defendant is discharged from all liability in respect to the notes; and in the alternative it is set up in the defence that the defendant executed to the plaintiff a chattel mortgage upon certain goods for the price of the drilling outfit and that the plaintiff before the commencement of the action made distress and seizure of the goods and chattels mentioned in the mortgage; and the defendant claims that the consideration for the lien notes was satisfied and discharged. The defendant also counterclaimed for breach of contract in not furnishing the expert assistance as hereinbefore set forth. Nothing turns upon the alternative defence. The plaintiff sent a man out to seize under the chattel mortgage, but he did not seize anything.

At the opening of the case, the defendant's counsel raised the objection that in point of law the plaintiff could not succeed because the first paragraph of the claim alleged that they were an incorporated company carrying on business in the Province of Manitoba with an office at the city of Winnipeg. It was urged that from this I must infer that the company was a foreign company, and there being no allegation that it had registered under the Foreign Companies Act, it could not carry on business in this Province. I declined to stop the case at that stage, and

SASK.

S. C.
1912

ONTARIO WIND ENGINE AND PUMP CO. v. ELDRED.

Wetmore, C.J.

heard the evidence produced. I may say I was somewhat in doubt whether under Rule 219 of the Rules of Court it was open to the defendant to insist upon this question of law, it not having been raised by his pleading. However, on consideration I am of opinion that he could do so. The text-books dealing with the corresponding rule in the English Practice seem to uniformly agree that it can be done. I refer to the Annual Practice, 1911, Note to Order XXV, Rule 3, and to Odgers on Pleading, 2nd ed., 114 [7th ed., pp. 169, 175]. I might also refer to the remarks of Lindley, J., in *Stokes* v. *Grant*, 4 C.P.D. 25, 40 L.T. 36 at p. 37. It seems that the practice as set forth in these text-books was as so set forth before the English Judicature Act, and it may be considered as not changed by that Act. I am, however, of opinion that the point cannot be raised in this case in view of the pleadings. It seems to me that it would require some allegation of fact before it could be raised. The mere facts set forth in the statement of claim do not raise it; and I find that wherever the question of the right of a foreign corporation to sue in a British Court has been raised, the fact has been stated that it is a foreign corporation. At any rate, I am of opinion that it must be distinctly set forth, in order to meet the law in this Province on this subject (which I shall hereafter point out), that the corporation, being a foreign corporation, was carrying on business for gain in the transaction out of which the lien notes came to be given. What I wish to convey, I think, can be more pointedly set out when I proceed to set forth what the facts of this case were as given in evidence, because the facts are not set forth with absolute correctness in the pleadings. The facts as I find them are as follows:—

One McTighe, some time in March or April, 1909, purchased this drilling outfit from the plaintiff. Now there is not a particle of evidence to shew where that purchase was made. The outfit was delivered to McTighe—there is no evidence where, but as a matter of fact it was delivered, and he operated it to some extent, and about the latter part of July or the first part of August he had it at Guernsey, in Saskatchewan. He was not very successful in operating it, and the defendant agreed to take it off his hands by an instrument dated the 28th July, 1909. McTighe had given his notes, which I am going to assume were lien notes, as the purchase price of this outfit. The instrument referred to is as follows:—

Guernsey, Sask., July 28th, 1909.

These articles of agreement made in duplicate this 28th day of July, in the year 1909, between Frank B. McTighe of the post office of Guernsey, in Province of Saskatchewan, farmer, hereinafter called the vendor, of the first part, and Sidney Eldred of the same place, farmer, hereinafter called the purchaser, of the second part.

WITNESSETH: Whereas the said vendor has agreed to sell to the purchaser and the purchaser has agreed to purchase of and from the

said vendor, all and singular the tubular well-drilling machine with all its attachments, and the ten h.p. Stickney gasoline engine with all its attachments, tools, and all such equipment as belong to the said drilling outfit, for and in consideration of the sum of one dollar and other valuable considerations, that is, that the purchaser to assume all the notes given by the vendor to the Ontario Wind Engine and Pump Co. in payment for the above mentioned drilling outfit. The time on the first note, which was due on July 10th, is extended for sixty days.

The purchaser will assume all the notes and will take possession and operate the said outfit as soon as the Ontario Wind Engine and Pump Co. will furnish a competent man to assist the purchaser to complete the first well. The purchaser to pay said man at a rate not to exceed five dollars a day in assisting to drill the first well.

IN WITNESS WHEREOF the vendor and the purchaser have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered
in the presence of—

S. B. BEHN. (Sgd.) SIDNEY ELDRED. (L.S.)
(Sgd.) FRANK B. MCTIGHE. (L.S.)

No objection was raised that the outfit was not a good one and suitable for the purpose for which it was sold.

Now, it will be seen in the first place that this machine was not purchased by the defendant from the plaintiffs but from McTighe. It is true that the company agreed to accept the lien notes in question in substitution for those of McTighe. One McDonald, an agent of the company, came up and approved of the transaction, and the defendant gave the notes in question then and the mortgage which has been referred to and took possession of the outfit and commenced to work it at the place of one Behn, where it was standing at the time the arrangement between the defendant and McTighe was made.

I will stop here now to discuss further the question of law that is raised. I cannot bring my mind to the conclusion that under such circumstances there was any offence proved or to be implied on the part of plaintiff against the provisions of section 3 of the Foreign Companies Act, ch. 73 of the Revised Statutes. It was urged that, under *The Bank of Montreal* v. *Bethune* (1836), 4 U.C.Q.B. O.S. 341, and some other cases decided subsequently thereto in Upper Canada, at common law a corporation could not carry on business in this Province unless there was some special authority to do so. Those cases, however, are overruled by clear implication by *The Canadian Pacific Railway Company* v. *The Western Union Telegraph Company*, 17 Can. S.C.R., 151, wherein Sir William Ritchie, C.J., at p. 155, states as follows:—

> The comity of nations distinctly recognizes the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation and not prohibited by its charter, and not inconsistent with the local laws of the country in which the busi-

SASK.

S. C. 1912

ONTARIO WIND ENGINE AND PUMP CO. v. ELDRED.

Wetmore, C.J.

ness was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a State may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such terms and conditions as it may prescribe.

The only question raised in this case is whether this company is prohibited by section 3 of the Foreign Companies Act and the authorities from suing upon the notes in question. I feel very clear that I must not assume that this company was acting illegally; that would not be assumed even if they were being prosecuted under the Act. For all I know to the contrary, the outfit may have been sold in Winnipeg to McTighe and delivered there to him possibly personally or to a carrier there which would be equivalent to a delivery to McTighe there. I must in the absence of evidence to the contrary assume *omnia acta rite*, and I must presume that they are seeking to recover a debt which they are legally authorized to recover unless the contrary is proved. The section of the Act in question provides in the first paragraph that no foreign company having gain for its object or a part of its object shall carry on any part of its business in Saskatchewan unless it is duly registered; and then the second paragraph provides:—

> Any unregistered company carrying on business . . . . shall be liable on summary conviction to a penalty of $50 for every day on which such business is carried on in contravention of this section.

It is intended by the second paragraph to make a person carrying on business contrary to the first paragraph liable to a penalty, that is, carrying on business having gain for its object. In my judgment it was not the intention of the legislature to provide that if a person contracts with, say, a Manitoba company at Winnipeg for the purchase of an article there, the company will not have a remedy to recover the purchase price in this Province or to secure itself by notes or other securities. I will even go so far as to say that where a person living in this Province forwards an order to a Manitoba company at Winnipeg to send an article to him, and that order is accepted and the article shipped, that is not carrying on business for gain in this Province. The order may be dated here, but it is received at Winnipeg, and when the article is shipped, the contract is complete there; the company has done nothing contrary to the laws of this Province. If a company, however, not being duly licensed, opens an office in this Province or sends its agents through the Province to canvass or commits acts of a like character, then it would bring itself within the provisions of the section and be liable to a penalty. I may say that the plaintiff's counsel offered in evidence the order given by McTighe to the plaintiffs for the outfit, but it was rejected (I now think improperly) on objection taken to its admission by the defendant's counsel. It is only necessary for me to say that the defendant has not brought this company,

SASK.

S. C.
1912

ONTARIO WIND ENGINE AND PUMP CO. v. ELDRED.

Wetmore, C.J.

so far as this transaction is concerned—and that is all I have to deal with—within the purview of the law, and therefore the objection of law so raised is not well taken.

There is a good deal of conflict of testimony as to what took place at the time these notes were signed, but that the notes were signed is clear, that they were signed for the purpose of carrying out the agreement with McTighe in so far as the defendant was concerned, and that the plaintiffs were willing to accept him instead of McTighe is equally clear. I am of opinion, even if the facts set up by the defendant are true, that it is not open to him to set up a verbal arrangement such as he attempted to set up in answer to the plaintiffs' right to recover on such notes. The testimony on the part of the defendant was, in substance, that at the time of the signing of the notes (whether before or after does not appear from the evidence on behalf of the defendant), one McDonald, an agent of the plaintiffs, agreed to send him an expert, for whose services the defendant was to pay, to assist him in completing the first well he dug in 1909, that he was to stay with him until such well was completed, and, if not completed, the notes would be void. McDonald swore that the conversation about the expert was after the notes were signed, and I find that to be the fact. The well was never completed. Such an agreement would be utterly at variance with the notes. I find, however, that this arrangement as stated by the defendant was not made; there was no arrangement that the expert should remain until the well was completed and if not completed the notes were to be void. McDonald absolutely denied that anything of that sort was arranged. He says he did consent and agree to send an expert to assist the defendant and shew him how to work the outfit, and that the defendant was to pay for the services of such man. It seems to me utterly incredible that McDonald would agree to relieve the defendant from all liability if the well was not completed, and I say this especially when I consider the great uncertainty of finding water when drilling for it. This case illustrates it. The expert came, but he only remained there ten or twelve days, and then went away. He went down 250 feet before he went away, and two or three men came afterwards, who worked at it for 37½ days, and no one ever got below the 250 feet; and, as before stated, there was nothing wrong with the machine nor the skill of the workmen or their ability to do the work, so far as the evidence shews.

There will be judgment for the plaintiff on the claim for the full amount of the claim and costs. The local registrar will figure up the amount of principal and interest due on the notes and enter judgment accordingly. There will be also judgment for the plaintiff on the counterclaim, with costs.

Judgment for plaintiff.

B.C.

C. A.
1912

Jan. 24.

CARTY v. BRITISH COLUMBIA ELECTRIC CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 24, 1912.

1. APPEAL (§ VIII B—672)—REDUCTION OF DAMAGES—REMITTING CASE FOR NEW TRIAL.

In an action for personal injuries in a negligence action against a street railway, where it appeared that the plaintiff, a man aged thirty-one, was permanently incapacitated by the injury from following any continuous occupation, although he might be able to earn something towards his own support, a verdict for $11,500 is not unreasonable and will not, under ordinary circumstances, form a ground for ordering a new trial or reducing the verdict on appeal.

MACDONALD, C.J.A.:—The plaintiff was awarded $15,000 by the jury at the first trial of the action. The defendants appealed to this Court, which ordered a new trial on the ground that the damages were excessive. On the new trial, the jury awarded $11,500, and the defendants have again appealed, claiming that that sum is excessive. The evidence at the new trial was very similar to that given at the first trial. The jury have, I think, negatived the suggestion that the plaintiff was malingering, and I cannot say that they were wrong. It would appear from the evidence that the plaintiff might be able to do something towards his own support, but I think the jury could very well come to the conclusion that he was not fit to engage continuously daily in any occupation which it could be suggested he might follow. A period of several months elapsed between the first and second trials, and the evidence discloses no material change in the plaintiff's condition. This would strengthen the conclusion that the plaintiff's injuries were likely to be permanent. The plaintiff at the time of the injury was a man of about 31 years of age. He had suffered a great deal of pain and has been put to considerable expense, and may be put to further expense in the future for medical care. The loss of his earning power will extend over a long period, having regard to his expectation of life.

While the amount awarded is large, yet I think in the circumstances, I would not be justified in disturbing the verdict.

The appeal should therefore be dismissed.

IRVING, J.A. concurred with the Chief Justice.

GALLIHER, J.A.:—This case has been twice tried. At the first trial the plaintiff was awarded $15,000 damages, which this Court held excessive, and granted a new trial. On the second trial the jury awarded $11,000, and against this the defendants appeal.

I have read the evidence carefully, and can find no grounds on which a jury could reasonably award any such damages.

Following my view in *Taylor* v. *B.C. Electric Co.*, 1 D.L.R.

384, 19 W.L.R. 851, I would, by virtue of the provisions of rule 869*a** of our Supreme Court Rules, reduce the damages to $6000 instead of sending the case back for a new trial.

Appeal dismissed.

B.C.
C. A.
1912
CARTY
v.
BRITISH
COLUMBIA
ELECTRIC
CO.

BROWN v. MOTHERLODE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 1, 1912.

B.C.
C. A
1912
April 1.

1. TRESPASS (§ I B—10)—APPLICANT FOR CROWN LANDS—ACTUAL POSSESSION BY ADVERSE CLAIMANT.

Neither an applicant to purchase Crown lands or his assignees have any legal or equitable interest therein which will amount to an answer to an action of trespass by a person having actual possession thereof with the concurrence of the Crown.

[*Wilson* v. *McClure*, 16 B.C.R. 82, specially referred to.]

AN appeal by the defendants from an order of Hunter, C.J. B.C., striking out certain paragraphs of the statement of defence.

The order below was varied.

Harold Robertson, for appellants.

H. A. Maclean, K.C., for respondents.

MACDONALD, C.J.A., concurred in the judgment of GALLIHER, J.A.

IRVING, J.A.:—I would dismiss this appeal.

In *Harper* v. *Charlesworth* (1825), 4 B. & C. 574, it was decided that a person having the actual possession of Crown lands with the concurrence of the Crown can maintain trespass against a wrong-doer.

Holroyd, J., points out in that case that an entry on the possession of another cannot be justified unless it is made by the authority of a person in whom the right of soil is vested.

It is useless for the defendants to refer to the interest of John McMartin. He has no vested right of soil: *Wilson* v. *McClure*, 16 B.C.R. 82.

The defendant, I think, should be at liberty to plead that

*The British Columbia Rules of 1896 (marginal rule 869*a*) passed under statutory authority conferred a special power on the full Court the Supreme Court of British Columbia sitting in appeal to reduce excessive verdicts which appellate jurisdiction was on the establishment of the Court of Appeal of British Columbia, conferred on the latter Court. The rule is as follows:—

5A. (869*a*). Where excessive damages have been awarded by a jury, if the full Court is of the opinion that the verdict is not otherwise unreasonable, it may reduce the damages without the consent of either party instead of ordering a new trial.

See annotation as to same, 1 D.L.R. 386.

B.C.
C. A.
1912
BROWN
v.
MOTHERLODE.
Irving, J.A.

the plaintiff's claims were invalid as not being on the waste lands of the Crown.

GALLIHER, J.A.:—I would vary the order appealed from to the extent of allowing paragraph 4 of the statement of defence to stand up to and including the word "Crown" in the second line thereof, the remainder of the plea is embarrassing and was rightly struck out.

Admitting that application had been made by McMartin to purchase these lands from the Crown, that did not give him or his assigns any interest (legal or equitable) in the lands, and is no answer to an action for trespass: see *Wilson* v. *McClure*, 16 B.C.R. 82, and cases there cited.

As the learned Chief Justice who made the order gave leave to amend, the defendants should pay the costs of appeal.

Order varied accordingly.

LEAKIM v. LEAKIM.

Ontario High Court, Riddell, J. April 10, 1912.

ONT.
H. C. J.
1912
April 10.

1. MARRIAGE (§ IV B—56)—ANNULMENT—PHYSICAL INCAPACITY—JURISDICTION.

The High Court of Justice for Ontario has no jurisdiction to entertain an action to have a marriage declared invalid by reason of the alleged physical incapacity to consummate the same on the part of one of the parties thereto.

[*T.* v. *B.*, 15 O.L.R. 224.]

MOTION by the defendant to strike out the statement of claim and to dismiss the action.

The motion was allowed, the statement of claim struck out and the action dismissed with costs.

L. F. Heyd, K.C., for the plaintiff.

T. J. W. O'Connor, for the defendant.

RIDDELL, J.:—The plaintiff alleges in his statement of claim that he and the defendant were married in Russia; that the defendant was born without vagina, uterus, and tubes, and consequently physically incapable of copulation, and the marriage was never consummated, although the parties lived together for some time. He asks for a declaration that "the alleged ceremony of marriage did not constitute a valid marriage between the said parties or in the alternative that the said marriage may be dissolved."

A motion is made under Con. Rule 261 to strike out the statement of claim and to dismiss the action.

It is clear that the case is fully and exactly covered by *T.* v. *B.*, 15 O.L.R. 224, by which I am bound.

ONT.

C. A.
1912

LEAKIM
v.
LEAKIM.

Riddell, J.

Without, therefore, expressing an independent opinion, I follow *T.* v. *B.*, and strike out the statement of claim.

The writ of summons is indorsed for the same relief as is asked in the statement of claim, and there is no pretence that the statement of claim can be amended. It is, therefore, a proper case for turning the motion into a motion for judgment under Con. Rule 617, and dismissing the action.

The motion will be allowed, the statement of claim struck out, and the action dismissed with costs.

Action dismissed.

DERBY v. ELLISON.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 1, 1912.

B.C.

C. A.
1912

April 1.

1. FIRES (§ I—1)—LIABILITY OF OWNER OF LAND—SERVANTS EMPLOYED TO BUILD A CABIN—CLEARING SITE BY FIRE.

Where servants employed to build a cabin on uncleared lands set out fire for the purpose of clearing a part of the land for the erection of the cabin, and the fire spread and caused damage, the employer will be liable for the resultant damage due to the failure of the servants to take reasonable means to prevent it spreading, even though he had forbidden the servants setting out any fires.

2. MASTER AND SERVANT (§ III A 2—291)—SCOPE OF EMPLOYMENT—BUILDING A CABIN—CLEARING THE SITE.

Where servants are employed to build a cabin on uncleared land, the clearing of the site for the erecting of the cabin is presumably within the scope of their employment.

APPEAL by the defendant from a judgment in a County Court action in favour of plaintiff for damages from the spread of fire.

W. J. Taylor, K.C., for appellant.
A. D. Macintyre, for respondent.

MACDONALD, C.J.A.:—I concur in the reasons of judgment of GALLIHER, J.A.

IRVING, J.A.:—The argument for the defendant was based on the admission that the fire (if lighted by the defendant's servants) was an illegal act, and therefore on the principle of *Poulton* v. *L. & S.W. Ry.*, L.R. 2 Q.B. 534, at p. 540, the defendant could not be responsible.

The limitation on the principal's authority in that case turned on the fact that the act done was *ultra vires* of the company. The judgment of the majority of the Court in *Mill* v. *Hawker*, L.R. 10 Ex. 92, affirming same case, L.R. 9 Ex. 309, 317, establishes this distinction.

Dyer v. *Munday*, [1895] 1 Q.B. 742, shews that a principal may be liable for the act of his servant, although the act complained of is a criminal offence.

B.C.
C. A.
1912
DERBY
v.
ELLISON.
Irving, J.A.

The evidence of the violence of the wind is not satisfactory. That there would be a great deal of wind must be conceded, but on the other hand, there is evidence that the wind was not great. I am not satisfied that there was that terrible wind that the defendant's witnesses would have us believe. As to what constitutes a storm so as to come within the doctrine of *vis major*, see *Garfield* v. *Toronto*, 22 Ont. A.R. 128.

This is an action for tort, and in such a case the plaintiff has to prove that the act of setting fire to the brush was within the scope of a servant's duty. I think that has been proved. Clearing is incidental to the erection of a cabin. By legal intendment, the act was done for the defendant's benefit, because it is presumed that the defendant's intention in employing these men to erect the cabin, and as incidental thereto to clear the site, was to benefit himself. I would dismiss the appeal.

GALLIHER, J.A.:—The plaintiff at the trial amended his plaint by adding a clause that the lands of the plaintiff and defendant were within a fire district, but gave no proof of this.

The appellant contends that as this was not denied by the defendant, it must be taken to be admitted, and that no proof is necessary. That would undoubtedly be true if the action was in the Supreme Court: see Supreme Court Rules, B.C.13, Marginal Rule 209. There is no such rule in the County Court Rules, and unless it is covered by sec. 77 of the County Court Act, 1905, that contention cannot stand. Sec. 77 reads as follows:—

> As to any matters of practice or procedure (including costs) not specifically provided for by this Act or the rules of Court, the rules, procedure and practice of the Supreme Court from time to time in force shall apply, so far as, and in the opinion of the Judge, the same shall be applicable, and the exercise of the Judge's discretion hereunder shall be final and without appeal.

I am of opinion that sec. 77 does not apply because in the County Court Rules themselves the methods of practice and procedure are very clearly laid down, but if I am in error in that view, sec. 77 only applies when in the opinion of the Judge the Supreme Court Rules are applicable, and the exercise of the Judge's discretion is final. It does not appear on the proceedings that the point was taken at the trial, or that he exercised his discretion, and if it is to be taken that he exercised his discretion at all, it was against the appellant's present contention, for we find that twice in the written judgment delivered the Judge holds that the defendant-appellant fails in his contention that it was an unlawful act, as no proof was given that the lands were within a fire district.

It then became a question of recovery at common law.

The learned trial Judge has found that the defendant's ser-

vants set out the fire which caused the damage and that they used no reasonable means to prevent it from spreading to other lands, and on the evidence I am unable to say he was wrong. He also finds that the defendant is not protected on the ground of *vis major*, and with that I agree.

The evidence is that the servants were forbidden by the defendant to set out fires, but this fact, under the authorities, does not free the defendant from liability if the act of the servant was within the scope of his employment, and in the interest of the master.

It is admitted by the defendant's witnesses that they were employed to build fences, keep cattle off the premises, dig a well and build a cabin, and the defendant himself says a short time previous to the occurrence of the fire, he, in company with one of his servants, Blondin, attempted to clear a site for the cabin by lighting some brushwood, but that it was too wet and the fire did not burn, so he abandoned that site.

The clearing of a site by fire or otherwise would be incidental to the building of a cabin, and work within the scope of the servant's employment, and something in the interest of the master. It was no part of the work for which the servants were engaged to clear the land other than such as might be necessary for a site for the cabin to be built, and in fact they say they were not employed to clear land.

As the servants in this case deny the setting out of the fire at all, it would of course be impossible to elicit in cross-examination for what purpose it was done, which could have been done if the setting out of the fire had been admitted. The trial Judge having found that they did set out the fire, we are driven to one of two conclusions, either that they did it for the purpose of clearing a site for the cabin, or they did it wantonly and for no reason or purpose. Considering that one of the purposes for which they were employed was the building of a cabin, and incidental to that was the clearing of a site, and the plaintiffs having proved the setting out of the fire and the nature of the employment, I think the reasonable inference to draw from the facts is that it was set out for that purpose, and not simply as a wanton, causeless act of the servants.

I would dismiss the appeal with costs.

Appeal dismissed.

B.C.

C. A.

1912

Jan. 31.

THE KING v. DEAKIN.

(*Decision No.* 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 31, 1912.

1. APPEAL (§ VII I—361)—IMPROPER ADMISSION OF EVIDENCE—NEW TRIAL —WAIVER OF RIGHT TO A JURY.

Where the Court of Appeal has ordered a new trial of a criminal case tried before a County Court Judge's Criminal Court because of the improper admission of evidence, the case is remitted to the same Court for trial upon his original election for speedy trial therein and waiver of his right to a jury.

2. EVIDENCE (§ IV G—421)—NEW TRIAL—DEPOSITIONS ON FIRST TRIAL— ADMISSIONS.

Where a new trial has been granted to the accused by a Court of criminal appeal on the ground that the principal witness for the prosecution had not been properly sworn at the first trial, the depositions of the accused given on the first trial as a witness on his own behalf and his cross-examination and re-examination, may notwithstanding be given in evidence on behalf of the prosecution on the second trial as being evidence of admissions made by the accused.

APPEAL by way of case stated from the judgment of County Judge Howay, in the County Court Judge's Criminal Court. The accused had been tried before on the charge of stealing and killing a cow, and was given a new trial by the Court of Appeal on the ground that the principal witness against him had not been properly sworn: *Rex* v. *Deakin* (1911), 16 B.C.R. 271, 19 Can. Cr. Cas. 62. On appearing for the second trial, he claimed the right to re-elect whether he should be tried speedily or take a jury, which was refused. He, on the trial, entered a plea of not guilty under protest. The trial Judge reserved this question for the opinion of the Court of Appeal. The other question reserved was: "At the first trial of the accused he gave evidence as a witness on his own behalf. At the second trial the prosecuting counsel offered in evidence as admission evidence, the examination, cross-examination, re-examination and examination by the Judge of the accused, being the evidence of the accused so given in the first trial, to which the counsel for the accused objected on the ground that such testimony could not be used against him, and I allowed the same. Was I right in allowing said evidence of the accused so given upon his first trial to be used by the prosecution as evidence upon this trial?"

The Judge refused to reserve the point taken by counsel for the accused that there was no evidence warranting the finding of guilty against the accused.

J. A. Aikman, for the accused:—We submit that the accused is entitled to a trial *de novo*, and that means he must go back to where he commenced and re-elect. The County Court Judge's Criminal Court is a tribunal of limited jurisdiction; it obtains its jurisdiction by virtue of the election of the accused to be tried by it. Therefore, a new trial having been ordered, he must go back and observe all the procedure.

B.C.

C. A.
1912

THE KING
v.
DEAKIN.

[MACDONALD, C.J.A.:—We only set aside the trial.

IRVING, J.A.:—We send him back to the Court whence he came.]

Mr. *Aikman* referred to *Reg.* v. *Riel* (No. 2), (1885), 1 Terr. L.R. 23, at p. 60.

For this case on appeal to the Privy Council, see *Riel* v. *Reg.*, 10 A.C. 675, 16 Cox C.C. 48.

IRVING, J.A.:—That was where there was a defect in the charge. He goes back to the place where the error occurred and re-commences there. You might as well say there should be new depositions.

Aikman:—On the other points: It is submitted that the evidence given on the first trial should not have been used on the second. The Judge is "a person in authority" within the principle of warning a prisoner. Besides, it is not legal evidence, because there is no provison for taking evidence in the Speedy Trials Court by the stenographer, and the extended report of transcript of the stenographer's notes is not proper evidence. In any event, the evidence of the chief or prosecuting witness is not sufficient.

Maclean, K.C., for the Crown, was not called upon.

PER CURIAM:—The prisoner undoubtedly was not entitled to re-elect. The election is no part of the trial at all; it is a preliminary required to give the County Court Judge jurisdiction. The accused is brought before the County Judge, and elects to be tried by him; that is taken down and made of record. Afterwards the trial takes place, which in this case turns out to be a mis-trial. This Court sends it back to the Court where it came from, that is, back to the Court which the prisoner elected to be tried by. It cannot reasonably be contended that the form of election should be gone through again.

The second question was answered in the affirmative, and on the point on which the trial Judge refused to reserve a case, the Court was of opinion that there was sufficient evidence, if believed, to convict.

Conviction sustained.

B.C.

C. A.
1912

April 2.

MACPHERSON v. CITY OF VANCOUVER.

British Columbia Court of Appeal. Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. HIGHWAYS (§ IV A 6—156)—OPENING IN SIDEWALK—DEFECTIVE COVERING—LIABILITY OF MUNICIPAL CORPORATION.

It is actionable negligence for a municipal corporation, in rebuilding a sidewalk, to cover an opening therein with an old, defective grating, through which a person fell and was injured.

[*Cooksley* v. *New Westminster*, 14 B.C.R. 330, referred to.]

B.C.

C. A.

1912

MACPHERSON v. CITY OF VANCOUVER.

2. HIGHWAYS (§ IV D 1—231)—NOTICE OF DEFECTS IN SIDEWALKS—CONTRACTOR ENGAGED BY MUNICIPALITY BY THE YEAR TO BUILD ALL SIDEWALKS.

Lack of notice of the existence of a defect in a sidewalk will not avail a municipal corporation as a defence to an action for injuries thereby sustained, where the defect was caused by a contractor employed by the year by the city to build, under the direction of the city officials, all sidewalks required.

[*Rice* v. *Whitby*, 25 Ont. A.R. 191, and *McGregor* v. *Harwich* (1899), 29 Can. S.C.R. 443, referred to.]

3. HIGHWAYS (§ IV B 3—176)—LIABILITY OF ABUTTING OWNER FOR INJURY BY DEFECT IN SIDEWALKS—VANCOUVER INCORPORATION ACT (1900), B.C.

An adjoining property owner is exempt, under sub-sec. 149-154 of Vancouver Incorporation Act (1900), ch. 54, from liability over on a judgment against a municipal corporation for personal injuries sustained by a defect in a sidewalk due to the negligence of the agents or servants thereof.

[*Sombra* v. *Township of Moore*, 19 Ont. A.R. 144 at p. 150, specially referred to.]

4. HIGHWAYS (§ IV B 3—176)—ABUTTING OWNER—DEFECT IN SIDEWALK—VANCOUVER INCORPORATION ACT, 1900—RELIEF OVER.

A property owner does not "leave" or "maintain" an excavation under an adjoining sidewalk, within the meaning of sub-sec. 149-154 of Vancouver Incorporation Act (1900), ch 54, so as to render him liable over on a judgment against a municipal corporation for injuries sustained by falling through an old, defective grating, placed in the sidewalk by the servants or agents of the city over an opening therein, notwithstanding such excavation was for the use and convenience of the adjoining owner.

APPEAL by defendant corporation from the judgment in favour of plaintiff for damages for personal injuries by falling through a sidewalk grating and by the third party, the owner of the adjoining property, brought in by the defendant corporation on a claim for indemnity and relief over.

The corporation's appeal was dismissed and the third party's appeal was allowed.

W. A. Macdonald, K.C., for appellant.

Messrs. *E. P. Davis*, K.C., and *J. A. Russell*, for respondents.

MACDONALD, C.J.A.:—I would dismiss the appeal. The grating in question was placed in the new sidewalk by the appellant corporation itself without any interference on the part of Mrs. Stirling. Whether she would or would not have been liable had the accident occurred while the grating was in the old sidewalk, which had been torn up by the corporation, is a matter which I need not consider. The appellant corporation is not entitled to recourse against Mrs. Stirling for damages resulting from its own act. I would, therefore, dismiss the appeal.

IRVING, J.A.:—An accident occurred in June, 1909, the defendant sustaining injury by falling through a wooden grating, which the city officials had in 1907 placed in the cement sidewalk opposite a shop or store owned by Mrs. Stirling in Granville

Street, one of the chief streets of Vancouver, near the centre of the town.

Judgment, which proceeded on the ground that the city was guilty of misfeasance, went against the city in favour of the plaintiff, but the city was given a remedy over against Mrs. Stirling.

From that judgment the city appealed, and Mrs. Stirling also appealed.

The appeal of the city was limited to the seventh ground, viz.:—

> There was no evidence adduced at the trial of any notice or knowledge on the part of the defendant corporation of the non-repair of the sidewalk in question.

There was in my opinion abundant evidence to support this, viz., that the city officials had taken the grating in question and placed it in the cement sidewalk, and that its construction as part of the sidewalk was as flimsy as it well could be; and that the nails used to support it, or the cleats upon which it rested, were rusted.

The argument of the city was based on the want of notice: *Rice* v. *Whitby* (1898), 25 A.R. 191; *McGregor* v. *Harwick* (1899), 29 Can. S.C.R. 443, being cited. In those cases the work complained of was done by somebody for whose acts the corporation was not responsible. The transplanting of this well-worn grating from its original board sidewalk to the new granolithic bed was the handiwork of the city officials. Here there was negligent work in the construction of the thing, and it is not necessary to fall back on *Cooksley* v. *New Westminster*, 14 B.C.R. 330.

The appeal of Mrs. Stirling is not so easily disposed of, and I confess that I have felt grave doubts as to the correctness of my conclusion with regard to it.

The sections governing the right of remedy over are sub-secs. 149-154 of the Vancouver Incorporation Act (1900), ch. 54*. The

*The Vancouver Incorporation Act (1900), B.C., ch. 54, secs. 149-154, provides as follows:—

§ 149. In case an action is brought against the corporation to recover damages sustained by reason of any obstruction, excavation or opening in or near to a public highway, street or bridge, placed, made, left or maintained by any person or body corporate, other than a servant or agent of the corporation, or to recover damages sustained by reason of any neglect or wrongful act or omission of or failure to comply with the provisions of any by-law of the city, by any person, persons or body corporate, other than a servant or agent of the corporation, the corporation shall have a remedy over against such person, persons or body corporate, and may enforce payment accordingly of the damages and costs, if any, which the plaintiff in the action may recover against the corporation.

§ 150. The corporation shall be entitled to such remedy over in the same action, if the other person, persons or body corporate is made a party to the action, and if it is established in the action as against such other person, persons or body corporate, that the damages were sustained by reason of an obstruction, excavation or opening in or near to a public highway, street or bridge, placed, made, left or maintained by such person, persons or body corporate, or by reason of any negligent or wrongful act or omission of any person, persons or body

B.C.
C. A.
1912
MACPHERSON
v.
CITY OF
VANCOUVER.
Irving, J.A.

provisions of a very similar statute were discussed in *Sombra* v. *Township of Moore* (1891), 19 A.R. 144, at p. 150.

Mrs. Stirling bought the property in question in November, 1902, from one Davidson. The opening in the wooden sidewalk was made by Davidson, without permission.

The cement walk was built by contractors who had a contract with the city to build all work required during the year under the supervision of the city officials. It was built in November, 1907.

The third party relies on the exception in the statute and claims this excavation was "made" "by a servant or agent of the corporation." The city contends that the third party's liability turns on the fact that Mrs. Stirling left and maintained the excavation. She undoubtedly did "leave" and "maintain" the

corporate, other than the servants of the corporation; and the corporation may in such action have the other person, persons or body corporate added as a party defendant or third party for the purposes hereof (if not already a defendant in the action jointly with the corporation); and the other person, persons or body corporate may defend such action as well against the plaintiff's claim as against the claim of the corporation to a remedy over, and the Court or Judge, upon the trial of the action, may order costs to be paid by or to any of the parties thereto, or in respect of any claim set up therein as in other cases.

§ 151. If such other person, persons or body corporate be not a party defendant to such action, or be not added as a party defendant or third party, or if the corporation has paid the claim for such damages before any action is brought to recover the same, or before any recovery of damages or costs against the corporation therein, the corporation shall have a remedy over by action against such other person, persons or body corporate for such damages and costs as have been sustained by reason of any obstruction, excavation or opening placed, made, left or maintained by such other person, persons or body corporate.

§ 152. Such other person, persons or body corporate shall be deemed to admit the validity of the judgment, if any, obtained against the corporation in cases only where a notice has been served upon such other person, persons or body corporate pursuant to the provisions of the rules of Court made under the Supreme Court Act, or where such other person, persons or body corporate has admitted or is estopped from denying the validity of such judgment.

§ 153. Where no such notice has been served, and there has been no such admission or estoppel, and the other person, persons or body corporate has not been made a party defendant or third party to the action against the corporation, or where such damages have been paid without action, or without recovery of judgment against the corporation, the liability of the corporation for such damages, and the fact that the damages were sustained by reason of an obstruction, excavation or opening placed, made, left or maintained by the other person, persons or body corporate, must be established in the action against such other person, persons or body corporate to entitle the corporation to recover in such action.

§ 154. Where a solicitor or counsel is employed by the Council, whose remuneration is wholly or partly by salary, annual or otherwise, the corporation shall, notwithstanding, have the right to recover and collect lawful costs in all actions and proceedings in the same manner as if the solicitor or counsel was not receiving a salary, when the costs are, by the terms of his employment, payable to the solicitor or counsel as part of his remuneration in addition to his salary.

excavation. It was there for her convenience, but was she bound to examine it; and if the city did not strengthen it according to her views, was she at liberty to do the work? In the Manitoba case to which we have been referred, there was an active leaving and maintenance. Here, her leaving and maintaining was passive. It would be more correct to say that she permitted the work to remain rather than that she maintained the excavation. On the whole I am disposed to allow the appeal in her case.

GALLIHER, J.A.:—The only ground urged before us by the city as against the judgment in favour of the plaintiff was want of notice of non-repair. In the light of the evidence this cannot prevail, and the appeal must be dismissed with costs.

The third party Stirling is appealing against the judgment over against him in favour of the city. The city in 1907 when they took up the old wooden sidewalk and replaced it by cement, left the area or space as it was, and instead of covering the space with a new and substantial grating, took up the old wooden grating which had been in use for five years, and utilized it. This work was done under the supervision of the city, and Mrs. Stirling had nothing whatever to do with it, nor had she any control over it. I think the placing of this old grating in the new sidewalk by the city is faulty construction and misfeasance.

I cannot see under what principle the city can claim over against Mrs. Stirling.

The evidence discloses a state of facts which take it out of the application of the Statute of Incorporation (sec. 149 of 1900, Vancouver Incorporation Act).

The cases cited by Mr. Macdonald for the city, all of which I have carefully read, are on the facts clearly distinguishable.

The appeal of the third party should be allowed with costs.

Defendant's appeal dismissed; third party's appeal allowed.

DAVIE v. CITY OF VICTORIA.

British Columbia Supreme Court. Motion before Clement, J. March 11, 1912.

1. EMINENT DOMAIN (§ ID 3—60)—MUNICIPALITY EXPROPRIATING LAND FOR WATER WORKS—ENFORCING AWARD.

Where it is not alleged that the financial limit of a municipality may be overrun, a landowner is entitled to judgment, on motion, for the amount of an award rendered by arbitrators under ch. 20 of British Columbia Statutes of 1873 and ch. 64 of the British Columbia Statutes of 1892, where the parties could not agree as to compensation for land taken possession of by a municipal corporation for water works purposes, notwithstanding the city, which did not pay the award within the time limited by the statute, proposed to abandon the arbitration and take a smaller amount of land, as, where land has been once expropriated and possession taken by a municipal corporation it cannot withdraw therefrom.

[*Reg.* v. *Commissioners of H. M. Woods, etc.* (1850), 19 L.J.Q.B. 497, distinguished.]

B.C.

S. C.
1912

DAVIE
v.
CITY OF
VICTORIA.

Statement

2. ARBITRATION (§ IV—44)—ENFORCING AWARD—STATUTORY RELIEF FOR FAILURE TO CARRY OUT AWARD—REMEDIES OF LAND OWNER.

The provisions of clause (*u*), sec. 6, of Victoria Waterworks Act, 1873, 36 Viet. (B.C.) ch. 20, 55 Viet. ch. 64, sec. 3, that upon default in payment of the amount awarded for land expropriated for waterworks purposes the proprietor may resume possession thereof, in which case all his rights shall revive, is intended only as an additional safeguard to secure payment of such award, and is not the exclusive remedy available to him, and he may obtain judgment on the award.

[As to damages upon expropriation see Annotation 1 D.L.R. 508.]

MOTION by plaintiff for judgment. Plaintiff was the owner of lot 34, Malahat district, bordering on Sooke Lake. The defendant corporation, under the powers conferred upon them by chapter 20 of the statutes of 1873 took possession of this land in connection with the construction of a waterworks system for the city of Victoria. The parties not being able to agree as to the amount of compensation to be given for the land, the matter was referred to arbitration, and the sum of $13,500 was awarded plaintiff. This decision was rendered in September of last year, but the city has not yet paid the amount, but has intimated that it proposes to practically abandon the arbitration and take a smaller amount of plaintiff's land. On this decision being arrived at, plaintiff commenced his action, claiming that the city has no power to abandon the award; that they have taken possession of the land, and by virtue of the above named statute, it is vested in them. No motion has been made to set aside the award or pay the amount awarded.

H. A. Maclean, K.C., for plaintiff:—The plaintiff cannot sue on the award, as the time for payment has not arrived. The city proceeds under chapter 20 of the statutes of 1873, and chapter 64 of the statutes of 1892. Section 6 gives the water commissioners the right to appropriate land for the purposes set forth in the Acts, and section 7 provides that the land so taken shall be vested in the corporation absolutely. The compensation shall be ascertained, if necessary by arbitration, and the city has six months in which to make payment of the amount awarded or agreed upon. If the city does not make such payment the land owner has the right to re-enter and resume possession. He is not compelled to resume possession; such right is only an additional remedy. Every act has been done to vest the property in the corporation and the vesting in the corporation is not subject to the ascertainment and payment of compensation. The city's powers are equivalent to those of the Esquimalt Waterworks Company, and this point was decided by the Privy Council in *The Esquimalt Waterworks Company* v. *City of Victoria Corporation*, [1907] A.C. 499. See also *Tawney* v. *Lynn and Ely Railway Company* (1847), 16 L.J.Ch. 282; *The King* v. *The Hungerford Market Company* (1832), 4 B. & Ad. 327; *Simpson* v. *The South Staffordshire Waterworks Company* (1865), 34 L.J. Ch. 380. The city cannot withdraw from the transaction.

B.C.

S. C.
1912

DAVIE
v.
CITY OF
VICTORIA.

Argument

Messrs. *F. A. McDiarmid* and *J. Y. Copeman*, for the defendants:—We do not require the land, therefore we have no power to take it.

[CLEMENT, J.:—This case cannot be decided without having evidence if that point is raised.]

McDiarmid:—It is in the discretion of the city as to how much land it will require. The question turns on the interpretation of sections 6 and 7 of the Act. Sub-section (*m*) of section 7, which provides that the award of the arbitrators shall be binding on all parties concerned, must be subject to the divesting clause which operates as a re-conveyance by statute. He relied on *Reg.* v. *Commissioners of Woods, etc.* (1850), 19 L.J.Q.B. 497. Under the divesting clause the owner of the land has his remedy in addition to which he is entitled to any damage which he may suffer. The city has a right to refuse to make use of the land. There is nothing analagous under the statutes which give us power to act, to a notice to treat under the English statute. Where a general intention is expressed and also particular intention which is incompatible with the general intention, the particular intention is considered an exception to the general one: see *Churchill* v. *Crease* (1828), 5 Bing. 177; *Pilkington* v. *Cooke* (1847), 16 M. & W. 615; *Taylor* v. *Corporation of Oldham* (1876), 4 Ch.D. 395.

CLEMENT, J.:—On this record, in my opinion, the plaintiff is entitled to the declaratory judgment for which he asks in his statement of claim.

The case mainly relied on by Mr. McDiarmid (*Reg.* v. *Commissioners of H. M. Woods, etc.* (1850), 19 L.J.Q.B. 497) was decided upon grounds of public policy which do not exist in the case of a municipal corporation. And, moreover, there is no allegation here that the financial limit, if any, may be overrun. Apart from that case, the line of authority in reference to private corporations is clearly in the plaintiff's favour.

The only doubt arises from the provision in clause (*n*) of section 6 of the Corporation of Victoria Waterworks Act, 1873, 36 Vict. (B.C.) ch. 20 (as enacted by 55 Vict. ch. 64, sec. 3) that the sum awarded is to be paid within six months from the date of the award, etc., and that "in default of such payment the proprietor may resume possession of his property, and all his rights shall thereupon revive." On consideration I construe this as an additional safeguard in the landowner's favour, and not as his only remedy. If the latter were intended one would naturally look for some provision for payment of the damages, and costs incurred by the landowner through the locking up of his land and the time and expense involved in arbitration proceedings. There are no such provisions, and to read the clause

B.C.
S. C.
1912
DAVIE
v.
CITY OF
VICTORIA.
Clement, J.

as a practical undoing of all that had been done, and as giving to the earlier and leading clauses an interpretation different from that which, according to all the authorities, they should naturally bear, would be to make the Act an easy engine of oppression.

In short, I think that when once lands have been expropriated the corporation is not entitled to withdraw, and that this option given to the landowner to resume possession in default of payment within a certain time limit is not to be treated as subversive of the whole scheme of the Act as indicated in its leading clauses, but simply as a weapon to compel reasonably prompt payment by a municipal corporation, which ordinarily cannot be forced to speedy action.

The plaintiff is entitled to his costs.

Judgment for plaintiff.

B.C.
C. A.
1912
April 2.

ALBO v. GREAT NORTHERN RAILWAY CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. CARRIERS (§ III C—387)—PROVISION IN BILL OF LADING FOR PROTECTING GOODS AGAINST FROST—ONUS ON CONNECTING CARRIER.

Where, under a bill of lading which required protection of goods from frost, a carrier has had possession, for an unreasonably long time during very cold weather, of a consignment of figs, which were found to be frozen upon arrival at their destination, a *primâ facie* case of negligence on the part of that carrier is established which casts the onus upon it, in order to escape liability of shewing that the consignment was in a damaged condition when received from the connecting carrier.

2. CARRIERS (§ III D 4—421)—UNREASONABLE DELAY IN DELIVERING GOODS BY CONNECTING CARRIER—PRESUMPTION AS TO LOSS OR DAMAGE.

Where it appears that the climate at the point of shipment precludes the frosting of a consignment of figs at the time of their delivery to an initial carrier, and that a connecting carrier had possession of them for an unreasonably long time in very cold weather without offering any acceptable explanation for the delay, a strong presumption arises that if they were damaged by frost it was while in the latter's possession.

3. CONTRACTS (§ IV B—331)—CONSIGNEE REFUSING TO ACCEPT DELIVERY—GOODS FROZEN THROUGH NEGLIGENCE OF CARRIER.

A consignee is justified in refusing to accept a consignment of figs, which, through the negligence of the carrier, were frozen in transit.

4. EVIDENCE (§ II H 1—237)—DAMAGE THROUGH NEGLIGENCE OF CARRIER—PAYMENT OF PART—EFFECT OF AS TO OTHER DAMAGE.

The payment by a common carrier of damages for injuries to a portion of a consignment of goods is not an admission of liability in respect to other portions thereof. (*Per* Irving, J.A.)

[*Hennell* v. *Davies*, [1893] 1 Q.B. 367, followed.]

APPEAL by plaintiff from judgment of Wilson, Co.C.J., dismissing action.

The appeal was allowed.

E. P. Davis, K.C., for appellant.
A. H. MacNeill, K.C., for respondents.

MACDONALD, C.J.A.:—I do not find it necessary to decide the legal question which was raised in argument, nor to say whether or not Sutherland, who was the proprietor of the Oceanic Transit Company, the initial carrier, was the agent of defendants. I prefer to rest my judgment entirely upon the fact, which is to my mind clearly established, that on arrival of the figs at Fernie, they were then in a frozen condition. It was not a case of having been frosted, but the frost was actually in them at that time. They were received by the defendants, the Great Northern Railway Company, at St. Paul, on December 24, 1909, and were kept in transit to Fernie from that date until January 19, 1910. The defendants gave no explanation of what seems to me an unnecessarily long delay. In January the weather was very cold at Fernie. These figs were in the possession of the defendants for almost a month. The defendants offer no evidence at all as to the care taken to protect them against frost. In these circumstances I have no difficulty in drawing the inference of fact that the figs were frozen while in the possession of the defendants. I say the defendants, because no distinction was made in argument between these two companies which are operated, as I understand it, as one concern.

I would dismiss the appeal, and as it was conceded that if the defendants were liable at all they were liable for the full amount claimed, judgment should be entered below for that amount, with costs there and here.

IRVING, J.A.:—The bill of lading had across its face "Goods to be protected against frost." One of the conditions provided that any damage to goods for which the carrier is liable must be claimed against the company in whose actual custody the same may be at the time of the accident. The acceptance of these goods by the defendants at St. Paul was in effect a contract by the defendants to carry the goods on the terms stated in the original bill of lading.

It seems to me that the plaintiffs established a *primâ facie* case against the defendants when they proved that the goods were frozen when delivered at Fernie on January 19, and that the defendants had the custody of them from December 21 to January 19.

It became the duty of the defendants to shew that the goods were damaged when they took them over.

The letter of January 28, 1911, in my opinion ought to be regarded as written without prejudice: see *Pirie* v. *Wyld*, 11 O.R. 422.

B.C.

C. A.
1912

ALBO
v.
GREAT
NORTHERN
RAILWAY
CO.

Galliher, J.A.

Hennell v. *Davies*, [1893] 1 Q.B. 367, is against the plaintiffs' contention that the defendants by paying for the chestnuts admitted their liability in respect of the figs.

I would allow the appeal.

GALLIHER, J.A.:—I think this appeal should be allowed.

I am not sure that Mr. Davis' contention that the payment of the $160 for the chestnuts under the circumstances of this case is an admission of the cause of action as to the balance of the claim, is not well founded, but as I think the appeal should be allowed on another ground I refrain from deciding that point.

The goods in question, which were shipped from Naples, Italy, were receipted for in good condition.

As the only damage to the goods complained of is by frost, the evidence as to the climate of Italy precludes the possibility of their being damaged in that way at the time of shipment.

The defendant company, the terminal carriers, received these goods at St. Paul, Minn., and receipted for same in apparent good order, with this limitation, if I may so term it, "Contents and condition of contents of packages unknown."

Under such circumstances the weight of authority in the United States Courts seems to be that when it is shewn that the goods are received by the first carrier as in good order, it will be presumed in the absence of proof to the contrary that they were in like good order when received by the (here defendant) company, and unless this be repelled by evidence (the onus of which is on the company) they will be held liable. This seems to me, if I may say so, sound common sense.

Moreover, there is this further feature to be considered in the case at bar. These goods were on the road between St. Paul, Minn., and Fernie, B. C., between the 21st day of December, 1909, and the 19th day of January, 1910, an unreasonable length of time, at a time when during the month of January the evidence is that the weather was very cold.

The presumption is very strong that if these goods were damaged by frost it was during that interval.

I am quite satisfied (as the learned trial Judge appears to have been) that the figs were frozen, and the plaintiff was justified in refusing them.

At the trial the only evidence put in by the defendants was as to whether the figs were frozen or not.

The Ida, 32 L.T.N.S. 541, is distinguishable. There it was held that there was no proof of the condition of the cargo when received at the point of shipment, and the defendants successfully met in their evidence every contention of the plaintiffs as to damage to the cargo while in transit.

Appeal allowed.

PERIARD v. BERGERON.

B.C.
C. A.
1912
April 2.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. CONTRACTS (§ V A—379)—REPUDIATION OF CONTRACT TO PURCHASE STOCK OF GOODS AT ADVANCE OVER INVOICE PRICE.

The inability of the plaintiff to produce invoices in many instances pursuant to a written contract whereby the defendants were to purchase a stock of merchandise at an advance over the invoice prices, justifies the latter's repudiation of the contract, and relieves them from liability to the plaintiff for a breach thereof. (*Per* Irving, J.A.)

APPEAL by plaintiff from judgment of Morrison, J., for damages for breach of an agreement.

The appeal was dismissed, MACDONALD, C.J.A., dissenting.

W. B. A. Ritchie, K.C., for appellant.

J. A. Russell, for respondent.

MACDONALD, C.J.A. (dissenting):—This action arose out of the sale of a stock of gents' furnishing goods under a written agreement whereby the defendants agreed to pay $1.10 on the dollar invoice price, which was afterwards increased by three cents. When the parties came to take an inventory of the stock, disputes arose with respect to the price of certain articles, and in many cases the plaintiff was unable to produce invoices. I do not find it necessary to decide whether or not the defendants were at liberty to withdraw from the contract if and when invoices were not forthcoming. They did not withdraw, but attempted to adjust their differences at the time.

I think the evidence is convincing that these differences were adjusted before the prices were put in the inventory, and that when the stock-taking was completed, no complaint or declaration was made by the defendants that they would re-open the matter for further proof of invoice prices. As this is an appeal on the facts, and as the learned trial Judge has accepted the evidence of Mr. French, who was agent for, and whose firm was backing the defendants financially in this matter, it becomes necessary to examine how far Mr. French's evidence is in conflict, if at all, with the evidence given on behalf of the plaintiff. I may say at the outset that the evidence of Miss Periard and A. J. Periard, and the other witnesses called on plaintiff's behalf, impresses me favourably. They gave a fair and lucid statement of the manner in which the stock was taken and the inventory made up and completed.

On the other hand, I am not impressed with the evidence of conduct of either of the defendants. The defendant Bergeron was employed as a salesman in the business for a month. This was in accordance with the agreement and prior to the taking of the stock. In this way he became familiar with the cost marks on the goods, but he was discharged from his position because he was surreptitiously disposing of goods for less than the prices

B.C.
C. A.
1912
PERIARD
v.
BERGERON.
Macdonald, C.J.A.

at which he was instructed to sell, and at less than the defendants had agreed to pay when they should take over the stock. He endeavoured dishonestly to reduce the stock for his own and partners' benefit and to plaintiff's detriment. But as I have said, the learned trial Judge accepts as truthful the evidence of Mr. French, and if I were able to find that his evidence was substantially repugnant to the conclusion to which I have come, I should hesitate about it; but I do not find that his evidence is to any material extent opposed to that given on behalf of the plaintiff.

As disputes arose as to prices, they were settled between the parties at the time, and before the disputed articles were entered in the inventory, and on several occasions Mr. French was sent for to decide disputes. He says that he thinks his prices were not accepted by the plaintiff, but when pressed, admits that he may be mistaken about this and could not contradict the evidence to the contrary. The evidence to the contrary is that his prices were accepted, the matter was settled and the articles entered in the inventory. It is undisputed that the parties went on with the stock-taking, which lasted a day and a half, and ended at about noon on Friday, and that when the inventory was complete there was no objection and no declaration made to the plaintiff or to anyone on her behalf, that the prices were not to be considered as settled. Mr. French's evidence upon this point does not contradict that of the plaintiff, and does not help the defendants, and the evidence of Erisman strongly supports this conclusion. I think, therefore, that the production of the invoices was waived. It was not until the Monday after the conclusion of the stock-taking that defendants through Mr. French stated that they would not go on with the transaction, but I do not think that the repudiation was even then distinctly based upon the non-production of the invoices. I infer that the total value of the stock was considerably in excess of what defendants and Mr. French anticipated. Mr. French was agent for two Montreal firms who were to assist the defendants in financing the purchase, and I think that when it was found that the purchase price was larger than anticipated, it was then decided that the undertaking was beyond the means of defendants, and the non-production of the invoices was seized upon as a ready excuse. Defendants must have felt that they had not acted fairly when they offered to compensate the plaintiff for loss occasioned by the closing of her store at the time of the stock-taking.

There is another matter calling for some comment in this case. In the statement of defence the plaintiff is charged with having made representations knowingly false. There is not from beginning to end of the case the slightest foundation for such a charge, it was wholly gratuitous, and one which reflects discredit upon those who made it.

I would allow the appeal, and remit the case to the Court below to assess the plaintiff's damages.

B.C.
C. A.
1912
PERIARD v. BERGERON.
Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal.

The plain meaning of the words "invoice price" in the contract was the amount which Periard had been charged when he bought the goods.

The contract contemplated that these invoices should be produced, so that after stock had been taken the total price payable could be ascertained. This conclusion, I think, can be reached without the assistance of any evidence. We are entitled to take into consideration well-known mercantile practices in reading a commercial agreement.

The non-production of these invoices in the circumstances supports, in my opinion, the conclusion of the learned trial Judge that the plaintiffs were not acting honestly.

GALLIHER, J.A.:—I am unable to say that the learned trial Judge came to a wrong conclusion, and would dismiss the appeal.

Appeal dismissed, MACDONALD, C.J.A., *dissenting*.

ROMANG v. TAMOURNI.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

B.C.
C. A.
1912
April 2.

1. DESCENT AND DISTRIBUTION (§ I E—23)—TENANCY BY THE COURTESY.

Where a wife dies intestate leaving her surviving her husband and children, the husband is not entitled to tenancy by the courtesy in the wife's real estate where the circumstances are such that section 5, sub-section 5, of British Columbia statutes 1898, ch. 40, can be applied, although the effect of its application may be to cut down the husband's interest from a life estate in the whole of his deceased wife's lands as tenant by the courtesy to a life estate in one third thereof.

[*Romang* v. *Tamourni*, 17 W.L.R. 133, affirmed on appeal.]

2. STATUTES (§ III—131)—GENERAL AND SPECIAL LAWS—CONSOLIDATION AND REVISION—AMENDMENTS.

The British Columbia statute R.S.B.C. 1897, ch. 22 as to a surviving husband's tenancy by the courtesy in his wife's lands is to be interpreted as subject to the modifications introduced by the same Act as that by which the Revised Statutes of British Columbia were declared to come into force and effect expressly subject to the amendments accompanying such declaratory Act.

APPEAL by the defendants from the judgment of Murphy, J., 17 W.L.R. 133, holding that the defendants who had taken a conveyance from the surviving husband of the decedent acquired only a one-third interest therein for the term of the husband's life.

The appeal was dismissed.

B.C.

C. A.
1912

ROMANG
v.
TAMOURNI.

Murphy, J.

The judgment appealed from was as follows:—

MURPHY, J.:—The substantial question to be decided in this case is, whether sub-sec. 5 of sec. 5, of ch. 97, R.S.B.C. as enacted by ch. 40 of the statutes of 1898, first schedule impliedly repeals sec. 22 of ch. 97.

It was argued on behalf of the defendants that the two sections are not necessarily so inconsistent and repugnant to each other that the earlier must be taken to be repealed by the later legislation. To support this, it was urged that sub-sec. 5 of ch. 40 is intended to deal with the devolution of real estate in general, and operates upon every interest in land, legal or equitable, with the single exception of tenancy by the courtesy. Tenancy by the courtesy being created only if certain requisites are present, viz., a valid marriage, birth of a child capable of inheriting, sole *seisin* of a wife during coverture, and the death of the wife, it is argued that sec. 22 of ch. 97 applies only to estates fulfilling every one of these requirements, while sub-sec. 5 operates upon estates which are lacking in one or more of these requisites; and therefore, the two sections are not necessarily repugnant. This is ingenious, but I hardly think the argument can prevail.

In the first place, it is to be observed that sec. 22 deals with dower, as well as tenancy by the courtesy, and that all in one sentence. One could not urge the same line of reasoning if this were a case of dower, where there was no issue, instead of tenancy, for, by sub-sec. 5, the widow would, under such circumstances, take one-half of her husband's real estate absolutely, whilst under sec. 22 she would be entitled to dower or a life interest in one-third thereof. These provisions are, I think, obviously so repugnant as to be irreconcilable. As dower attaches to any real estate to which a deceased husband has any legal or equitable right, unless held by him in joint tenancy, it would be necessary to divide sec. 22 into two provisions, if the defendants' argument is to prevail, and I know of no authority for so doing, particularly when regard is paid to its grammatical construction. Rather, I think, such repugnancy is a clear indication of the intention of the legislature to repeal the earlier section by the later.

Again, the facts of this case fall directly within the four corners of sub-sec. 5. The mother died seised of an estate in fee simple, intestate, leaving a husband and a lawful descendant. Sub-section 5 expressly states that, in such circumstances, the husband shall be entitled to one-third of such real estate for life. If effect is given to sec. 22, the husband takes the whole of the estate for life. That is, I think, a clear repugnancy. I hold that the defendants have, by the deed from the husband, acquired his interest, viz., one-third of the property for the

term of the husband's life, subject to a lien on the whole property for $115.80, and interest at the legal rate, for taxes paid on her behalf thereon.

I am asked to order a partition or sale; but, as the question was not argued at the trial, I desire to hear counsel further, unless they can agree on this point.

There should be an inquiry before the registrar as to mesne profits.

J. A. Russell, for appellants.

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

MACDONALD, C.J.A.:—I would dismiss this appeal. Ch. 97, sec. 22, R.S.B.C. 1897,* preserved to a husband his tenancy by the courtesy of England. By ch. 40 of the Acts of 1898, being an Act to give effect to the said Revised Statutes of B.C. 1897, the said Revised Statutes were given the force of law subject to the amendments set forth in the first schedule to the said ch. 40. Sec. 5 of the latter Act must be read in connection with sec. 1, and thus read I think there is no doubt that the amendment made to said ch. 97 by the said schedule, and reading as follows:—

> 5—(5) If the intestate should leave a widow or husband him or her surviving such widow or husband as the case may be shall be entitled in case the intestate has left no lawful descendant to one-half of such real estate absolutely and in case the intestate has left lawful descendants him or her surviving then to one-third of such real estate for life.

is applicable to the facts of this case, and that the husband is therefore entitled to a life estate in one-third only of the land in question.

I would dismiss the appeal.

IRVING, J.A.:—Prior to the passage of the Act of 1898, the father, Joseph, would, as tenant by courtesy, have been entitled to the whole of his wife's real estate for life. The 5th sub-section passed by that Act under the circumstances of this case has cut his interest down to one-third for life.

I can see many reasons for saying that the tenancy by courtesy has not been abolished, but this case I think can be determined upon the statute of 1898, and the facts of this particular case.

I would dismiss the appeal.

GALLIHER, J.A.:—I agree entirely in the judgment of the learned trial Judge, and would dismiss the appeal.

Appeal dismissed.

*R.S.B.C. 1897, ch. 97, sec. 22 is as follows:—

"Nothing in this Act contained shall be held to impair or affect the right of a widow of an intestate to her dower out of her deceased husband's lands, nor the right of a husband to his courtesy out of his deceased wife's lands."

B.C.

C. A.
1912

April 2.

LANGAN v. NEWBERRY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND—FAILURE TO PAY PURCHASE MONEY—REFUSAL TO ANSWER REQUISITION ON TITLE.

Specific performance may be granted of a contract for the sale of land at the suit of a purchaser who failed to pay the purchase price when due, though time was made of the essence of the contract in that regard, where it appeared that the vendor who, to the knowledge of the purchaser, was merely a holder of an agreement for the purchase of the land from the owner, refused a request for inspection of such agreement and ignored a subsequent demand for a solicitor's abstract of title, both the request and demand being made by the purchaser before the first instalment of the purchase price was due.

2. CONTRACTS (§ II D 2—174)—VENDOR SELLING LAND—TITLE UNDER AN AGREEMENT—PURCHASER'S RIGHT TO INSPECT AGREEMENT.

A person contracting to buy land from one he knows to be merely a holder of an agreement for its purchase, is entitled to an inspection of such an agreement before he pays any part of the purchase price and the vendor has no power to cancel the agreement upon a failure of the purchaser to pay the first instalment of the purchase price when due where he has refused the other's request for such inspection and ignored the further demand, on the latter's part, for a solicitor's abstract of title both made before any part of the purchase price was due, even though time was made of the essence of the contract as far as the payment of the purchase price was concerned.

[*Gamble* v. *Gummerson*, 9 Gr. 193, and *Cameron* v. *Carter*, 9 Ont. R. 426, specially referred to. See also *Knight* v. *Cushing*, 1 D.L.R. 331, and annotation, 1 D.L.R. 354.]

APPEAL by the plaintiff from the judgment of Clement, J., 18 W.L.R. 458.

The appeal was allowed.

E. V. Bodwell, K.C., for appellant.

J. S. MacKay, for respondent.

MACDONALD, C.J.A.:—The two agreements in question in this action, dated November 18, 1910, are for the sale by the defendant to one Ryan, the plaintiff's assignor, of two parcels of land. They are practically in identical terms, the one with respect to one parcel, and the other to the other. One parcel may be conveniently designated the Wakefield lot, and the other the Kendall lot. The defendant, prior to said November 18, agreed with Kendall to purchase his lot on deferred payments. He had paid a deposit of $50, and received a receipt therefor. Defendant and one Clark had bought the Wakefield lot on similar terms, but had a formal agreement of purchase, which was registered, at all events before the commencement of this action. It also appears that defendant had an assignment of Clark's interest which was not registered. These agreements were not shewn to Ryan, with the exception of the receipt for the $50. On November 19 defendant procured a formal agreement from Kendall which was not shewn to Ryan.

By the agreements of November 18, the purchaser was to

B.C.
C. A.
1912
LANGAN v. NEWBERRY.
Macdonald, C.J.A.

pay, and did pay, a deposit on each transaction of $500, the balance of the defendant's "equity," as it has been called, amounting to almost $8,000 on the two transactions, was to be paid to the defendant on January 1, and the balance of the purchase price was to be paid to defendant's vendors, Wakefield and Kendall, being the instalments falling due upon their agreements with the defendant. Time was declared to be of the essence of the agreements. Early in December, plaintiffs requested defendant to shew them the agreements under which he held the property, and I think the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs on December 27 formally notified the defendant that they intended to proceed with the purchase, and demanded a solicitor's abstract of title. This demand was ignored, and the plaintiffs did not make the January payments. When they took the matter up with the defendant within two or three days afterwards, the defendant in effect declared the agreements cancelled for non-payment on January 1. It was contended before us that the agreements of November 18 were merely options, and that failure to pay on the day agreed upon, and defendants' election to cancel, put an end to the plaintiffs' right to insist upon having the lots. I do not read the agreements as mere options. The documents themselves purport to be agreements for sale, and while not signed by the purchaser yet were treated by all parties as agreements for sale. I think the conduct of the parties shews that there was an acceptance either by words or conduct on the part of the purchaser at the time the agreements were made, or at all events long before the notice of December 27. However that may be, the notice of December 27 was clearly an acceptance. I do not stop here to inquire whether it would make any difference to this case if I were to treat the agreements as options. The real question I have to decide is whether or not the vendor was under obligation to furnish an abstract on demand of the purchaser, and if he was, whether his failure to do so disentitled him to call for payment of the purchase money until he had complied with the demand. We were not referred to any authority, but on the argument I was strongly of opinion that the plaintiffs' contention was right, and that an abstract should have been furnished, and this has been strengthened by reference to *Townend* v. *Graham* (1899), 6 B.C.R. 539, where my brother Martin, then sitting in the Supreme Court, decided a somewhat similar question. He referred to some Ontario cases, notably *Cameron* v. *Carter*, 9 O.R. 426, in which the learned Chancellor of Ontario, after agreeing with the rule laid down by Esten, V.-C., in *Gamble* v. *Gummerson* (1862), 9 Gr. 193, said:—

> I think the rule has often been recognized in this Court, and when the price is payable in instalments the purchaser has a right to have

B.C.
C. A.
1912
LANGAN
v.
NEWBERRY.
Macdonald, C.J.A.

a reference as to title and to have the title manifested before he makes a single payment.

The learned Judge appealed from was of opinion that in cases like the present the English practice of delivering a solicitor's abstract ought not to be imported into this Province, but it seems to me that that practice was imported into this Province with the common law, and was always in force here. True, it may be more honoured in the breach than in the observance owing to the loose manner in which the sale of real estate is conducted, particularly by real estate agents, who in general appear to be absolutely ignorant of the law governing the transactions in which they engage. There never was any doubt about the right of the purchaser to an abstract under contracts like the present, where no restrictions were imposed upon the sellers' liability to shew and make title, and where the purchase money was to be paid at the time of completion. But here, the purchase money in question was to be paid before the time arrived for conveyance, and the question is, in the absence of waiver, had the purchaser a right to call upon the vendor to shew his title before paying the instalments due on January 1? It seems to me that the rule laid down in *Cameron* v. *Carter*, 9 O.R. 426, is a most salutary one. What might be the result if a purchaser from a person who had only an agreement of purchase from another, were not entitled to call upon such person to shew that he could sell what he purports to sell? If such a person were unscrupulous or unfortunate in being unable to meet his own payments, a purchaser from him would be paying his instalments not on the security of the land, but on that of a worthless vendor.

It was also suggested in the reasons for judgment below that the purchaser having had notice that the defendant's title consisted of agreements from Wakefield and Kendall, and having agreed to accept assignments of those agreements, and pay the balance of the purchase moneys due thereon, must look to Kendall and Wakefield to shew and make title. I do not think such a conclusion could be arrived at from the agreements themselves. The clause is very inaptly worded, but it is plain enough what it means. It means that the purchaser is to pay the balance of the purchase price, that is, of the price which Ryan agreed to pay to the defendant, by assuming the payments in the Wakefield and Kendall agreements. I do not think the clause can be read as tantamount to an agreement to purchase merely all the right, title and interest of the defendant in those two agreements. Ryan had not seen those agreements at the time he agreed to purchase from the defendant, and they only came into the transaction in connection with the payment of the balance of the purchase money. But even if the learned Judge were right in considering that the plaintiffs should be compelled to look only to Wakefield and Kendall to make their title when the time arrived

for completion, still I think the defendant was obliged to shew the title from Kendall and Wakefield and Clark to himself, that is to say, the two agreements under which he held these lands, and the assignment from Clark, so that the plaintiffs might satisfy themselves whether or not those agreements gave the defendant the right to the fee.

The defendant's attitude as shewn by his evidence was that he was obliged to do nothing until the plaintiffs came with their money on or before January 1. He said that when they came with the money he would hand them over the agreements. That position I do not think is tenable. The plaintiffs were entitled to a reasonable time to investigate. Even if it could be said as the learned Judge thought that the time between December 27 and January 1 was too short to permit of reasonable notice to the defendant to deliver an abstract, yet it cannot be said that the demand for inspection of the agreements which was made early in December was not made in ample time to permit the production of these agreements which the defendant says were in his possession all the time.

In my opinion the plaintiffs were not obliged to pay their money on January 1, nor until the defendant had complied with their demand for a solicitor's abstract of title, shewing not only the Wakefield, Kendall and Clark agreements, but also the title back to the fee.

In this view of the matter the plaintiffs were not in default, and having made proper tenders before the commencement of this action, they are entitled to specific performance, and I would make an order accordingly, the costs of the action and of this appeal to be given to the plaintiffs, and unless the parties can agree, there should be a reference to the registrar with regard to title.

IRVING, J.A.:—The defendant, holding two contracts for sale to him of two lots, agreed with the plaintiff Ryan to sell the said lots to him, and he executed two separate receipts (p. 195). As they are identical in terms, it is sufficient to set out one of them:—

Interim Receipt.

Vancouver, B.C., Nov. 18th, 1910.

Received from W. B. Ryan the sum of $500.00 (five hundred dollars), being deposit on account of purchase of 13.74 acres Lot (15) Fifteen, Block 15, Subdivision 463, Coquitlam, for the sum of $4,830.00, on the following terms: $500.00 cash, $2,330.00 on Jan. 1st, 1911. Balance will assign my agreement Wakefield to myself.

The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Net. No commission.

Time is the essence of this agreement, and unless payments with interest are punctually made, at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded,

B.C.
C. A.
1912
LANGAN
v.
NEWBERRY.
Irving, J.A.

and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5.00, to be paid by the purchaser. This receipt is given by the undersigned as agent and subject to the owner's confirmation.

F. M. Newberry, Owner.

These receipts shew on their face that the purchaser knew that the title to the land then being bought was not then in the defendant. It was agreed that time was to be of the essence; that the cost of the conveyance should be paid by the purchaser. Does this mean the conveyance of the land itself, or of the defendant's interest? As the receipt amounted to an assignment of the defendant's interest, this disposes of the learned Judge's contention that Newberry was to drop out, and that, without more, the obligation to shew title to the fee was intended to rest with the defendant's vendors.

It is well to consider what the true position of the defendant and Ryan was. According to the law of conveyancing it is the vendor's duty, unless there are express stipulations to the contrary:—

(1) To shew a good title, *i.e.*, by delivering a proper abstract and later verifying the same;

(2) If the title is accepted to convey free from encumbrances and to put the purchaser in possession.

The vendor's duties are:—

(1) To examine the title deeds, and when a good title is shewn to accept it.

(2) Then to tender a deed for execution, and also the whole amount due.

Unless definite dates are fixed, these things are to be done within reasonable time, but from the moment the agreement is made the property belongs to the purchaser.

In these receipts no dates are fixed for the performing of these preliminaries. The expression as to time being of the essence can therefore only relate to the dates of payment.

The purchaser called on the vendor and asked to see the documents which he (the purchaser) had obtained from his vendor (p. 68). This may be regarded as a waiver of the production of the abstract. It is open to the parties to waive any of their rights. In *Barclay* v. *Messenger*, 43 L.J. Ch. 449, it was waived by the conditions; and in *Foot* v. *Mason*, 3 B.C.R. 377, it was waived orally. The waiver, however, of an abstract does not waive the production of the deeds, and I think it was the defendant's duty to produce them when requested, but he refused to do so.

After some little time, Ryan assigned the agreements to Langan, who notified the defendant that he would buy and on December 29 called for abstracts of the defendant's title.

B.C.
C. A.
1912
LANGAN v. NEWBERRY.
Irving, J.A.

Having regard to the fact that the defendant had been previously asked to produce the evidence of his title, and that he says he had them in his safe, I think this demand was not made unreasonably late, nor the time unreasonably short.

The learned trial Judge regarded this demand as a subterfuge. I do not see that that necessarily follows. It is true the purchaser might allege non-compliance with this request was an excuse or justification for not paying on January 1, but if that was the object, it did not, in my opinion, excuse the vendor from satisfying the demand. The vendor could very easily have abstracted and produced all the papers he had within half an hour, but he did nothing. I am not, therefore, called upon to say what, if anything, beyond the agreements with his vendors he was bound to abstract and offer to produce. He made default, and not only continued in default until after January 1, the day fixed for payment, but afterwards intimated he was not going to complete. On January 2 (the 1st fell on Sunday), possibly it was the 3rd, the plaintiff's agent attended him with a deed, and an agreement for execution (p. 34) but the defendant declined to look at them. Mercer swears this took place on January 2, Newberry says it might have been in the first week in January (p. 70) but says it was not the 1st or 2nd. Mrs. Mulholland swears it was after the 3rd or 4th, in fact the second week in January, but I think her evidence is absolutely unreliable. I would be inclined to accept the 2nd or 3rd as the date of Mercer's visit.

From what happened at that interview, I am satisfied that the defendant was then, and had been at the time when he was requested to shew his title, endeavouring to bring about a deadlock, with a view to preventing this contract being carried out. Tactics like these should not be allowed to prevail. I would direct specific performance on the ground that there was no disclosure of the defendant's title. This he impliedly agreed to do before the date for payment.

GALLIHER, J.A., concurred in allowing the appeal.

Appeal allowed.

ROOT v. VANCOUVER POWER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

B.C.
C. A.
1912
April 2.

1. EXPLOSION AND EXPLOSIVES (§ II B—10)—INJURIES FROM ACCIDENTAL EXPLOSIONS—ABSENCE OF NEGLIGENCE.

There can be no recovery on the ground of negligence for injuries sustained by an explosion of dynamite into which a pick was stuck by a mine employee, where the proof fails to shew any negligence on the part of the master in permitting the explosive to be in the place where the injury occurred, or as to how it came there, or that its presence could have been discovered by the most careful inspection, or, if the explosion was caused by an unexploded charge, by counting the explosions at the time a blast was made.

B.C.
C. A.
1912
ROOT
v.
VANCOUVER POWER CO.

2. MASTER AND SERVANT (§ II E 6—276)—LIABILITY OF MASTER—EXPLOSION OF DYNAMITE—DUTY OF INSPECTION—NEGLIGENCE OF FELLOW-SERVANT.

An employer who has provided for the inspection as to the safety of a mining tunnel, is not answerable as for negligence to his workman who was injured by sticking his pick into a piece of dynamite, if the failure to discover its presence was due to the neglect of a fellow-servant to whom the duty of inspection had been assigned; and no facts were disclosed which would be inconsistent with the theory that the dynamite was left at the place of the accident through the carelessness of a fellow-workman. (*Per* Irving, J.A.)

[*Priestley* v. *Fowler*, 3 M. & W. 1, applied.]

APPEAL by the plaintiff from the judgment of Gregory, J., dismissing plaintiff's action for damages on the jury's answer to questions submitted to them.

The appeal was dismissed.

J. A. Russell, for appellant.

L. G. McPhillips, K.C., for respondents.

MACDONALD, C.J.A.:—The plaintiff was injured by an explosion of dynamite into which, as I gather from the evidence, he stuck his pick while employed as a mucker in the defendants' tunnel. There is no proof of how the dynamite got there, whether or not it was a loose piece hidden by muck or silt washed there by the water which had been flowing through the tunnel for some days, or the charge of an unexploded hole, or an unexploded piece in the end of a hole, called in mining parlance a "cut-off," no one can tell. That this dynamite could have been discovered by the most careful inspection or by counting the explosions at time of blasting, is not shewn. It was impossible to fix responsibility for negligence upon the defendants on the evidence in this case, and it therefore follows that the judgment below dismissing the action must be sustained.

In view of the evidence it seems to me a pity that the plaintiff did not elect to take compensation under the Workmen's Compensation Act, and I venture to express the hope that the defendants will yet do what they offered to do in the beginning, pay such compensation.

IRVING, J.A.:—Juries are not at liberty to find a verdict in favour of a plaintiff upon any statement of facts which they may think are decisive of the question. They must pass upon the state of facts put forward at the trial, and passed upon by the Judge as being sufficient for them to base a decision upon.

Assuming that no inspection was in fact made, the ground the jury went on would have been met by the doctrine of fellow-servant. The evidence is uncontradicted that Peterson told the night shift boss, Barney, to make an inspection, and inspections were as a rule made.

We have had this "defective system" before us many times. It is the master's duty to take reasonable care of his employees

by associating them with persons of ordinary care and skill, and superintendents competent to discharge their duties. If these men, brother workmen or superintendents make a slip and harm in consequence is occasioned to one of the men that is not proof of a defective system. It is not the fault of the master that caused the injury. It was the negligence of the fellow-worker, and there is no reason why the injured man should not proceed against his fellow-workmen: *Lees* v. *Dunkerley Bros.*, [1911] A.C. 5, but the negligence of the fellow-servant gives him no cause of action against the master. Here we get back to *Priestley* v. *Fowler* decided in 1837, 3 M. & W. 1.

The ground selected by the jury will not support a finding of negligence, and therefore the verdict cannot stand.

The case of *Miller* v. *Kaufman* (1911), 2 O. W.N. 925, was cited to us as an authority for the proposition that we should order a new trial as the proper remedy.

We should, in my opinion, discourage new trials as much as possible, and I do not think we should assume in this case that the jury was stupid—that was the trouble in the *Miller* v. *Kaufman*, 2 O.W.N. 925, case.

Mr. Russell refers us to *McArthur* v. *Dominion Cartridge Co.*, [1905] A.C. 72. There it was shewn that the cartridges were, owing to a fault in the working of the automatic machine, turned upside down, so that a blow intended to fall on the top of the cartridge sometimes fell on the metal end of the cartridge, in which the primer or percussion cap was contained. It was not an unreasonable inference to draw that the explosion was caused in that way, and then it was shewn that the explosion would or might have been comparatively harmless if the outside box which "back fired" had been left as it had been originally constructed.

This case is quite different. Here we know the cause. It was the pick striking the dynamite; but how or when did the dynamite get there? The defendants can only be responsible if they were negligent in respect of its being there, and on the plaintiff's own case the negligent system was not proved, nor was anything proved inconsistent with the theory that the dynamite might have got there owing to the carelessness of a fellow-workman. In fact, it was too equivocal to constitute a case to go to the jury.

GALLIHER, J.A.:—I would dismiss the appeal. This seems to me to have been essentially a case for relief under the Workmen's Compensation Act.

Appeal dismissed.

B. C. ORCHARD LANDS CO. v. KILMER.

B.C.

C. A.

1912

April 2.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. April 2, 1912.

1. CONTRACTS (§ IV F—371)—TIME OF THE ESSENCE—PROVISO FOR FORFEITURE ON DEFAULT—INSTALMENT PAYMENTS.

Where a person for speculative purposes purchased a ranch which was rapidly increasing in value at a price of $75,000, paying $2,000 down and agreeing to pay the balance in instalments and the contract made time of the essence and further provided that if default was made in the payment of any instalment it would avoid the contract and all payments made would be forfeited to the vendor, and the purchaser afterwards bought from the vendor other personalty on the ranch and expended somewhat less than $3,000 for surveys, etc., for irrigation purposes, he is entitled to no relief against forfeiture of the contract at the suit of the vendor upon his failure to pay the first instalment of the purchase price when due, though the vendor at his request extended the time of payment for more than three weeks and for his failure then to pay cancelled the contract and resold the ranch for $100,000.

[*In re Dagenham (Thames) Dock Co.*, L.R. 8 Ch. 1022, 43 L.J. Ch. 261, distinguished.]

APPEAL by plaintiff company from the dismissal of their action to annul a contract of sale made by them as vendors on the ground of the purchaser's default.

The appeal was allowed, GALLIHER, J.A., dissenting.

E. P. Davis, K.C., for appellant.

S. S. Taylor, K.C., for respondent.

MACDONALD, C.J.A.:—The plaintiff, appellant, an incorporated company, sold to defendant for the consideration of $75,000, "Sunnyside" ranch. The sum of $2,000 of the purchase-money was paid down, and the balance was to be paid in instalments, the first of which, $5,000 and interest, on the 14th June, 1910. Time was declared to be of the essence of the contract, and it was also agreed that if default were made in payment of any instalments, the contract should become null and void, and all sums theretofore paid should be forfeited to the vendor. The defendant afterwards also purchased cattle and other personal effects on the ranch. It appears to have been the defendant's intention to construct irrigation works on the land, and when water had been brought on, to subdivide the land for sale in parcels. Some preliminary work was done by him in the way of surveys, and he applied for water under the Water Act, but it does not appear that very much money was expended, I think less than $3,000. Shortly before the said first instalment of $5,000, and interest matured, the defendant requested the plaintiff to draw upon him for the amount thereof at five days, which was done, but being unable to find the money in time to meet this bill, he requested further delay, which was granted until the 7th July. The plaintiff's secretary in a letter notifying the defendant of the last extension, said that his directors "trust that the draft will be met at maturity." The defendant did not meet the bill on the 7th July, but wrote on

the 8th making excuses, and stating that the bill would be met on Tuesday (July 12th). On receipt of this letter on the 9th, a meeting of the plaintiff's directors was hurriedly called, and defendant was notified that the "directors considered the deal off, other parties negotiating," and a re-sale was made to the "other parties" on the 12th at an advance of $25,000.

The action was brought for a declaration that by reason of said non-payment on the 7th July, the agreement became null and void and should be delivered up to be cancelled. The defendant claims that the time clause in the contract is in the nature of a penalty from which he asks to be relieved; and he relies amongst other authorities, on *In re Dagenham (Thames) Dock Co.; ex parte Hulse*, L.R. 8 Ch. 1022. While the facts of that case are not very clearly stated either in the above report or in the Law Journal [*Re Dagenham Dock Co.*, 43 L.J. Ch. 261], I think enough appears to shew that that case is distinguishable from this. There, half the purchase-money had been paid; the property was not of a speculative nature; it was not bought for speculative purposes; by the terms of the forfeiture clause in the agreement, the whole works to be erected thereon, as well as the land, might be forfeited even after conveyance. It is therefore not surprising that the Court relieved.

In this case, I think it sufficiently appears that the purchase was a speculative one. Defendant appears to have had little or no money of his own, and while he succeeded in finding the $2,000 to make what to my mind is nothing more than a deposit, though to be applied as purchase-money, yet he had no certainty and nothing more than a probability of securing the balance which should be required from time to time to make his payments. Those whom he relied upon to find the money were not disposed to do so, and there is no evidence to shew that even on the 12th July, the defendant was in a position to make the payment. It was not until at least a month afterwards than a tender was made. The property was of a speculative nature, and rapidly appreciating in value, as is shewn by the very great increase in selling value evidenced by the resale.

Now, what are the equities relied upon by defendant to entitle him to the relief claimed? I think he cannot claim that the extension of time was one: that extension simply substituted the 7th July for the 14th June. The expression of a hope that defendant would be able to meet the draft at maturity does not in my opinion affect the matter, nor should it, as he claims, have led him to believe that strict compliance with his contract would not be insisted on. Neither the drawing of the bill of exchange nor the increased interest to be exacted for the extension could do more than suspend the plaintiff's rights under the contract for the period between the 14th June and

B.C.
C. A.
1912
B. C. ORCHARD LANDS CO. v. KILMER.
Macdonald, C.J.A.

7th July, and when the draft was not then met, all the rights of the plaintiff under the contract were restored. The delay in returning the bill of exchange was reasonable, having regard to the fact that it had been sent back to Kamloops after default had been made in the payment of it. In any case, he was not misled or prejudiced by its non-return. It seems to me that none of these circumstances raise any equity in the defendant's favour; but it is said that the taking of possession and the purchase of the personal chattels and the preliminary work done and expense incurred, does raise such an equity. I cannot see how the purchase of chattels can affect the matter one way or the other. Then ought the fact that possession was given, and that a comparatively small sum of money was expended in preliminary work, to induce the Court to say that the contract with respect to time shall not be given effect to. Had the matter proceeded further, and larger payments been made, or works erected on the land, it might be fair and equitable to grant relief; but in the present circumstances I do not see that it would be fair and equitable to interfere with what the parties have solemnly agreed to. The taking of possession and the expending of the preliminary moneys was in pursuance of the agreement itself, and in contemplation of the parties when the forfeiture clause was agreed upon. Defendant was not entitled to treat his being let into possession as evidence that a forfeiture would not be insisted upon. To so hold would be to nullify this very common term in agreements for the sale of land. Much stress was laid upon the re-sale at a higher price, and the agreement to pay one of the directors a commission, which it was alleged was contrary to law, but I am unable to see how such matters can affect the question at issue in this appeal. If otherwise, then the fact that the price of the land had advanced would automatically modify the agreement; or if a director committed a breach of duty towards his company, the purchaser would be released from an important clause in his contract. The plaintiff may have been ungenerous in its treatment of defendant, but it has done only what he contracted it might do.

I would allow the appeal.

IRVING, J.A.:—I am not able to agree with the learned trial Judge, although I feel, as he does, that the plaintiffs have been very prompt in asserting their rights.

The plaintiffs seek a declaration that the contract entered into by them is null and void, and for an order that the application for the registration of the agreement be cancelled.

The defendant counterclaims for specific performance, or if he shall be held in default, for relief against the alleged forfeiture.

In *Roberts* v. *Berry*, 3 DeG. M. & G. 284, 22 L.J.Ch. 398, where the purchaser was refusing to go on with the contract because the abstract was not delivered within 6 or 7 days of the agreed day, relief was granted on the ground of accident; the accident being the absence of the mortgagee of the property from England. Lord Justice Turner, however, said that it was open to the parties to have made the time essential by an express stipulation, or if the vendor was guilty of delay, by notice.

Lord Cairns, L.J., in *Tilley* v. *Thomas* (1867), L.R. 3 Ch. 61 at p. 67 [17 L.T. 422, 16 W.R. 166] referring to this judgment, said, equity will indeed enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract for the steps towards completion, if—

(*a*) It can do justice between the parties, and

(*b*) If there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right.

In this case we have "express stipulations."

As to the nature of the property we are considering the sale was the sale of an estate of 2,100 acres in a district where land is rising rapidly in value. These lands bought in December, 1909, for $75,000 were sold in July, 1910, for $100,000 and in November, 1910, are said to be worth $125,000. In January, 1910, there was a ready market apparently for lots at $250 per acre, and there was a clause in the deed that the defendant could sub-divide and sell, and on paying the company $75.00 per acre, or ¾ of the price the defendant could get, could obtain a conveyance of the lot. Apparently water was required for irrigating the land, we can judicially notice that it was situate in the Dry Belt, and a clause in the agreement provided for the immediate acquisition of 1,000 inches of water, and for its distribution over the lands not later than 14th June, 1911. These considerations point to the speculative nature of the transaction, and the necessity for prompt action.

The defendant paid $2,000 down, placed a man in possession, and caused surveys to be made for the irrigation scheme.

At one time it was supposed that time could not be made of the essence even by express stipulation of the parties, but in *Lloyd* v. *Collett*, 4 Bro. C.C., 469, reported in a footnote in 4 Vesey, p. 690, Lord Hardwicke, after remarking that—

> There is nothing of more importance than that the ordinary contracts between man and man which are so necessary in their intercourse with each other should be certain and fixed, and that it should be certain when a man is bound and when not.

(the key-note to the decision of Jessel, M.R. in *Barclay* v. *Messenger*, 43 L.J. Ch. 449, 30 L.T. 350, 22 W.R. 522) said:—

B.C.

C. A.
1912

B. C. ORCHARD LANDS CO. v. KILMER.

Irving, J.A.

> It is one thing to say the time is not so essential that in no case in which the day has by any means suffered to elapse, the Court would relieve against it and decree performance . . . But it is a different thing to say, the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that if the agreement is not executed at a particular time the parties shall be at liberty to rescind it.

In later cases, and in text-books, e.g., *Seaton* v. *Mapp*, 2 Coll. C.C. 556, 564; *Hipwell* v. *Knight*, 1 Y. & C. Ex. 401, 416; the rule has been laid down that where a party applying for specific performance has omitted to perform his part of the contract by the time stipulated in that behalf, without being able to assign sufficient excuse for his omission, and where there is nothing in the acts or conduct of the other party amounting to acquiescence, the Court will not decree specific performance. There seems to prevail a notion that the Courts of equity will not grant specific performance where the result will occasion to the defendant a loss, or what he calls hardship, such as loss of a deposit, or even of the chance of profit by the purchaser. That is all wrong. Relief against forfeiture and decrees of specific performance can only be granted on grounds of recognised equity. As pointed out by Anglin, J., in *Labelle* v. *O'Connor* (1901), 15 O.L.R. 519, at 546, the right of a purchaser to specific performance is one thing; his possible equity to relief from forfeiture of purchase-money paid on account is quite another.

In both cases the onus is on the applicant, and the Court I think should be satisfied that he was *bonâ fide*, and that the default is attributable to fraud, accident, surprise or mistake, and not to negligence. It is not necessary for the person resisting specific performance to shew any particular injury or inconvenience.

By his contract, the plaintiff was to pay the first instalment, $5,000, on the 14th June, 1910. On the 8th July, he wrote that he had been unable to raise money, but hoped to do so in a day or two. On the 9th July, the company cancelled the contract, and on the 11th re-sold the property.

The contract on its face said time was to be of the essence. The draft of the 11th June, the subsequent extension to 7th July, were qualified waivers, that is, waivers if the terms were complied with. The extensions were entirely for the convenience of the plaintiff, and therefore should not be regarded as operative beyond the day named: see Lord St. Leonards' opinion (Fry on Specific Performance, 5th ed., par. 1126) citing *Barclay* v. *Messenger*, 43 L.J. Ch. 449, with approval.

Between the default and the cancellation some correspondence took place, and the company drew on the purchaser. This draft was not returned to the defendant till the 19th July.

Both parties cite *Re Debtor*, [1908] 1 K.B. 344, 77 L.J.K.B. 409, I do not see any evidence that the bill was endorsed to the bank for value, therefore the mere fact that it was in the hands of the bank for collection at the time of the passage of the resolution should not, I think, prevent the company proceeding in the way they did.

It was argued that the letter of 30th June was not sufficiently peremptory to amount to a demand. I can only say that the expression "we sincerely trust" followed as it was by other statements shewing how important it was to the company that the bill should be met, was an ample notification to the defendant what he was expected to do. It certainly could not be regarded as something to lull him to sleep.

The provision in the margin of the bill for the additional 1%, if that provision forms part of the note, does not seem to me to be material, in view of the fact that the bill was never paid. The whole incident of the bill of exchange I think was wiped out, when it was finally dishonoured.

The learned Judge expresses the opinion that as the tender was made on the 19th of August there was no unreasonable delay. *In Barclay* v. *Messenger*, 43 L.J. Ch. 449, the notice was given by the vendors on 16th August, fixing 26th August as the date for payment, and the money not having been paid on that day, Jessel, M.R., thought the vendors were entitled at once to say the contract is at an end, 43 L.J. Ch. p. 456.

Under a clause in the agreement, the plaintiffs permitted the defendant to enter into possession, until default in payment, and the defendant agreed—

> To forthwith after the execution of these presents to take the necessary steps to apply for and obtain a record on Neskanlith Lake, for not less than 1,000 inches of water and carry out and duly perform all necessary surveys and works to bring said water upon the lands above-mentioned and cause said water to be available for and be distributed over all said lands in a proper and efficient manner not later than June 14th, 1911, all costs and expenses in any way connected with the obtaining of said record and putting said water on the land as aforesaid to be borne by the party of the second part who shall also defray all the expenses of managing the said lands as from the date hereof and all costs of surveying and subdividing said lands.

I confess that had there not been set out in the deed the express understanding that time was to be considered of the essence of the agreement, I would have thought this undertaking of the defendant to bring water onto the land and to defray the expenses of managing the same, would have indicated that time was not of the essence; but unfortunately for him he has agreed that it shall be otherwise, and in my opinion where time is of the essence, the Court must give effect to the intention of the parties.

B.C.
C. A.
1912
B. C. ORCHARD LANDS CO. v. KILMER.
Irving, J.A.

It was pressed upon us that as the company had in February, 1910, sold to the defendant the live stock and implements of husbandry running upon and used in connection with the land, the defendant was entitled to further and better consideration. The argument was that the taking possession of the land and the purchase of the live stock and machinery, and the applying for a water record, brought him within the principles of the *Dagenham Case* (1873), L.R. 8 Ch. 1022. The *Dagenham* case was, so far as the final instalment is concerned, more in the nature of a mortgage than of an agreement to purchase where payment on the days named is a condition precedent. The Court in that case thought compensation would meet the justice of the case.

I have referred to the purchase of the stock and implements, but in my opinion the purchase of them in February, 1910, is wholly irrelevant to the agreement of 14th December, 1909. The fact that this purchase was made tends to shew the hardship of the defendant's misfortune, but it does not alter the right to cancel the contract.

The action of Mr. Robinson in busying himself in the re-sale is without defence and wholly irrelevant to the case under consideration. His action does not seem to me to be wrong, having regard to what a man may do in his own interests: see *North West Transportation Co.* v. *Beatty*, 12 App. Cas. 589.

The reasonableness of the length of the notice given by the letter of 30th June was questioned, a week it was said was too short on the authority of *Webb* v. *Hughes*, L.R. 10 Eq. 281. In my opinion the fact that there had already been one or two extensions must be considered.

It is noticeable that the defendant did not go into the box. It is hard to believe that the defendant expected that he would be allowed three days' grace on an overdue bill. I think as a general rule relief against forfeiture should not be granted unless the applicant therefor submits himself to cross-examination. Equity has granted relief where the purchaser has gone into possession, and made improvements; but I think these must be proved with precision, and some reasonable explanation of the default would certainly be necessary.

As the learned trial Judge decreed specific performance it was unnecessary for him to deal with the $2,000 deposit. It is doubtful if the counterclaim asks for its return. The default clause in the agreement provides that the vendor shall be at liberty to re-sell, and all payments shall be absolutely forfeited. In an open contract no money is payable at all until the vendor has shewn, and the purchaser has accepted the title. Where a purchaser agrees that there shall be a deposit, or "as a deposit and part payment of the purchase money," it is taken not only

B.C.

C. A.
1912

B. C. ORCHARD LANDS CO. v. KILMER.

Irving, J.A.

in part payment of the purchase money, but also as an earnest to bind the bargain, and a guarantee for the due performance by the purchaser of his contract, and the purchaser will lose his deposit if his conduct is such as to amount to a repudiation of the contract: *Howe* v. *Smith*, 27 Ch.D. 89, where the nature and incidents of such a deposit are discussed; *Sprague* v. *Booth*, [1909] A.C. 576, 78 L.J.P.C. 164, 101 L.T. 211. But where, as here, the word "deposit" is not mentioned, it becomes a question to be determined upon the circumstances of the case whether the down payment is to be regarded as a deposit or an instalment of the purchase money. Mr. McCaul, in his admirable work on the Remedies of Vendors and Purchasers, thinks, in the absence of any specific provision, the intent of the parties must be determined to a very great extent upon the proportion that the down payment bears to the whole purchase price (p. 60). That seems to be sound, and having regard to the total amount payable, the sum of $200 bears as much resemblance to an earnest as an instalment of the purchase money can, without being labelled "deposit," and as there are express words that all payments shall be forfeited, I would hold that it is not recoverable.

If it is not recoverable because of the purchaser's default, why should he be relieved? It will be urged because he is actually seeking performance. That is a fallacious argument. He has brought an action for that purpose it is true; but he has at an earlier date acted in such a way as to justify the other side declaring the contract void.

I would allow the appeal and make the declaration and order asked for by the plaintiff, and dismiss the counterclaim.

GALLIHER, J.A., (dissenting):—In this case I am satisfied the learned trial Judge came to the right conclusion, and would dismiss the appeal.

Appeal allowed; GALLIHER, J.A. *dissenting.*

LATHAM v. HEAPS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

B.C.

C. A.
1912

April 2.

1. MASTER AND SERVANT (§ II B 6—170)—OBEYING COMMAND OF FOREMAN —ENGINEER—EMPLOYERS' LIABILITY ACT (B.C.).

Where the defendant's donkey engine was being moved by its pulling with its own steam upon a cable attached to a stationary object, thus being dragged along in the direction desired and was operated by the plaintiff, the engineer, who was standing on the two handles which worked the drums on one of which the cable was being rolled up as the engine moved along, though there was a runner along the side of the engine which would have been a safer place for him to stand if the engine should jerk, and the engine stuck fast and would not go ahead

B.C.

C. A.
1912

LATHAM
v.
HEAPS.

and the defendant's foreman in charge of the work shouted to the plaintiff to "slacken her up and give her head," meaning to loosen the cable and then to go ahead at full steam so that when the cable pulled taut the engine would be jerked over the obstruction, and the plaintiff obeyed the order, and the jerk resulting threw him off the engine and injured him, there being no evidence that the foreman knew that the plaintiff was riding on the handles, these circumstances shewed no negligence within sub-sec. 3 of sec. 3 of the British Columbia Employers' Liability Act, providing that a workman injured by reason of the negligence of any person in the service of the employer to whose orders the workman was bound to conform, and did conform, where such injury resulted from his having so conformed, shall have the same remedies against his employer as if he had not been in his employ.

[*Wild* v. *Waygood*, [1892] 1 Q.B. 783, specially referred to.]

APPEAL by defendant from judgment of Clement, J., and a jury.

The appeal was allowed, MACDONALD, C.J.A., dissenting.

C. W. Craig, for appellant.

Messrs. *G. E. McCrossan* and *C. W. St. John*, for respondents.

MACDONALD, C.J.A. (dissenting):—This appeal turns wholly upon questions of fact, and after a careful perusal of the evidence I have come to the conclusion that there was sufficient to justify the jury in finding negligence for which the employer was responsible, and the absence of contributory negligence on the part of the plaintiff. The issue of contributory negligence I have found the most difficult. The accident happened while a donkey engine was being moved from one position to another. The *modus operandi* of moving the engine was by the use of lines ordinarily used for hauling logs. One of these lines was attached to a tree or some other stationary object. The engine with its own steam then would pull on this line, and in this way was dragged along in the direction desired.

There were two winding drums, one for hauling, the other for taking in the slack, and projecting from the end of each drum was a crank or lever. In the operation it was necessary for the engineer to place one foot upon what was called the friction lever, so as to put friction on the drum; he had also to have his hand on the throttle of the engine. On this occasion the plaintiff, who was the engineer, stood with one foot upon the projecting lever or crank of the drum which was not being used, and the other on the lever or crank of the drum which was used for friction. Standing thus, he was able to put on friction when required, and to have his hand on the throttle. While so standing, the engine stuck fast, and after two or three ineffectual attempts by putting on additional steam to get it to move, the defendant's foreman, who was there assisting in the operation, angrily shouted at the plaintiff, and with an oath said: "Slacken her up and give her her head." This meant that the plaintiff was to slacken the hauling line and open up the throttle so that the engine would be jerked forward. In carrying out this order the plaintiff was thrown from his position and injured.

The defendant's contention is that the plaintiff ought not to have been standing upon the two levers as he was, but should have stood with one foot upon the runner which supported the engine and the other upon the friction lever. There was neither rule nor instructions with regard to how he should stand. The plaintiff and a number of his witnesses say that the runner was too narrow to enable him to safely stand on it. That standing on the runner the revolving crank wheel and the crank pin of the engine would be in front of his body. The evidence is that the runner projected only 6½ inches beyond this revolving crank pin. It is also stated that the upper surface of the runner, which was a log hewn on two sides, was somewhat rounded and slippery, and there is the evidence of Townley, who acted as engineer in the moving of the same engine previously on one occasion, and who stood on this runner in performing a like operation, that he was thrown off and had his knee injured by the crank pin. The fact seems to be that there was no really safe place for the engineer to stand, and there appears to have been no general rule followed by engineers with respect to where they should stand.

Sharply, a witness for the defendant, said: "Some stand facing the side of the donkey, and some stand sidewise; some stand on the haul back lever and sometimes . . . they all go different anyway."

Roberts, another of defendant's witnesses, was asked: "How does the enginer stand?" And he answered: "He stands anyway at all, I guess."

And Dineen, defendant's witness, was asked the question: "He ought to know his own engine?" And he answered: "Yes, they all stand differently."

Clark, the defendant's foreman, says:—

> He should stand with his right foot on the main lever and his other foot on the sleigh, or either use his hand to hold the friction. It is up to him to do what he likes.

And Townley, one of the plaintiff's witnesses above referred to, says that some engineers ride on their friction levers.

There is, of course, the expression of many opinions by witnesses as to the proper way to stand, but having regard to the evidence to which I have adverted, it would seem to be a matter of choice between two or more dangerous and awkward positions; but even if it were thought that the plaintiff made a mistake of judgment, the jury might properly absolve him of the charge of contributory negligence.

I would dismiss the appeal.

IRVING, J.A.:—The learned trial Judge told the jury that there was no evidence of negligence at common law. On that I agree. He did, however, leave to them the question, Was there negligence under the Employers' Liability Act?"

B.C.
C. A.
1912
LATHAM
v.
HEAPS.
Irving, J.A.

The particular question, was the order which Clark gave just before the accident took place, a negligent order under the circumstances?

The jury were also asked to pass on the question of contributory negligence.

The verdict was: We find for the full amount for the plaintiff.

The onus of proving affirmatively that the plaintiff was guilty of contributory negligence rests in the first instance upon the defendant. In the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative in order to entitle him to a verdict on that point.

But the other point raised is more difficult, and in considering that question it will be necessary to discuss the plaintiff's conduct, not for the purpose of establishing contributory negligence on his part, that question I have already disposed of, but for the purpose of discovering the true cause of the accident, and determining whether the plaintiff has made out such a case as should go to the jury.

The 3rd sub-section of section 3 of the B.C. Employers' Liability Act provides that a workman injured by reason of the negligence of any person in the service of the employer to whose orders the workman was bound to conform, and did conform, where such injury resulted from his having so conformed, shall have the same remedies against his employer as if he had not been in the employ of the defendants.

To establish a case, the plaintiff must prove, *inter alia*, these two things—the injury must have resulted from his having conformed to the order, and from the negligence of the foreman, who gave the order: *Wild* v. *Waygood*, [1892] 1 Q.B. 783, discussed the sub-section, and so far as I know that case has never been questioned. The injury must be the result of the two things above mentioned; then if they are so connected together as to cause the injury, the case comes within the sub-section.

The order was to loosen or slack off the main cable upon which the engine was being drawn up a hill, and then to give the engine a good head of steam. There is no trouble in seeing that when the engine, after the steam has been turned on, begins to wind up the cable over the drum, there will come a violent jerk when the slack is used up. The intention was to make use of this jerk in carrying the engine over the obstruction or hill, whatever it was that had caused the stoppage.

The foreman had, we were told, frequently during the argument, addressed his orders to the plaintiff in an angry tone of voice. That does not affect the case, in my opinion, one way or the other, although no doubt it might influence the jury, but where is there any negligence about the order and the evolution? The plaintiff says he does not think he ever did it before, *i.e.*,

slacking off the main line and starting the engine up again, when pulling the donkey, but he has when drawing in a train of logs. The case the plaintiff makes is that the order was wrong because pulling the donkey through the woods he had not the same safe platform to stand on when he overcame an obstruction by jerking the engine as he had when the engine was stationary.

In moving through the woods, the engine is stripped down to the runners, and on the runner at the right hand side a man could stand. The plaintiff admits this, but says it would be a very small place, and to work his levers he would have to stand in an awkward position. The plaintiff placed his feet on two iron handles, the handles of the levers which work the drums, one of these levers was loose and swinging backward and forward. There was no evidence that the foreman knew that the plaintiff had elected to ride with his feet on these handles, instead of on the runner, nor that the plaintiff had ever complained of the insufficiency of the foothold afforded by the runners.

There seems to me an obvious difference between an order to slack off the cable and give her a head of steam simply, and the same order with a further direction to carry out the manœuvre by standing in a particular place. How can a jury say that there was negligence on the part of the foreman under these circumstances, or that the accident came about through the plaintiff conforming to the order given?

This accident took place because the plaintiff placed his feet on the swinging handles; the foothold there was insufficient, and he had no order to put his feet there.

I think this is a case where the Judge would have been justified in refusing to let the case go to the jury.

GALLIHER, J.A.:—After the best consideration I can give to this case, I have come to the conclusion that the appeal should be allowed.

Considering the nature of the operations, and the surrounding circumstances, I think there was a reasonably safe place on the runner where the plaintiff should have stood instead of, as he did, on what might be termed a swinging crank, certainly a much more dangerous position going over rough ground—in fact, he admits negligence on p. 33 (A.B.).

Q. So if a man stood on those handles when he could properly and conveniently have stood on the runner that man was negligent?

A. Yes.

I do not pick out this one question and answer to base my judgment upon, but have carefully considered the evidence of all the witnesses, and am of opinion that a jury could not reasonably have failed to find contributory negligence.

B.C.
C. A.
1912
LATHAM
v.
HEAPS.

As to whether the foreman's order was a negligent order, I do not think it was, even allowing for the condition of the engine. It seems a very usual way of starting the engine under such circumstances, and the defects in the engine were not, in my opinion, such as would warrant the order being so classed.

Appeal allowed, MACDONALD, C.J.A., *dissenting.*

RICHARDS v. VERRINDER.

B.C.
C. A.
1912
April 1.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, J.J.A. April 1, 1912.

1. CONSPIRACY (§ I—3)—ADMISSION TO COLLEGE—PRELIMINARY EXAMINATION FOR PROFESSIONAL PRACTICE.

A wilful and fraudulent conspiracy on the part of the examiners and the College of Dental Surgeons to undermark the examination papers of an applicant so as to prevent his admission to the college, is not established by the fact that the secretary of the college, after the commencement of the plaintiff's action and making discovery therein of his own examination papers and the books of the college, while making a change in his office, destroyed, without the knowledge of his co-defendants, before the time fixed by said college therefor, and before he had knowledge that their discovery would be required, among a quantity of other papers, the examination papers of the other candidates who were examined with the plaintiff.

2. EVIDENCE (§ XII C—932)—FRAUD AND CONSPIRACY—EXPERT TESTIMONY.

The fact that the examination papers of an applicant, who was refused admission to the College of Dental Surgeons, were undermarked as the result of a conspiracy between the examiners and the college, is not shewn, nor can a conspiracy be inferred where it appears that each examiner, who marked the applicant's papers differently, acted independently and without reference to the other, notwithstanding that expert witnesses for the plaintiff testified that he should have received higher markings.

3. EVIDENCE (§ IV S—496)—NOTICE TO PRODUCE IN GENERAL TERMS.

A notice to produce "all . . . reports, documents, questions and answers relating in any respect to the examination, relating to the matter in question in" an action for alleged conspiracy between the examiners and the College of Dental Surgeons to undermark the plaintiff's examination papers so as to prevent his admission to such college, is not sufficient to apprise the defendant that discovery of the examination papers and answers of other candidates at the same examination was required. (*Per* Irving, J.A.)

APPEAL by plaintiff from the judgment of Gregory, J., nonsuiting plaintiff in an action against the examiners and the College of Dental Surgeons, charging wilful and fraudulent conspiracy.

The appeal was dismissed.

W. J. Taylor, K.C., for appellant.
E. V. Bodwell, K.C., for respondents.

MACDONALD, C.J.A.:—The plaintiff having complied with all the preliminaries prescribed by the Dental Act, being ch. 2 of

the Acts of B. C., 1908, presented himself for examination for admission to the College of Dental Surgeons. He was denied admission on the ground that he had fallen short of obtaining the percentage of marks prescribed by the by-laws of the college. He then brought this action against the college and the examiners, charging that—

> the defendants and each of them wilfully and fraudulently conspired together to prevent him, the said plaintiff, from entering said college by refusing to give him the full number of marks to which he was properly entitled in such examination by virtue of the answers made by him to the questions put at such examination.
>
> That the defendants and each of them have subsequently refused to give to the plaintiff any information whatsoever concerning the said examination, either as to the number of marks he obtained, the subjects, if any, in which he failed or the method upon which marks in the said examination were allotted to each candidate and the plaintiff will say that by his answers to said questions he was entitled to enter said college but that the defendants and each of them either marked or caused to be marked, his papers incorrectly or not at all and this for the purpose well known to each of them of fraudulently preventing him from entering said college.
>
> The plaintiff claims discovery of all matters and proceedings of said council with reference to his aforesaid examination.
>
> Discovery of the questions put therein and his answers thereto and the report of the examiners thereon.
>
> Damages.
>
> Such other relief as the nature of the case may require.

Before trial, the defendants were ordered to produce the plaintiff's examination papers. Subsequently an application was made to a Judge for an order that the defendants should produce the examination papers of the other candidates at that examination. This was contested by the defendants, but on finding that the Court was about to order the production of these papers, an affidavit of the defendant Verrinder was produced shewing the loss or destruction of these papers.

Such loss or destruction is one of the principal matters relied upon by the plaintiff as evidence of the misconduct charged against the defendants. Only one other matter was seriously relied upon as shewing such misconduct, the alleged under-marking of the plaintiff's papers. At the trial, witnesses were called by the plaintiff to prove that he was not given the number of marks which his answers entitled him to. These witnesses went over the questions and answers and gave their opinions as to how they ought to have been marked. In some cases they would have given higher marks, in others lower; but the net result according to their evidence is that the plaintiff ought to have been given in the aggregate about 10 per cent. higher marks than were allowed him by the college examiners.

The case then narrows down to this, can it be fairly inferred

B.C.
C. A.
1912
RICHARDS
v.
VERRINDER.
Macdonald, C.J.A.

from the loss or destruction of the other candidates' papers by the secretary of the college, Dr. Verrinder, and from the alleged under-marking of the plaintiff's papers, that the fraudulent conspiracy which the plaintiff alleges existed? Now, with regard to the loss or destruction of the papers, Dr. Verrinder says that he was making changes in his office and destroyed a lot of papers which he regarded as of no further use, and he thinks the papers in question were among them, but is not certain. At all events, he was unable to find them when they were required for production. The learned trial Judge accepts that explanation, and I am unable to say that he was wrong. It is true that these papers were destroyed (I do not think they were lost) after the action was commenced, and before the time authorized by a resolution of the college for the destruction of such papers; but as against this suspicious circumstance it appears that up to that time the defendants had received no intimation that discovery of them would be required. Plaintiff had already applied for and obtained discovery of the books of the college, and the examination papers of the plaintiff, and that circumstance may very well have led Dr. Verrinder to take less care of what he did with the papers in question than he otherwise might. But even if it be assumed that Dr. Verrinder destroyed these papers for the very purpose of preventing discovery of them, yet it appears from the evidence that the other defendants had no knowledge whatever of such destruction. Hence their destruction in no way implies the conspiracy alleged.

Then with regard to the under-marking of the plaintiff's papers. The evidence is that each examiner acted independently and without reference to the others, hence the only inference to be drawn from the difference between their marking and that of plaintiff's witnesses is the very natural one of differences of standard, of judgment, or skill. I doubt if two examiners acting independently would ever arrive at the same result in a series of examination papers. It may be that the College examiners' results fail to do entire justice to the plaintiff. I am inclined to think they do not. On the other hand, it may be that the plaintiff's witnesses do him more than justice. In the circumstances it would clearly be improper to infer the fraudulent conspiracy which plaintiff alleges.

It was conceded that even if we came to the conclusion, which I should be inclined to, that on a proper marking of the plaintiff's papers he was entitled to admission, we have no power to order the college to admit him. It is to be regretted that the examiners when they found that the plaintiff had come so near to obtaining the required number of marks, did not review his papers. The duties imposed on them under the Dental Act are such as admit of no want of conscientious care in their discharge,

and the fact that as members of a calling they have it in their power to keep others out of that calling ought to make them doubly careful to avoid the appearance of unfairness or selfishness.

I would dismiss the appeal.

IRVING, J.A.:—The statement of claim, delivered 17th January, 1910, alleges that the plaintiff presented himself before the examining board of the Dental College but was refused admission by the said defendants to the college and that this refusal was not the result of faulty answers to the questions put to him.

By the 7th paragraph it is alleged:—

> That the defendants and each of them wilfully and fraudulently conspired together to prevent him, the said plaintiff, from entering the said college by refusing to give him the full number of marks to which he was properly entitled in such examination by virtue of the answers made by him to the questions put at such examination.

By the 8th:—

> That the defendants and each of them have subsequently refused to give to the plaintiff any information whatsoever concerning the said examination, either as to the number of marks he obtained, the subjects, if any, in which he failed or the method upon which marks in the said examination were allotted to each candidate and the plaintiff will say that by his answers to said questions he was entitled to enter said college but that the defendants and each of them either marked or caused to be marked, his papers incorrectly or not at all and this for the purpose well known to each of them of fraudulently preventing him from entering said college.
>
> The plaintiff claims discovery of all matters and proceedings of said council with reference to his aforesaid examination.
>
> Discovery of the questions put therein and his answers thereto and the report of the examiners thereon.
>
> Damages.

On the 31st January, 1910, the plaintiff gave to defendants a notice to produce "All . . . reports, documents, questions and answers relating in any respect to the examination, relating to the matters in question in this action."

It is contended for the plaintiff that this notice called upon the defendants to produce the answers of the other candidates, as well as those of the plaintiff. There are cases, *Jacob* v. *Lee* (1837), 2 M. & Rob. 33; *Rogers* v. *Custance*, 2 M. & Rob. 179; *Morris* v. *Hauser*, 2 M. & Rob. 392, where notices have been held to embrace any document reasonably included in the description. On the other hand, the following notices have been held too vague:—

> All the plaintiffs' books of account containing entries of dealings between them and the defendant for September, 1896, and also all letters written by the defendant or any other person to the plaintiffs relating to relevant matters. (See *Anon.* (1899), 44 Sol. Jo. 95.)
>
> Letters and copies of letters, also all books relating to this cause:

B.C.

C. A.
1912

RICHARDS
v.
VERRINDER.

Irving, J.A.

Jones v. *Edwards* (1825), M'Cle. & Yo. 139; all letters, papers, and documents touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered: *France* v. *Lucy* (1825), Ry. & M. 341; Halsbury's Laws of Eng., vol. 13, p. 522.

It seems to me that if we test the question whether or not this notice to produce would include the answers of other candidates we should do so by the practice in making an affidavit of documents. Had the defendants been called upon to make an affidavit of documents in my opinion he might properly omit all mention of the answers of the other candidates because of the language used in the prayer for relief.

On this ground I would say that the plaintiff's contention that the defendants ought to have produced the answers of the other candidates is not well founded.

The plaintiff's advisers seem at that time to have taken the same view, because on the 21st February, after Verrinder had refused to produce any papers, the plaintiff took out a summons to compel Verrinder to produce all documents and examination questions and answers of the plaintiff relative in any respect to the examination held, etc.

These answers by the plaintiff were produced on the 10th or 11th of March, 1910. Doctor Verrinder was examined on the 13th April, and it was not until that date that the plaintiff's advisers thought that it would be necessary to have the answers of the other candidates produced for the purpose of comparison (pp. 113, 131).

The case came on for trial before Gregory, J., and a jury, but as the learned Judge came to the conclusion that there was no evidence of conspiracy to go to the jury, he dismissed the action.

On the appeal before this Court it was urged that the destruction of the answers of the other candidates which occurred in or about March, 1910, was strong evidence against the defendants, and that spoliation together with the testimony of an expert produced at the trial, shewing that the plaintiff was entitled to more marks than had been awarded him by the examiners, constituted a case sufficiently strong to go to the jury.

The whole of the case—if case there was—depended upon the application of the maxim *contra spoliatorem* to the witness Verrinder on account of his having destroyed the answers of the other candidates before the expiration of twelve months, the period fixed by resolution of the Council for their preservation.

It was argued that he had notice that they would be required at the trial. His explanation is that they were destroyed without his knowledge in March; that is, before the examination of 13th April, when their importance to the plaintiff was not appreciated.

Mr. Taylor's argument was that it was for the jury to pass on the destruction of these papers under all the circumstances, and with the evidence of the expert as to the sufficient number of

marks obtained by the plaintiff to qualify, a case of conspiracy was made out.

The action, it should be remembered, being one for damages, and not for the issuing of a diploma or other certificate, is based on the conspiracy of the defendants: *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374. There must be proved a "breathing together" as Sir Matthew Begbie used to say—that is, a communication of intention, and the assent of each conspirator to the wish or intent and plan of the other which constitutes a common purpose and which cannot be formed without some external manifestation of the intent or purpose of each conspirator.

Evidence in conspiracy cases is, as a rule, difficult to handle. I speak of the proof of the conspiracy or agreement.

The rules of evidence require the existence of the conspiracy to be proved, before evidence can be given of acts done or words spoken behind the back of the person against whom the evidence is tendered: *R.* v. *Blake*, 6 Q.B. 126, 137. When it has been established that two or more persons have so combined the acts and words of one of them in furtherance of their common purpose is admissible as evidence against the others, whether they were or were not present when the act was done or the words spoken: *R.* v. *Lord Preston* (1691), 12 St. Tri. 645; *R.* v. *Hardy*, 24 St. Tri. 199, 451; *R.* v. *Hardwick*, 11 East. 578, 585; *Dickinson* v. *Valpy*, 5 M. & R. 126, 8 L.J. (O.S.) K.B. 51, 10 B. & C. 128.

The difficulty of giving complete proof of the conspiracy before the evidence of words spoken and acts done are allowed to become applicable to the individuals, is got over in practice by the Judge receiving that which is evidence against one provisionally, and then at the close of the plaintiff's case ruling how much of the evidence may be considered by the jury with reference to each conspirator or *tort feasor*.

Now, if we sum up the evidence against each one of these defendants individually, the plaintiff's case vanishes into thin air. That each examiner in allowing marks to the plantiff has reached a different total from the result arrived at by the plaintiff's witnesses is nothing; and because they all four have reached this conclusion, is there anything remarkable about that? It is not unusual to find that men have been plucked in several papers.

As I have before remarked, the whole case is made to hinge on the destruction of the answers of the other candidates, and Dr. Verrinder's explanation has been given as to that on discovery. On the trial his examination as to how this happened was put in by the plaintiff as part of his case, and there is no contradiction of it.

I shall only refer to one case, *Sweeney* v. *Coote*, [1907] A.C. 221, and that only for shewing what evidence is necessary. At p. 222, the Lord Chancellor says:—

B.C.
C. A.
1912
RICHARDS
v.
VERRINDER.
Irving, J.A.

It is an action for conspiracy, and no other ground is relied upon. In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them.

I agree that the action should be dismissed on the ground stated by the learned trial Judge. The jury, if they had from the destruction of these papers found that Verrinder had wilfully destroyed them, under the circumstances, would be doing violence to every principle of justice. It is well to remember that the presumption of innocence is not applicable only to persons placed on trial as criminals, but also to officials or persons in the discharge of their civil duties and rights.

I would dismiss the appeal.

GALLIHER, J.A., concurred with the judgment of MACDONALD, C.J.A.

Appeal dismissed.

AUSTIN v. REAL ESTATE EXCHANGE.

B.C.
C. A.
1912
April 2.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. CONTRACTS (§ IV E—367)—SELLING LIST OF PROPERTIES LISTED FOR SALE —BREACH OF WARRANTY.

The fact that property was genuinely listed for sale with a real estate exchange, which, for a monthly payment, sold a list thereof to real estate brokers, who made sales therefrom, and that the exchange acted *bonâ fide* throughout the transaction, will not relieve it from responsibility for a breach of warranty to a subscriber who made a sale of property of which, it afterwards appeared, there was no such listing as the exchange held out to its subscribers, and which could, therefore, not be carried out.

[*Collen* v. *Wright* (1857), 8 E. & B. 647; *Firbank* v. *Humphreys* (1886), 18 Q.B.D. 54, 62; *Starkey* v. *Bank of England*, [1903] A.C. 114, and *Yonge* v. *Toynbee* (1910), 79 L.J.K.B. 208, followed.]

2. BROKERS (§ II B 2—15)—FAILURE TO COMPLETE TRANSACTION—DEFAULT OF PRINCIPAL—LAPSE OF TIME—LISTING PROPERTIES.

As the information contained in a list of property listed for sale with a real estate exchange and sold by it to brokers, who made sales therefrom, is held out and guaranteed by the exchange to be correct, and their subscribers are invited to act thereon, it is immaterial, in an action for the loss of commissions on a sale of property improperly listed by the exchange, that a long time elapsed between the listing and the sale by the plaintiff where it appeared that before the latter acted he was informed by the exchange that the property was still for sale.

3. DAMAGES (§ III P 2—343)—WRONG INFORMATION IN LIST OF PROPERTIES FOR SALE—BROKER SECURING PURCHASER—MEASURE OF FIXING COMPENSATION.

The measure of damages for misinformation contained in a list of property listed for sale with a real estate exchange, which was sold by it to the plaintiff, a real estate broker, who secured a purchaser for property improperly listed by the defendant, is the commissions the latter would have earned had the sale been completed.

[*Spedding* v. *Nevell*, L.R. 4 C.P. 212; and *Meek* v. *Wendt & Co.*, 21 Q.B.D. 126, followed.]

B.C.

C. A.

1912

AUSTIN v. REAL ESTATE EXCHANGE.

APPEAL by defendants from a judgment against them for damages for breach of warranty in respect of information supplied to a subscriber as to properties in respect of which commissions might be earned by real estate agents effecting a sale thereof.

W. B. A. Ritchie, K.C., for appellant.

R. M. Macdonald, for respondent.

IRVING, J.:—We must have regard to the implied warrant of authority which the exchange is supposed by law to have given Austin when they entered into the contract, *i.e.*, that they had the authority which they professed to have.

Where this implied warranty exists, there is an exception to the rule that no damages can be obtained for innocent misrepresentation. The leading case of *Collen* v. *Wright* (1857), 8 E. & B. 647, was a decision by the Exchequer Chamber affirming a decision of the Queen's Bench, and was a case of an agent innocently assuming that he had authority to contract. More recent cases have extended the liability to every transaction, *e.g.*, *Firbank* v. *Humphreys* (1886), 18 Q.B.D. 54, 62; and *Starkey* v. *Bank of England*, [1903] A.C. 114.

The measure of damages is discussed in many cases. I shall refer to two only: *Spedding* v. *Nevell*, L.R. 4 C.P. 212; and *Meek* v. *Wendt & Co.*, 21 Q.B.D. 126. *Prima facie* the plaintiff is entitled to what he would have gained by the contract which the defendant had warranted should be made.

I would dismiss the appeal.

GALLIHER, J.A.:—The defendants, the Real Estate Listing Exchange, carry on business in the city of Vancouver, and obtain the listing of properties from various parties for sale upon commission. They do not make the sales themselves, but turn over to their subscribers (real estate brokers) the properties thus obtained for sale.

Their lists are sent to each subscriber from day to day, and any alterations in terms or otherwise, or withdrawals, or sales, are noted on these lists against the respective properties. For this information and opportunity the subscriber pays $20 per month, and the first subscriber obtaining a purchaser for a piece of property, and making a deposit with the exchange, is deemed

B.C.
C. A.
1912
AUSTIN
v.
REAL
ESTATE
EXCHANGE.
Galliher, J.A.

to be entitled to the commission, and is given a receipt for the deposit and an order on the vendor for the commission.

The plaintiffs in this case were subscribers to the exchange, and received a list containing among others a piece of property belonging to the defendant, Mary Casher, with price, terms, etc. This was in June, and on July 8th the same property appeared in the regular list sent out with the note "reduced from $6,000 to $5,700." No sale, however, was made by the plaintiffs, nor does it appear that they made any effort to sell until November of the same year, when, owing to the time that had elapsed since the property had first appeared as listed, enquiry was made by them of the exchange to put it in their own words "was this property still good," to which they say they received the answer, "Yes, it has not been withdrawn." The exchange say their answer was, "It is not marked sold on the list." However, the plaintiffs proceeded to advertise the property and made a sale to one Stimson, took a deposit of $50, which they handed over to the exchange and obtained from them a receipt and order on the defendant, Mary Casher, for the amount of the commission. It transpired when the plaintiffs went to Mrs. Casher to complete the deal with Stimson, and for their commission, that she had sold the property herself to another purchaser the previous July.

This action was then brought against Mary Casher for the amount of the commission, $275, and alternatively against the Listing Exchange for breach of warranty of authority to list the property.

At the trial Mary Casher denied positively having signed the listing agreement (Ex. 7, A.B. 81), although she says she did sign a listing form which was good only for fifteen days, and was subject to owner's confirmation; that from the day the canvasser from the exchange called upon her until the plaintiff's lawyers wrote to her after the sale, she heard nothing of the exchange people, and had no conversation or correspondence with them, and never gave them any authority to sell except for fifteen days and at $6,000.

F. A. Tourell, who obtained the listing and turned in exhibit 7 to the exchange, swears positively that Mrs. Casher signed same at her house in his presence, and his name is affixed as having been listed by him.

There was a direct conflict between these two witnesses, both of whom gave evidence in Court, and the trial Judge has found in favour of Mrs. Casher and dismissed the action as against her.

Whatever might be my personal view, I have not had the advantage of seeing the witnesses, and feel I would not be justified in interfering with that finding.

I am satisfied the exchange received this as a genuine listing, and acted *bona fide* throughout in so holding it out to their sub-

scribers, but that does not relieve them from responsibility if it afterwards turns out as found by the learned trial Judge that in fact there was no such listing as claimed, if a third party has acted upon that guarantee. The case of *Yonge* v. *Toynbee* (1910), 79 L.J.K.B. 208, fully covers that point in the present case.

A further feature was urged as against the plaintiffs' right to recover from the exchange, viz., that as a long time had elapsed between the listing in the first place as set out in the lists furnished the subscribers before any action was taken by the plaintiffs to sell the property, the plaintiffs should have satisfied themselves before incurring any expense, or making any efforts to sell, that the property was still in the market, and under the control of the exchange, and that the plaintiffs should not have relied on the conversation over the phone.

Whether we accept the version of that conversation as given by the plaintiffs, or as given by the exchange, it seems to me to make no difference.

The exchange held out and guaranteed to their subscribers that the information contained in their lists sent out was correct, and invited them to act thereon, and at the time the inquiry was made over the phone in November by the plaintiffs, it was the duty of the exchange to have satisfied themselves that the property was still under their control before permitting the plaintiffs to incur expense in connection therewith. That was one of the considerations for the payment of the monthly fee.

I think the learned trial Judge was right, and that the measure of damages is the commission which the plaintiffs would have earned.

The appeal should be dismissed with costs.

MACDONALD, C.J.A., concurred.

Appeal dismissed.

GORDON v. HOLLAND.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. PARTNERSHIP (§ IV—15)—SALE BY TWO OF THREE PARTNERS—PARTNERSHIP REAL ESTATE—THE PARTNERSHIP ACT, B.C.

Where the plaintiff and the three defendants purchased land in partnership and the conveyance was made to one of the defendants who afterwards gave an option of purchase to another defendant and the latter succeeded in securing a purchaser at a price and on terms to which all expressed assent, though the plaintiff refused his formal consent unless the defendant who secured the purchaser would make an affidavit, which he refused to do, that he was not receiving a secret profit, the defendants were not guilty of fraud or of a breach of duty to the plaintiff in completing the sale without his consent, if there was in fact no secret profit, particularly in view of the provisions of the Partnership Act, R.S.B.C. ch. 175, sec. 25, making the assent of the majority of a number of partners sufficient.

B.C.

C. A.

1912

GORDON v. HOLLAND.

2. TRUSTS (§ I D—23)—SALE OF LAND BY TRUSTEE OF PARTNERSHIP REAL ESTATE—SECRET TRUST—RIGHTS OF PARTNERS.

Where persons purchased land in partnership and had the conveyance made to one of their number who was afterwards judicially declared a trustee thereof for the partnership, a sale made by him of the land ostensibly to a stranger, who was an innocent purchaser, but in reality to the stranger, and to one of the other partners jointly, a non-assenting partner would still be entitled to claim out of the interest of the partner who so acquired title, the same share as such non-assenting partner would otherwise have held under the partnership agreement.

APPEAL by defendant from the judgment of Gregory, J.

Messrs. *E. P. Davis*, K.C., and *W. S. Deacon*, for appellant.

S. S. Taylor, K.C., for respondent.

MACDONALD, C.J.A.:—In May, 1906, the plaintiff and the defendants, W. S. Holland, Horne, and one R. W. Holland, purchased three blocks of land comprising about 43 acres. The transaction was a speculative one, the parties expecting to resell at a profit, at a very early date. In fact, defendant Horne was induced to join the others and to bear the principal financial burden, namely, 85 per cent. of the whole, on the representation that the property could probably be resold before the second instalment of the purchase money should become due. The conveyance was by consent of all made to Horne. Subsequently, there arose a dispute, Horne contending that he had purchased the property outright on the understanding that he was to divide the profits with the others, Gordon, on the other hand, claiming that Horne was merely a partner in the land as well as in the profits; this dispute was finally decided by the Judicial Committee of the Privy Council* against Horne's contention. Shortly after the purchase, plaintiff and defendant W. S. Holland quarrelled over another business with which Horne had nothing to do, and Horne finding that these quarrels were hampering the sale of the land, very foolishly, if not dishonestly, though I am inclined to believe that he did not appreciate the responsibilities of a fiduciary relationship, attempted to make a fictitious sale to one Ford. The intention was to vest the legal and equitable ownership and control of the property in Horne himself in the name of Ford, and thus get rid of the plaintiff, who was found to be a difficult man to do business with, but Ford withdrew and the transaction came to an end about March 12, 1907. Shortly before this date, Horne had given an option of purchase to the defendant W. S. Holland at the price of $300 per acre. While in form an option of purchase, it was really an authority to sell. W. S. Holland opened up a correspondence with one Ewing, of St. John, N. B., quoting the price at $325 per acre. Ewing

*_Gordon_ v. _Horne_, 29 July, 1910, not reported, P.C., reversing _Horne_ v. _Gordon_, 42 Can. S.C.R. 240, and restoring _Gordon_ v. _Horne_, 14 B.C.R. 138, see 1911 Can. Ann. Digest, 775.

finally made an offer to buy an undivided half-interest at that price, and this was received by W. S. Holland about the time the Ford transaction came to an end. Holland submitted this offer to his partners including the plaintiff. They were all quite satisfied with the price, and that a sale should be made to Ewing on the terms offered; but the plaintiff being suspicious of W. S. Holland, demanded that he should make affidavit that he was not receiving a secret profit. Holland declined, but nevertheless the sale was made, the plaintiff not actively consenting.

While I have grave suspicion that W. S. Holland counted on the completion of the Ford purchase to place him in a position to make a secret profit on a sale to Ewing, yet that intention, if it existed, was frustrated. The sale to Ewing was made without any secret profit or peculiar advantage accruing to anyone, and Holland had no arrangement by which he might re-purchase the property from Ewing at a future time, as he, in fact, afterwards did. I am unable, therefore, to see how the attempted wrong-doing of Horne and Holland, assuming that he was a party to it, in the Ford transaction, could in any way taint the Ewing sale with fraud or breach of duty. It seems to me that having regard to the purpose for which the property was purchased by the partnership, the object being to make a speedy sale for profit; to the representations made to Horne when he was induced to put his money into it; to the fact that the sale to Ewing was an advantageous one, and in pursuance of that object; that its terms were satisfactory to the plaintiff; that in itself it was an honest transaction; that the plaintiff's conduct was whimsical and unreasonable in demanding from W. S. Holland an humiliating affidavit that he was not a rogue; and that the other partners were willing that the sale should go through, I cannot think that they were guilty of fraud or breach of duty in making it even without the assent of the plaintiff; in the circumstances the assent of the majority was sufficient: see Partnership Act, R.S. B.C., ch. 175, sec. 25 (8). I am further of opinion that the plaintiff acquiesced in the sale to Ewing, if not at that time, then by his subsequent acts and conduct.

Two years afterwards W. S. Holland purchased this half-interest from Ewing, and the plaintiff now claims that Holland holds it in trust for him to the extent of his original interest in it. I am unable to agree to this.

But this does not dispose of the whole appeal. Subsequently, defendant Horne sold the remaining half-interest ostensibly to one Spencer, but in reality to Spencer and W. S. Holland. Spencer was innocent in the matter, and no question affecting him arises in this appeal. As the true nature of that transaction was not disclosed to the plaintiff, I am of opinion that W. S. Holland must be held to be a trustee for the plaintiff to the extent of his interest, that is to say, one-sixth of one-half. I am unable to

B.C.
C. A.
1912
GORDON
v.
HOLLAND.
Macdonald, C.J.A.

accede to the contention that this sale, having been made while the judgment of the Supreme Court of Canada declaring Horne to be the owner and entitled to sell without reference to the others, was protected by that judgment from attack after the reversal of the judgment.

One of the blocks in question, known as lot 2, was subdivided and sold by Spencer and W. S. Holland to *bonâ fide* purchasers without notice. The judgment below directs that the plaintiff shall have his one-sixth (what he was there adjudged entitled to) out of the unsold blocks with 20 per cent. added, to make up the adjudged difference in relative value between the unsold blocks and said lot 2. I am not sure that this is the proper redress to give, but as no point was made of this in the appeal, I assume that that mode of adjustment is not objected to. I would therefore vary the judgment below by declaring the plaintiff entitled only to an interest of one-sixth of one-half in the lands out of W. S. Holland's interest in the remaining blocks with the addition of the 20 per cent. above referred to, and to one-sixth of the profits of the Ewing sale.

I would make no order as to costs. Success and failure has been divided. But in addition to this appellant's conduct all through has been such as to invite an attack on even the Ewing sale.

IRVING, J.A.:—Plaintiff brought an action to have terms of partnership declared, and succeeded.

The defendants, having been guilty of improper conduct, the plaintiff was held entitled to a decree winding up the partnership and directing the defendant to account. It was declared that plaintiff was entitled to one-sixth thereof. It was a term of the partnership that no sale or dealing with the said lands could be had without the consent of all the partners.

After the accounting had been proceeded with, plaintiff discovered, or thought he had discovered, that the land (now greatly increased in value) was now the property of the defendant Holland, and that the sums he proposed that the plaintiff should accept were sums received by him on the sale to his trustee. He thereupon launched this action.

The sales attacked were:—

(1) The sale to Ewing, dated March 7, 1907, of a one-half interest in the three lots, carried into effect by conveyance dated June 21, 1909.

On June 8, 1909, Ewing had contracted to sell to Holland the said half interest for $17,200. This contract Holland, on June 21, 1909, assigned to the defendant Spencer. These contracts were carried into effect by conveyances dated respectively December 2, 1909, and December 16, 1909.

(2) The other undivided half interest was sold to Spencer

for $25,872 by agreement dated September 21, 1909, and completed by conveyance on March 21, 1910.

The learned trial Judge came to the conclusion that these sales were fraudulent, and that they cannot be the basis upon which the accounts of the partnership are to be taken. I agree with him.

The plaintiff also joined a claim for damages sustained by him by reason of the defendant Holland suppressing certain evidence at the trial of the first action. This branch of the action was dismissed by the learned trial Judge. I agree with the view of the learned trial Judge that neither sale can be upheld. The sale to Ewing of March 7, 1907, in my opinion was not consented to by Gordon. The letter of March 18, 1907, shews that it was not a clear sale of an undivided half-interest, but a deal, a shifting about of interests to get rid of Gordon. W. S. Holland arranged it with Horne that Horne should part with one-half of his interest to Ewing, and retain for himself the other quarter. As to the partnership half-interest, he took to himself one-quarter, and the other passed to Ewing. It was a juggle to get rid of Gordon, and as such should not be allowed to stand. Never at any time from March 7 was Holland without an interest in the property greater than the one-sixth interest which, by virtue of the original pact, belonged to Gordon.

I would find as a fact that Gordon never assented to the sale of the property to Ewing.

The plaintiff is entitled to an account of his share of the profits realized by Holland out of the sales of lot 2. The 20 per cent. arrangement should be struck out, if the decree is varied in this respect or if all parties consent to the 20 per cent.

I would dismiss the appeal.

GALLIHER, J.A., concurred in the judgment of MACDONALD, C.J.A.

Judgment below varied.

B.C.
C. A.
1912
GORDON
v.
HOLLAND.
Irving, J.A.

CLARK v. CANADIAN PACIFIC R. CO.

B.C.
C. A.
1912
April 2.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. MASTER AND SERVANT (§ II A 4—94*a*)—LIABILITY OF RAILWAY COMPANY TO BRAKEMAN—STAND PIPE NEAR TRACK—COMPLIANCE WITH ORDER OF BOARD OF RAILWAY COMMISSIONERS.

A railway company which has complied with an order of the Board of Railway Commissioners, under sub-sec. (*g*) of sec. 30, ch. 37, R.S.C. 1906, requiring its water stand pipes to be placed 7 feet 6 inches from the centre of its tracks, is relieved from liability to a brakeman for injuries sustained while riding on a ladder on the side of a car, by coming in contact with a stand pipe located as required by such order.

[*G. T. R.* v. *McKay* (1903), 34 Can. S.C.R. 81, followed.]

B.C.
C. A.
1912
CLARK
v.
CANADIAN PACIFIC R. CO.

2. CARRIERS (§ IV A—519)—ORDERS OF BOARD OF RAILWAY COMMISSIONERS—ERECTIONS NEAR TRACK—NOT RETROACTIVE—SPECIAL ORDER.

A general order of the Board of Railway Commissioners, under subsec. (*g*), sec. 30, ch. 37, R.S.C. 1906, providing that thereafter no structure more than 4 feet in height shall be placed within 6 feet from the nearest rail of a railway track, and that no water stand pipe shall be placed so that there shall be less than 2 feet 6 inches between it and the widest engine cab, is not retroactive, and does not contemplate the removal of stand pipes within such prohibited distance erected under a special order of such Board permitting the C. P. R. to maintain its stand pipes at a lesser distance.

[*Kutner* v. *Phillips*, [1891] 2 Q.B. 267, specially referred to.]

3. CARRIERS (§ IV A—519)—CONSTRUCTION OF SPECIAL AND GENERAL ORDERS OF BOARD OF RAILWAY COMMISSIONERS—ERECTIONS NEAR TRACK.

A special order of the Board of Railway Commissioners, under subsec. (*g*) of sec. 30, ch. 37, R.S.C. 1906, providing that water stand pipes shall be placed not less than 7 feet 6 inches from the centre of the tracks of the C. P. R., is not abrogated by a subsequent general order, not retroactive in effect, which prohibited the placing of water stand pipes so that there should be less than 2 feet 6 inches between them and the widest engine cab, so as to render the railway company liable to a brakeman who was injured by coming in contact, while riding on a ladder on the side of a car, with a stand pipe which was 7 feet 6 inches from the centre of the track, but not 2 feet 6 inches from the side of the widest engine cab.

4. MASTER AND SERVANT (§ II B 4—161)—KNOWLEDGE OF DEFECTS OR DANGER BY SERVANT—KNOWLEDGE ALSO OF STATUTORY DUTY IMPOSED ON MASTER.

Where a statutory duty is cast upon a master in any particular work, the fact that a servant continues in that work with knowledge of its dangerous character and appreciation of the risk thereof, does not render the maxim *volente non fit injuria* applicable so as to absolve the master from liability, unless it is shewn that the servant undertook the employment not only with knowledge of the risk involved, but also of the master's statutory duty in respect thereto. (*Per* Galliher, J.A.)

APPEAL by plaintiff from judgment of Gregory, J., dismissing action upon the jury's answers to questions submitted to them.

The appeal was dismissed.

S. S. Taylor, K.C., for appellant.
Sir *C. H. Tupper*, K.C., for respondents.

MACDONALD, C.J.A.:—The action was dismissed at the trial on the ground that the jury could not properly find that the plaintiff had not been guilty of contributory negligence. After a perusal of the evidence, particularly that of the defendants' trainmaster, I am of opinion that there was sufficient upon which the jury could find as they did; that the plaintiff was not guilty of contributory negligence. Brakemen were allowed to, and made a constant practice of riding on the ladder on the side of the car, and this seems to have been recognized by the officials as proper and convenient to enable the brakemen to perform their duties efficiently. The fact that the plaintiff inadvertently failed to remember the danger on this occasion does not in the circumstances of this case disentitle the jury to acquit him of

contributory negligence, and if this were the only question involved in the appeal, I should reverse the judgment dismissing the action, and give judgment to the plaintiff.

The difficulty, however, in the plaintiff's way is the existence of an order of the Board of Railway Commissioners, dated February 2, 1910, approving the plan of water stand pipes which shews the distance they are to be placed from the centre of the railway track, namely, not less than 7 feet 6 inches. It was, I think, proved satisfactorily that the stand pipe which injured the plaintiff was of this standard type, and was placed not less than 7 feet 6 inches from the centre of the track. The jury found that defendants' negligence consisted in having this water stand pipe too near to the track. It therefore follows that if it were placed there with authority equivalent to statutory authority, and if the authority has not been withdrawn or displaced by the subsequent order, which I shall presently mention, the plaintiff could have no right of action. The subsequent order relied on by the plaintiff is dated November 9, 1910, and it provides that "water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab." It appeared that the water stand pipe in question was less than that distance from the widest engine cab. No evidence was adduced to shew that either of these orders was promulgated pursuant to sec. 31 of the Railway Act, but no objection was taken by counsel to their admission in evidence on that account. That section provides that any order or decision of the Board published by or with the leave of the Board for three weeks in the *Canada Gazette*, and while the same remains in force, shall have the like effect as if enacted in the Act, and that all Courts shall take judicial notice thereof. What effect failure to prove such publication might have upon this case it is not necessary here to consider because no objection was taken either at the trial, or on the appeal, based upon said sec. 31, and the trial seems to have proceeded on the assumption that both orders were in full force and effect except as the earlier one might be affected by the later.

The plaintiff's contention is that the order of November overrides the one of February, while the defendant contends that the order of February being a special and that of November a general one, the later order has no application to the water stand pipe in question here. I think that the defendant's contention is right. The order of November, if I may say so, is very loosely drawn. On its face it appears to have been made *ex parte*. If it were intended to be retroactive, or to conceal the previous order, one would expect that the defendant and all other railway companies affected thereby would have been notified of the proposal to make it. It was not a weighty matter to decide and direct that all water stand pipes should in future be erected at a specified distance from the tracks, but to direct that all such

B.C.

C. A.
1912

CLARK
v.
CANADIAN
PACIFIC
R. CO.

Macdonald,
C.J.A.

pipes already erected along many thousands of miles of railway should, instanter, where they were within that distance, be removed and made to comply with the order, was a serious matter, and while uniformity is important in securing safety, yet if so sweeping a change were intended, one would expect that reasonable time would be allowed to enable the railway companies to make the change. The language used in the order is peculiar, and I find some difficulty in construing it. It seems to me to be open to the construction that in future water stand pipes shall not be erected nearer than a specified distance from the tracks, but it is also capable of the additional meaning that all existing stand pipes which are less than that distance from the tracks shall be removed. Having regard, however, to the considerations above referred to, I cannot think it was the intention of the Board to do more than direct that in future the terms of that order should be complied with. In other words, it was not intended to be retroactive. On this point the position of the C. P. R. Co. is perhaps stronger than that of other railway companies, because of the order of February. Had it been the intention of the Board to rescind that order, I think it would have been so expressed in the order of November. In this view of the case, even apart from the maxim, *generalia specialibus non derogant*, the November order cannot be successfully relied upon in aid of the plaintiff.

It follows that the appeal must be dismissed.

IRVING, J.A.:—The action was for damages sustained by the plaintiff, a brakeman on a freight train, on November 24, 1910, by striking a stand pipe erected close to the track upon which the train was running.

The Judge permitted the case to go to the jury for precaution's sake: see *Bridges* v. *North London R. Co.* (1873), L.R. 7 H.L. 213, at p. 235.

The jury found that the defendants were guilty of negligence, viz., permitting the stand pipe to be too close to the track, and that the plaintiff was not guilty of contributory negligence.

In answer to question 5, the jury found that the plaintiff could not, by the exercise of reasonable care, have avoided the company's negligence.

In answer to Q. 8:—

> Did the plaintiff know of the risk due to the position of the standpipe, and have a knowledge and appreciation of its danger, and had he at the time of the accident voluntarily accepted the risk as a risk incident to his employment?
>
> (*a*) The plaintiff knew of the risk due to the position of the standpipe, but under the circumstances couldn't appreciate the proximity of the pipe.
>
> (*b*) Yes.

On these answers the learned Judge ordered judgment to be entered for defendants.

By sub-sec. (*g*) of sec. 30 of the Railway Act, ch. 37 of Rev. Stats. Can., 1906, the Board of Railway Commissioners is authorized to deal with the structures and works to be used by the railway, so as to protect the employees of the company.

Under that section the defendant company obtained on February 2, 1910, an order approving of a system of stand pipes to be erected on their road not less than 7 feet 6 inches from the centre of the track.

The stand pipe in question was erected in compliance with the requirements of that plan.

Prior to the passing of that order, a general order (p. 135) had been made (December 16, 1908) with reference to all railways in Canada, requiring the water stand pipes to be fastened parallel with the main track; and on November 9, 1910, that general order was repealed and a new general order, providing that the water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab, was promulgated.

This pipe is only 16½ inches from the widest part of engine No. 575, so that judged by the standard of the order of November 9, 1910, it is 13½ inches too close.

The learned Judge, on motion for judgment, came to the conclusion that the plaintiff was the author of his own injury irrespective of whether the stand pipe was placed in a dangerous position or not, and gave judgment for the defendants, following *Dominion Iron & Steel Co.* v. *Day* (1903), 34 Can. S.C.R. 387; and *Ryan* v. *Canada Southern R. Co.*, 10 O.R. 745. Both of these cases are illustrations of the rule laid down by Lord Cairns in *Dublin, Wicklow & Wexford R.* v. *Slatterly* (1878), 3 A.C. 1155, at 1166, that in certain cases a defendant is entitled to have a direction to the jury to find a verdict for the defendant. This right was recognized by the Judicial Committee in *Toronto R. Co.* v. *King*, [1908] A.C. 260, at 269. I do not wish to express an opinion as to whether or not this was a proper case for the exercise by the Judge of that duty, and it is not necessary for me to do so, because I have come to a conclusion on another point, and that is, there was no evidence of negligence on the part of the company to go to the jury.

In *G. T. R.* v. *McKay* (1903), 34 Can. S.C.R. 81, the Supreme Court of Canada considered the 187th section of the Railway Act (now sec. 30 of ch. 37, R.S.C. 1906) and it was there laid down that the standard of duty, if complied with by a railway company, cannot be regarded by a jury as negligence. Compare *C. P. R.* v. *Fleming* (1893), 22 Can. S.C.R. 33.

The defendant company, in my opinion, were governed by the special order of February 2, 1910, and not by the general order of November 9, 1910.

The general order of November 9, 1910, provides art. 8, that (*a*) open drains shall be forthwith covered up; (*b*) that in future

B.C.
C. A.
1912
CLARK
v.
CANADIAN
PACIFIC
R. CO.
Irving, J.A.

semaphores shall not be nearer than 6 feet from the nearest rail, and that existing semaphores shall be changed so as to comply with this article within two years; (c) enacts that "no structure over 4 feet high shall hereafter be placed within 6 feet from the nearest rail without first obtaining the approval of the Board; (e) water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab.

I read (e) with (c) that in placing a stand pipe hereafter it shall be at least 6 feet from the gauge side of the nearest rail, and if the engine cabs are so wide that this will not give a 2 feet 6 inches space between the stand and the engine, then they must be put back even a greater distance.

It is not to be overlooked that sub-sections (b) and (c) both deal with the erection of semaphores and structures to be erected; and no provision is made in (e) for the removal of existing stand pipes, although we find in (d) a time limited for the removal of existing switches, etc. The circumstance that the general order of November, 1910, was to come into force at once, and a penalty was given for every offence, goes to shew that the immediate removal of the stand pipes sanctioned by the special order of February 2, 1910, and the erection of another, was not contemplated.

There is another argument which perhaps is convincing, namely, that the Board, having by the special order prescribed a special minimum measurement for the C. P. R. stand pipes of 7 feet 6 inches from the centre of the track, to meet the requirements of the rolling stock used by that company, were not in November, 1910, dealing with the C. P. R. at all. This argument seems to me not as strong as the one I have put forward, because the general order is remedial in its nature.

GALLIHER, J.A.:—This is an action for damages for injuries sustained by the plaintiff in the loss of his right hand.

The plaintiff was a brakeman in the defendants' employ, and on the night of November 24, 1910, while in the performance of his duties in the yard at Spence's Bridge, a point between North Bend and Kamloops, on the defendants' railway, the wheels of the freight car ran over his right arm, cutting off the hand above the wrist. The only evidence as to how the accident occurred is that of the plaintiff, who swears that he was riding on the ladder on the side of the box car which he was ordered to cut off from the train and switch on to a siding in the yard. That while so riding, the night being dark and the yard badly lighted, he did not see the water stand pipe erected close to the track, and while passing was struck by this stand pipe and knocked under the wheels of the car, suffering the injury complained of. The plaintiff's case is that the stand pipe was placed so near the track as to be dangerous to brakemen, and to the plaintiff in carrying

out his duty, and that the placing or maintaining of the stand pipe in that position was contrary to an order of the Board of Railway Commissioners, dated November 8, 1910. The defendants set up: (1) Contributory negligence; (2) *volens;* (3) that the order of the Board of Railway Commissioners was not retroactive; and (4) that they were not negligent in that the said Board had by an order of February 2, 1910, permitted the defendants' stand pipes to be in the position and within the distance from the track in which the stand pipe in question was. The question of contributory negligence was left to the jury, and they found in favour of the plaintiff. Such being their finding, and in view of the circumstances disclosed in the evidence, I am unable to say that there was not evidence upon which they could so find; and I also am of opinion that it was a case where the evidence was properly submitted to the jury upon that point.

If the defendants committed a breach of a statutory obligation in connection with this stand pipe, that would be no answer to a plea of contributory negligence; but in the application of the maxim, *volenti non fit injuria*, it might be quite different. In the case of *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685, Bowen and Fry, L.JJ., expressed the opinion (though it is only *dicta*) that where a statutory duty exists, and a breach is committed, the maxim, *volenti non fit injuria*, is not to be presumed to avail (the Master of the Rolls expressing a different opinion) and in the later case of *Baddeley* v. *Earl Granville*, 19 Q.B.D. 423, Wills and Grantham, JJ., both expressed the opinion that under such circumstances the maxim does not apply. In any event it appears to me that where a statutory duty is cast upon a master in any particular work, the fact that the servant continues in that work even if he knows its dangerous character, and appreciates the risk he is running, does not make him *volens* unless it is brought home to him that he undertook the employment not only with the knowledge of the risk involved, but of the master's statutory duty in respect thereto, and if such knowledge is not brought home to him, and the master commits a breach of that statutory duty, he is not discharged from his liability to compensate the servant for injuries sustained through such breach of duty.

Here there has been no attempt to shew that the plaintiff had any knowledge that the defendants were under any statutory obligation to have these stand pipes a certain distance from the track, so that in that sense he could not be said to be *volens* so as to take him out of the protection afforded by statute. Subsection (*c*) of the order of November 9, 1910, in so far as it affects this case, is as follows:—

"Water stand pipes shall not be nearer than 2 feet 6 inches from the widest engine cab."

The order of the Board of February 2, upon which the de-

B.C.
C. A.
1912
CLARK
v.
CANADIAN
PACIFIC
R. CO.
Galliher, J.A.

fendants rely, provides that the distance at which the stand pipes shall be placed, measuring from centre of track to centre of stand pipe, shall not be less than 7 feet 6 inches. The particular stand pipe in question complies with this, but applying the measurement as specified in the order of November 9, the stand pipe does not conform to that standard.

Two questions are raised in connection with these orders, first, is the order of November 9 retroactive? and second, if it is so, are the company protected by the order of February 2? It has been laid down that legislation is not retroactive unless it says so in express words, or unless it can be inferred from the language of the Act. We have been referred to the case of *Village of Joachim de la Pointe Claire* v. *Pointe Claire Turnpike Road Co.*, 24 Can. S.C.R. 486, but this case does not assist us very much.

In that case the words used were "the company cannot, however, place any toll or other gate within the limits of any town or village incorporated by special charter or under the municipal code unless the corporation consents thereto." The words so used clearly could not be considered so as to have reference to existing toll gates. The words in the order of November 9, however, appear to me to be very different, and wide enough to include not only placing but maintaining stand pipes, and if this view is correct, it would have reference to every stand pipe, whether already existing or to be afterwards erected. It seems to me there is a direct prohibition that no water stand pipe shall be nearer than the prescribed distance. It may be said that such an order coming into effect at once would be unreasonable, and that the company should, at all events if the order was intended to apply to existing stand pipes, have been given a reasonable time within which to make all existing stand pipes conform to the order. That may be true, but we have to interpret the order as we find it without regard to whether it may be reasonable or unreasonable, but it is of course an element that ought to be considered in deciding whether the order was retroactive or not. If this sub-section stood alone, I am inclined to think the order would be retroactive, but I think sub-section (*e*) of section 8 of the same order must be considered and read with sub-section (*c*). This reads as follows:—

> "No structure over four feet high shall hereafter be placed within six feet from the gauge side of the nearest rail without first obtaining the approval of the Board."

Now a stand pipe is a structure and comes within the general class in sub-section (*c*), and the Board have in effect said in sub-section (*e*), notwithstanding what is said generally in sub-section (*c*) as to distance of structures from rail; in the case of water stand pipes a distance which may be different is fixed, leaving the word "hereafter" in sub-section (*c*) to govern.

If I am wrong in this conclusion it remains to consider whether the company, having obtained the order of February 2, is exempt from the provisions of this order. By virtue of the Railway Act, Con. Stats. of Canada, 1906, section 30, sub-section (*g*), the Board may make orders and regulations with respect to the rolling stock, apparatus, cattle guards, appliances, signals, methods, devices, structures and works to be used upon the railway, so as to provide means for the due protection of property, the employees of the company and the public, and by sub-section 2 of said section 30, "Any such orders or regulations may be made to apply to any particular district or to any railway or section or portion thereof, and the Board may exempt any railway or section or portion thereof from the operation of any such order or regulation for such time or during such period as the Board deems expedient."

It seems to me under these provisions the Board would have power to fix a standard such as was fixed in the order of November 9, and exempt from this standard either in the same order or in a separate one the present defendants.

In the present case, however, the special order of February 2 confirming plans of the defendants with regard to water stand pipes is prior in date to the general order, and as in the general order there is no exception or exemption, we are called upon to decide whether the general order over-rides the special order.

A general later order does not abrogate an earlier special one by mere implication: *Kutner* v. *Phillips*, [1891] 2 Q.B. 267.

In *London & Blackwall Ry. Co.* v. *Limehouse District Board of Works*, 3 K. & J. 123; 26 L.J.Eq. 164, Vice-Chancellor Sir W. Page Wood, says:—

> I confess I entertain a strong opinion on the law applicable to this railway company's special Act, with which the local commissioners are seeking to interfere. Whenever the legislature has, by such an Act, vested powers of a special character in a corporate body or any body of commissioners, for the express purpose of carrying out a particular object which the legislature has in view, no subsequent statute, in merely general terms giving powers which by their generality apply to the special powers conferred by the former Act, will override the special powers thereby delegated to the particular body of commissioners or corporation.

While perhaps not on all fours, it seems to me the principle in this case is applicable to the case at bar if we are to apply the same principle to the orders of the Railway Board as is applied to statutory enactments.

Mr. Taylor, counsel for the appellant, however, urged that the approval of the C. P. R. plans in the order of the Board of February 2 goes no further than permitting stand pipes already erected to remain as constructed, and is therefore under their supervisory powers and not under the legislative powers as the general order is.

B.C.

C. A.
1912

CLARK
v.
CANADIAN
PACIFIC
R. Co.

Galliher, J.A.

I do not think this can prevail when we consider the effect of sub-section 2 of section 30 of the Railway Act above referred to, and any order confirming a standard for water stand pipes of any particular railway system made under the powers therein granted would be as much within the legislative powers of the Board as would a general order.

It follows, therefore, that as the stand pipe in question conforms to this order of February 2, by which the defendants are protected, they are not guilty of negligence, and the plaintiff's appeal must be dismissed.

I merely desire to add that there was no evidence adduced to shew that these orders of the Board had been promulgated, but as neither side took objection, and the whole matter was argued before us as if they had, I have so dealt with the case.

Appeal dismissed.

B.C.

C. A.
1912

Jan. 16.

POWELL RIVER PAPER COMPANY, Limited v. WELLS CONSTRUCTION COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 16, 1912.

1. PRINCIPAL AND SURETY (§ I A—3)—ARCHITECT TAKING WORK OVER FROM CONTRACTOR—LIABILITY OF SURETY—PARTICULARS OF LOSS.

As the provisions of a construction contract to the effect that an architect, who was thereby empowered, under certain circumstances, to take the work from the contractor's hands and complete it, should ascertain the cost of so doing, which award should be binding upon and be paid by the contractor, does not bind a surety upon a bond given by the latter, indemnifying the plaintiff against loss or damage arising from the contractor's failure to fulfil his contract, the trial Judge, in an action against such surety, rightfully ordered the plaintiff to furnish the defendant with particulars of loss, together with full details as to how it arose, where the only damages claimed referred to in the plaintiff's statement was the amount found by the architect to be due from the contractor to the plaintiff.

APPEAL by plaintiff company from an order made by Murphy, J., in Chambers at Vancouver, on the 20th of November, 1911, directing the delivery of particulars of amount of loss and damage referred to in the statement of claim, such order being made upon application of the defendant, the American Surety Company of New York.

The Wells Construction Company entered into a contract with plaintiff for the construction of a dam, bulkhead, etc., at Powell River, B.C., in accordance with specifications attached to and forming part of the contract. By the specifications the architect was empowered, under certain circumstances, to take the work out of the hands of the construction company and to employ workmen and procure material for the execution of the work; and the specifications further provided that the cost and

charges of so executing the work should be ascertained by the architect and paid for or allowed to the plaintiff company by the construction company.

By the bond of the American Surety Company of New York, it became bound jointly with the Wells Construction Company to plaintiff company in the sum of $50,000, the condition being that if the Wells Construction Company should indemnify the plaintiff against any loss or damage directly arising by reason of the failure of the Wells Construction Company to faithfully perform its contract, the bond should be void. The work had been taken out of the hands of the construction company by the architect and completed by plaintiff company under his direction, and the statement of claim alleged that the cost and charges incurred by plaintiff company in so doing were ascertained by the architect at $155,250; that such amount had not been paid for or allowed to plaintiff company by the construction company; that the work should have been completed by the construction company under the contract for the sum of $118,561; that the architect settled and determined the amount payable to plaintiff company by the construction company in respect of the completion of the work by plaintiff company to be $36,688, against which the construction company was entitled to a credit of $5,056, leaving the amount of $31,632 as the amount of damage suffered by plaintiff company by reason of the construction company's failure to complete its contract.

The order appealed from directed plaintiff company to deliver particulars of its loss and damage, being the said sum of $31,632, with full details as to how the loss and damage arose.

The appeal was dismissed, GALLIHER, J.A., dissenting.

W. B. A. Ritchie, K.C., for appellants:—Plaintiff company's claim is based on the amount of loss and damage, ascertained by the architect, in accordance with the provisions of the contract, and the order appealed from, in effect, requires plaintiff company to give particulars of the way in which the loss and damage were ascertained by the architect. This is practically requiring a person in whose favour an arbitrator's award has been made to give particulars of how the arbitrator made up the amount adjudged by the award to be paid. The way in which the arbitrator made up his award is not a matter within the knowledge of the plaintiff company. Even if there is a question whether the American Surety Company is bound by the ascertainment of the architect, that is a question to be threshed out at the trial, and furnishes no justification for an order for particulars.

E. P. Davis, K.C., for respondent, American Surety Company of New York:—The architect in the contract was plaintiff company's architect, and they are possessed of full information as to the loss and damage claimed. The American Surety Company

B.C.
C. A.
1912
POWELL RIVER PAPER CO. v. WELLS CONSTRUCTION CO.
Macdonald, C.J.A.

is not bound by the amount of loss or damage as ascertained by the architect, his determination being binding only upon the Wells Construction Company: *Ex parte Young, In re Kitchin* (1881), 17 Ch.D. 668. Plaintiff company can only claim against the American Surety Company for the actual amount of loss or damage caused by the construction company's breach of contract, irrespective of the determination of the architect as to such amount, and as to such loss or damage, plaintiff company must furnish particulars.

MACDONALD, C.J.A.:—I think the appeal should be dismissed. I cannot take the view so strongly urged by Mr. *Ritchie* that this contract of suretyship is one which renders the surety company liable and bound by the finding of the architect as between a principal debtor and creditor—that they agreed to abide by the decision of the architect. I cannot find that the surety company has decided to have the architect established as a tribunal to settle the differences between the parties.

IRVING, J.A.:—I agree.

GALLIHER, J.A.:—I take a different view from my learned brothers. The specifications provide:—

> To prevent any disputes, doubts, differences or litigations arising or happening, touching or concerning the said work, or any portion of it, or relating to the quantities, qualities, description, classification or manner of work done and executed, or to be done and executed by the contractor, or to the quality, or classification of the materials, to be employed therein, or in respect to any additions, deductions, alterations, or deviations made in, to or from the said work, or any part of it, or touching or concerning the meaning or intention of the specifications and of this agreement, or any part thereof, or of any contract entered into by and between the company and the contractor pertaining to work herein described, or of any plans, drawings, instructions or directions referred to in the said specifications or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order or award which may have been made by the architect, or in anywise whatsoever relating to the interests of the company, or of the contractor in the premises; it is expressly agreed that every such question, doubt, dispute and difference shall from time to time be referred to and be settled and decided by the architect, who shall be competent to enter upon the subject-matter of such question, doubt, dispute or difference, with or without formal reference or notice to the parties to this agreement, or either of them, and that he shall judge, decide, order and determine thereon; and that to the architect shall also be referred the settlement of this contract, and the determination of the sum or sums or balance of money to be paid or to be received by the contractor from the owner, and it is further expressly agreed that such decision as to any and every question, doubt, dispute and difference, and said determination and estimate of the quantities, qualities, classifications, and of the sum, values, and all other matters hereinbefore mentioned and described, shall be a condition precedent

B.C.

C. A.
1912

POWELL RIVER PAPER CO. v. WELLS CONSTRUCTION CO.

Gallihe, J.A.

to any right of the contractor to receive, demand or claim any money or other compensation under this agreement, and a condition precedent to any liability on the part of the owner to the contractor or on account of this contract, or for any labour or materials furnished in connection therewith.

That conveys to my mind, at all events, one meaning: there is a contract, which contract is referred to in and attached to this bond. There is a provision in the contract that the loss shall be for a specified sum or a sum to be found by the architect, and when the architect does find that sum, that is the sum that will be due, and could not be disputed by a principal in the first instance; that is the sum which, as I read the paragraph in the bond, the principal has agreed to pay. If the architect had found a much smaller sum, it does not seem to me that the principal could recover any more than he had agreed to recover from the obligors under the bond. Holding that view I, with great respect, dissent.

Appeal dismissed, GALLIHER, J.A., *dissenting*.

ROYAL BANK OF CANADA v. FULLERTON LUMBER AND SHINGLE COMPANY, Limited.

B.C.

C. A.
1912

Jan. 17.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 17, 1912.

1. APPEAL (§ VII I 3—355)—DISCRETION AS TO GRANTING LEAVE TO DEFEND—JUDGMENT BY DEFAULT.

The Court of Appeal will not interfere with the exercise of a trial Judge's discretion in granting leave to defend an action after judgment by default, unless it appears that there was an abuse thereof.

2. APPEAL (§ VII I 3—355)—TRIAL JUDGE'S DISCRETION—JUDGMENT BY DEFAULT—LEAVE TO DEFEND.

An order granting leave to defend an action, after entry of judgment, upon payment of the costs of the action up to judgment, and payment into Court of the amount of the judgment, to abide the result of the trial, does not amount to such an abuse of the wide discretion vested in the trial Judge, as will justify interference by the appellate Court.

APPEAL from an order of Howay, Co. J., at New Westminster, on the 18th of December, 1911, giving defendant leave to defend, after judgment had been entered by default, on paying the costs of the action up to judgment, and also paying into Court the full amount of the judgment to abide the result of the trial. The default of the defendant's counsel was due to an oversight in the solicitor's office, as to the date of the trial. Defendant appealed.

The appeal was dismissed.

J. H. Senkler, K.C., for appellant:—The order is an improper one and should not have been made. Defendant has sworn that he has a good defence, and is and was ready to defend. He is willing to pay the costs occasioned by the over-

B.C.

C. A.
1912

ROYAL BANK OF CANADA v. FULLERTON LUMBER AND SHINGLE CO., LTD.

Argument

sight in the solicitor's office, but in view of the fact that he has sworn to having a good defence, he should not in equity be compelled to pay into Court the full amount of a judgment which, when the action is tried out, may never be rendered against him. The order is oppressive, and works a hardship. In effect such an order might prevent a defendant from litigating his just claim, because financially, he might be unable to comply with the order, and thus be denied justice in the Courts: *Burgoine* v. *Taylor* (1878), 9 Ch.D. 1, and *Wolffe* v. *Hughes* (1881), 17 C.L.J. 427, are cases directly in point, where the Court decided that a litigant who had a good or proper case, should not suffer or be deprived of his right to litigate his claim on account of the fault or omission of his solicitor. It is true he should be put on terms, but here the terms are unreasonable. It is not a case here of a party against whom a judgment has been properly and after full litigation, obtained, asking for a stay of execution pending appeal. In such a case it would be reasonable that he should be required to put up the amount of the judgment. Here the defendant merely wishes to get an opportunity to litigate the claim against him.

W. M. Griffin, for respondent, was not called upon.

MACDONALD, C.J.A., did not think that if he had been in the place of the learned Judge below, he would have made the order appealed from. The law, however, gives the Judge a wide discretion; he has exercised that discretion, and unless it is plain that it has been wrongly exercised, it is inadvisable to interfere. It is a mistake, as a rule, to impose a term which might have the effect of preventing a person from litigating his rights, and a Judge should exercise great care to see that no injustice of that kind is done, but it is a well-known rule of all Courts of Appeal that the Court will not interfere with the exercise of discretion save in exceptional cases. His Lordship did not see anything fundamentally wrong, where a solicitor or counsel fails to reach the place of trial and then asks to be allowed to come in and defend, in imposing security such as had been imposed in this case.

IRVING, J.A., was of the same opinion. It is a pity to make any departure from the usual course. In this case probably the proper course would have been to have gone to the Judge and asked him to make another order, but as the matter stood, the Court of Appeal could not very well interfere.

GALLIHER, J.A., was of opinion, in the absence of any evidence shewing that the discretion vested in the trial Judge had been wrongly used, that the Court could not interfere. With all respect to the learned Judge who made the order, the term imposed seemed a very severe one, but as far as his Lordship could see, the Court of Appeal could not very well disturb the ruling.

Appeal dismissed.

KING LUMBER MILLS, Limited v. CANADIAN PACIFIC R. CO.

B.C.
C. A.
1912
Jan. 30.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 30, 1912.

1. DISCOVERY AND INSPECTION (§ IV—31)—FIRE WARDEN—OFFICER OF A RAILWAY CORPORATION—EXAMINATION FOR DISCOVERY.

A person in the employ of a railway company as a fire warden having superintendence over subordinates who patrolled a large territory to protect railway property from forest fires is an officer of the railway company for the purposes of discovery and not merely a servant.

2. DISCOVERY AND INSPECTION (§ IV—31)—OFFICER OF A CORPORATION—AN EMPLOYEE IN POSITION OF AUTHORITY TO WHOM REPORTS ARE MADE.

Whether or not a person is an "officer" of a corporation for the purpose of being examined for discovery depends upon the circumstances of each particular case, and apart from any official designation given to him, may include an employee in a position of authority and responsibilty to whom reports would be made by his assistants in the course of their duties. (*Per* Irving, J.A.)

APPEAL from an order of Wilson, Co. J., sitting as a local Judge of the Supreme Court, granting an application for the examination of one McDonald, a fire warden, in an action for damages caused by fire alleged to have been started by one of defendant company's engines. This was a motion for a stay of proceedings under that order pending an appeal, but by consent it was allowed to be taken as a hearing of the appeal. The facts were somewhat indefinitely before the Court, but in effect they were that one Cook had been examined for discovery in the action. Cook was a fire warden of the railway company, having a large area to cover. It developed from his evidence that the witness McDonald was the warden who patrolled the particular area covered by the fire. It was alleged for the defendant company that the fire occurred on the 4th of July, and that McDonald did not enter their service until the 18th, and he is not now in their employ. For the plaintiff company it was alleged that the fire smouldered until the 31st of July, when it broke out and did the damage. The question was whether (1) McDonald was an officer of the company who could bind them by any admissions or statements so as to come within the rule*

*By marginal rule 370 (*e*) of the B.C. Supreme Court Rules, 1906, as amended 1908, the following provisions are made (*inter alia*) for examinations for discovery.

370(*e*).—A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest and may be compelled to attend and testify in the same manner; upon the same terms and subject to the same rules of examination of a witness except as hereinafter provided.

(1) In the case of a corporation any officer or servant of such corporation may, without any special order, and any one who has been one of the officers of such corporation may, by order of a Court or a Judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation and may be compelled to attend and testify in the same manner and upon the same terms and

B.C.

C. A.

1912

KING LUMBER MILLS, LTD. v. CANADIAN PACIFIC R. CO.

Statement

and (2) if not, then, not now being a servant of the company, was he examinable as such?

The appeal was dismissed, MACDONALD, C.J.A., *dubitante*.

E. V. Bodwell, K.C., in support of the motion:—We say that the rule distinguishes between a past and present officer or servant of the corporation, and we submit in any event that this fire warden would not be an officer within the rule. It would be wrong to bind a corporation by the statements of a person (who had been in their employ) after he had left their service. As to who is an officer, see *Morrison* v. *Grand Trunk R. Co.* (1902), 5 O.L.R. 38. If McDonald were at present in the service there is no doubt he could be examined.

[MACDONALD, C.J.A.:—Is he not a past officer?]

Bodwell:—He came into the company's employ after this fire. He commenced on the 18th and the fire broke out on the 4th. He can have no knowledge of it.

H. A. Maclean, K.C., *contra*:—We say the fire started on the 4th and smouldered until the 31st, and McDonald was given superintendence over this area. He, therefore, was on the ground from the 18th to the 31st, and must of necessity have knowledge. He is also an officer, examinable under the rule: see *Dawson* v. *London Street R. Co.* (1898), 18 P.R. 223, where a motorman and a conductor were held to be officers of the company for purposes of discovery. See also *Watson* v. *Rodwell* (1876), 3 Ch. D. 380.

Bodwell, in reply:—The *Dawson* v. *London Street R. Co.*, 18 P.R. 223, case is distinguishable; the men there were present servants, and the company were given the election of which man should be examined.

MACDONALD, C.J.A.:—As both my learned brothers are satisfied that the person sought to be examined had been an officer, not merely a servant of the company, and therefore examinable under the rule, there is no need to reserve judgment, although I may say I have some doubt.

IRVING, J.A.:—I think he was an officer. Whether a person is an officer or not depends upon the circumstances of each particular case. This man was one to whom subordinates would report from time to time, and would be in a position to state what reports he had received from his assistants.

subject to the same rules of examination as a witness, save as hereinafter provided. Such examination may be used as evidence at the trial if the trial Judge so orders.

(2) After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order of the Court or a Judge.

GALLIHER, J.A.:—I think that while he was in the employ of the company he was an officer liable to examination, and the fact that he had left the employ would not take from him any information that he had gained while he was an officer; in fact, he is a past officer.

Appeal dismissed, MACDONALD, C.J.A., *dubitante*.

B.C.
C. A.
1912
KING LUMBER MILLS, LTD. v. CANADIAN PACIFIC R. Co.

McARTHUR v. ROGERS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 16, 1912.

B.C.
C. A.
1912
Jan. 16.

1. JURY (§ I B 1—17)—RIGHT TO JURY IN CIVIL ACTIONS—INJUNCTION.

The plaintiff in an action for damages for breach of an agreement to supply water for domestic and irrigation purposes, and for a mandatory injunction to compel performance thereof, is not entitled upon notice to a jury, under B.C. Rules, 1906, marginal rules 426-432.

2. APPEALS (§ VII J 6—375)—TRIAL JUDGE'S DISCRETION—REFUSING TRIAL BY JURY.

The appellate Court will not interfere with the trial Judge's exercise of discretion, under marginal rules 426-432 of the B.C. Rules, 1906, in refusing the plaintiff a jury in an action for damages for the breach of an agreement to supply water for domestic and irrigation purposes, and for a mandatory injunction to compel performance thereof.

APPEAL from an order made by Morrison, J., at Chambers in Vancouver on the 5th of December, 1911, dismissing plaintiff's application for an order for trial with a jury.

The statement of claim alleged breach by defendant of an agreement to supply water for use on plaintiff's lot for domestic and irrigation purposes, and claimed damages and a mandatory injunction to compel the performance by defendant of his agreement.

The statement of defence, besides denial of the agreement, set up a proviso exempting defendant from liability for causes beyond his control and alleged that any deficiency in the supply of water was caused by drought, and also set up a proviso that if certain payments were not made by plaintiff, his supply of water should be cut off, and alleged that such payments had not been made. The application for order for trial with a jury was made within four days after notice of trial given. Plaintiff appealed.

The appeal was dismissed.

W. B. A. Ritchie, K.C., for appellant:—While Order XXXVI.* differs somewhat from the English rule on account

*Order XXXVI. Part II. (Mode of Trial) of British Columbia Rules 1906, provides as follows (marginal rules 426-432):—

426. In actions of slander, libel, false imprisonment, malicious prosecution, or breach of promise of marriage, the plaintiff may, in his notice of trial to be given as hereinafter provided, and the defendant may, upon

B.C.

C. A.
1912

MCARTHUR
v.
ROGERS.

Statement

of there being no chancery division in British Columbia, its scope and intention is the same, namely, that, subject to certain cases where the Judge is given discretion, the mode of trial is to remain as it was before the rules were passed, viz., when equity cases, except where a special issue was ordered to be tried by a jury, were tried by a Judge without a jury, and common law cases were tried with a jury where the cause does not come within rules 3, 4, or 5, a party making application within due time is entitled as a matter of right, to an order for trial with a jury, under rule 6.

It cannot be said here that the equitable jurisdiction of the Court is invoked. The action is brought to recover damages

giving notice within four days from the time of the service of notice of trial or within such extended time as the Court or a Judge may allow, or in the notice of trial to be given by him as hereinafter provided, signify his desire to have the issues of fact tried by a Judge with a jury, and thereupon the same shall be so tried.

427. All causes and matters relating to the following shall be tried by a Judge without a jury, viz.:—

The administration of the estates of deceased persons;

The dissolution of partnerships or the taking of partnership or other accounts;

The redemption of foreclosure of mortgages;

The raising of portions, or other charges on land;

The sale and distribution of the proceeds of property subject to any lien or charge;

The execution of trusts, charitable or private;

The rectification, setting aside, or cancellation of deed or other written instruments;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;

The partition or sale of real estates;

The wardship of infants and the care of infants' estates.

Probate:

All causes or matters other than those specified in this Rule, in which the equitable jurisdiction of the Court is invoked, unless the Court or Judge shall otherwise order.

428. The Court or a Judge may, if it shall appear desirable direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act, 1879, could without any consent of parties have been tried without a jury.

429. The Court or a Judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury, or where the issues are of an intricate and complex character.

430. In any other cause or matter, upon the application within four days after notice of trial has been given of any party thereto for a trial with a jury of the cause of matter or any issue of fact, an order shall be made for a trial with a jury.

431. (*a*) In every cause or matter, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, or under Rule 2 of this Order either party has signified a desire to have a trial with a jury the mode of trial shall be by a Judge without a jury; provided that in any such case the Court or a Judge may at any time order any cause, matter, or issue to be tried by a Judge with a jury, or by a Judge sitting with an assessor or assessors. And in the event of such trial being ordered to be held by a Judge sitting with an assessor or assessors, then

for breach of contract and an injunction is claimed only as an ancillary remedy. The test is whether the action is in substance a common law or an equity action: see *Coles* v. *Civil Service Supply Association* (1884), 32 W.R. 407; *Gardner* v. *Jay* (1885), 29 Ch. D. 50; *Clairmonte* v. *Prince* (1897), 30 N.S.R. 258.

B.C.
C. A.
1912
McARTHUR v. ROGERS.
Statement.

G. E. McCrossan, for respondent, not called upon.

PER CURIAM:—The appeal should be dismissed. It does not appear to be a case for a jury, but in any event, seeing that the learned Judge below has exercised his discretion, and has come to the conclusion not to grant a jury, we ought not to interfere.

Appeal dismissed.

such Judge may call in the aid of one or more assessors specially qualified and try the cause or matter wholly or partially with the assistance of such assessor or assessors. The Court or Judge may fix such remuneration for the assessor or assessors as may seem meet, and the amount so fixed shall form part of the costs of the action;

(*b*) The plaintiff in any cause or matter in which he is entitled to a jury may have the issues tried by a special jury, upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial;

(*c*) The defendant, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given;

(*d*) Provided that a Judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just.

432. Subject to the provisions of the preceding Rules of this Order, the Court or a Judge may, in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others.

IN RE MUNICIPAL ELECTIONS ACT.

British Columbia Supreme Court, Gregory, J. January 5, 1912.

B.C.
S. C.
1912
Jan. 5.

1. ELECTIONS (§ I B—12)—VOTERS' LISTS—CONDITIONS PRECEDENT TO BEING PLACED ON SAME—MUNICIPAL ELECTIONS ACT (B.C.).

Where an applicant to have his name placed upon the municipal voters' list, properly qualified in every respect, made the necessary declaration before a special commissioner for taking affidavits appointed under the provisions of the Provincial Elections Act (B.C.) instead of making the same before a Commissioner for taking affidavits in the Supreme Court, as required by the Municipal Elections Act (B.C.), such non-compliance with provisions of the last-mentioned Act is fatal, and the placing of his name on the municipal voters' list by the clerk of the municipality was improper and the Court of Revision rightfully struck his name from the list.

[*Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376, distinguished.]

B.C.

S. C.
1912

IN RE MUNICIPAL ELECTIONS ACT.

2. OATH (§ 1—3)—DECLARATION OF QUALIFICATION OF VOTERS—MUNICIPAL ELECTIONS ACT (B.C.)—PROVINCIAL ELECTIONS ACT (B.C.).

Where by the terms of the Municipal Elections Act (B.C.) the declaration of qualification of voters is to be made before a "commissioner for taking affidavits in the Supreme Court," a declaration of qualification made before a commissioner appointed under the provisions of the Provincial Elections Act (B.C.) is of no legal effect; the powers of the commissioners last referred to being restricted to those conferred upon him by the Act under which he was appointed.

[*Boyd* v. *McNutt*, 9 Ont. P.R. 493; *Pollard* v. *Huntingdon*, 16 C.L.J. 168, and *Reynolds* v. *Williamson*, 25 U.C.C.P. 49, referred to.]

APPLICATION on the part of certain persons for an order that the names of such persons be added to the voters' list, as revised by the Court of Revision of the city of Victoria. Heard by Gregory, J., at Victoria, on the 2nd of January, 1911. At the last meeting of the Court of Revision for the city of Victoria, the names of a large number of persons otherwise entitled to be entered upon the list of voters for the municipality were stricken from such list on the ground that the declarations made by them were not taken before a properly authorized officer.

The declarations in question were taken before a commissioner appointed to take affidavits under the provisions of the Provincial Elections Act in the electoral district in which such commissioners resided. All declarations were made and taken in good faith.

The application was refused.

H. A. Maclean, K.C., in support of the application:—These persons were qualified to vote and the action of the Court of Revision practically disfranchises them. The Courts lean in the strongest way against an act operating as a disfranchisement of a citizen. The Elections Act should be liberally construed: *Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376. Commissioners appointed under the Provincial Elections Act are competent to take affidavits in the Supreme Court, not especially for the purposes of that Act: see also *Nuth* v. *Tamplin* (1881), 8 Q.B.D. 247 at pp. 252 and 253.

Messrs. *F. A. McDiarmid*, and *J. Y. Copeman*, *contra*:—*Davies* v. *Hopkins*, 3 C.B.N.S. 376, is not applicable, because the statute governing that case and this case are dissimilar. The British Columbia statute definitely states before whom declarations can be made. The statute also provides for the only thing which the clerk has power to check, viz., the delivery of a statutory declaration to him within a prescribed time, and the statute further provides for the duties of the Court of Revision. A declaration is not valid if made before a person who has no authority to take the same. Such declaration is not an instrument upon which perjury could be assigned. A commissioner appointed under the Provincial Elections Act is appointed as a commissioner for taking affidavits for the purposes of that Act

in the electoral district in which he resides, and is restricted not only to that district, but to the purposes of that Act. Numerous cases demonstrate the strictness with which the Courts look upon affidavits: *Boyd* v. *McNutt* (1883), 9 Ont. P.R. 493; *Pollard* v. *Huntingdon* (1880), 16 C.L.J. 168. An affidavit sworn before an official having no power to take a deposition is invalid: *Reynolds* v. *Williamson et al.* (1875), 25 U.C.C.P. 49; Ontario Evidence Act, R.S.O. 1887, ch. 61. The Court has power to put only such names of voters on the list as have been improperly omitted.

GREGORY, J.:—This is an application under the provisions of the Municipal Elections Act, sec. 17, ch. 14, British Columbia statutes, 1908, by a number of householders, to have their names placed on the voters' list for the city of Victoria.

The names were originally placed on the list by the clerk of the municipality under sec. 6 of the Act, but were struck off by the Court of Revision, acting under the authority of sub-sec. (c) of sec. 14 of the Act, on the ground that the applicants had not made the statutory declaration required by sec. 6 before a commissioner for taking affidavits in the Supreme Court, but before a special commissioner for taking affidavits appointed under the Provincial Elections Act (sec. 13, ch. 17, British Columbia statutes, 1903-04).

Mr. Maclean, for the applicants, raises two points, viz.: First: The Court of Revision had no jurisdiction to review the finding of the clerk as to the authority or qualification of the commissioner before whom the declaration was taken. Second: That a commissioner appointed under the Provincial Elections Act is qualified to take the declaration, inasmuch as he is a commissioner for taking affidavits, and the Court will ignore the qualification in the statute that he is appointed "for the purpose of acting under the Act," or will treat the words merely as a declaration of the reasons for making the appointment.

It is undisputed that the applicants have the necessary qualifications, and are entitled to go on if the declarations are properly made.

Mr. Maclean lays great stress upon his first point, and he frankly admits that his argument goes the length of holding that if the clerk put names on the list without any declaration at all, the Court of Revision would have no jurisdiction to remove them on that ground, citing Registration Appeals, *Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376, where, although a very similar contention was successfully maintained, I do not think it assists him, because that decision turned upon the wording of the statute (6 and 7 Vict., ch. 18) then under consideration, and Cockburn, C.J., and Williams, J., expressly drew attention to the peculiar wording of that statute, Williams, J., stating, at p. 387, that if the application before the Court had been one to insert a

B.C.

S. C.
1912

IN RE MUNICIPAL ELECTIONS ACT.

Gregory, J.

name omitted by the overseer, the decision of the Court would have to be different, as in such case it had to be proved before the revising barrister that the proper notice had been given, and that the applicant possessed the qualification named in that statute; but as the case before the Court was one to strike out a name on the list, the revising barrister could only inquire into such matters as the statute permitted him to inquire into in such cases, and the sufficiency of the notice was not one of them. Now, our statute makes no distinction. The duties of the Court of Revision are the same whether a name has been improperly placed on the list or improperly omitted from it. Sub-sec. 2 of sec. 14 of the Municipal Elections Act provides that the Court of Revision shall correct and revise the list, and shall have power "to determine any application to strike out the name of any person which has been improperly placed thereon, or to place on such list the name of any person improperly omitted," etc.

If there has been no declaration, or a declaration made before an unauthorized person, and yet the name of the declarant appears on the list, it is beyond dispute that the requirements of sec. 6 of the Act have not been complied with, and the name has been improperly placed there; that is the exact situation which the Court of Revision is empowered to deal with under our statute.

It seems to me, therefore, clear that Mr. Maclean's first contention is unsound.

As to the second point, there may be some doubt. My attention has been called to the case of *In re Provincial Elections Act* (1903), 10 B.C.R. 114, and particularly to the remarks of Walkem, J., at the bottom of p. 120, to the effect that franchise Acts are to be liberally construed, as their object is to enfranchise and not disfranchise persons possessing the necessary qualifications. In that case the language of the Act itself was broad, and the Court held that it could not be cut down by implication from the form of the *jurat* given in a specimen affidavit set out in a schedule to the Act. No one will be inclined to question the soundness of that decision, or Mr. Justice Walkem's remarks; but neither seems to justify me in ignoring the plain qualification of the powers of a commissioner appointed under sec. 13 of the Provincial Elections Act. That section is as follows:—

> The Lieutenant-Governor in Council may appoint any person who is a British subject as a commissioner for taking affidavits in the Supreme Court for a limited period without payment of any fee, *for the purpose of acting under this Act* in the electoral district in which he resides.

The commissioners before whom the declarations in question were made were appointed under that section, and the order in council appointing them, and their official notification of appointment expressly state that the appointment is "for the purpose of acting" under that Act. The applicants argue that the

words of qualification in the Act, the order in council, and the notification mean nothing, are merely a declaration of the reason why the appointments are made, and that once made, the appointees have, as Mr. Maclean puts it, "the full appointment," and have full power and authority to take any declarations made in any cause or matter pending in the Supreme Court. I cannot agree with that; to me the language appears perfectly plain, and in addition, the temporary nature of the appointments, the limitation of the appointees' activities to the electoral district in which they reside; the fact that there is no fee payable and that they are not appointed by a Judge of the Supreme Court under the Oaths Act (changed in 1911), and under which appointment on payment of a fee they receive a formal commission under the seal of the Supreme Court, and were entered on the roll of commissioners in the registry of that Court, all indicate, I think, that the Legislature intended expressly to restrict the powers of such appointees to the purposes of that Act. To accept the applicants' contention would be to treat these qualifying words as surplusage.

It is a well-known rule of interpretation of statutes that such a sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent: Craies Statute Law, 2nd ed., 112.

If the persons taking the declaration had no authority to do so, then they cannot be looked at—they are not declarations under the Act: see *Reynolds v. Williamson et al.* (1875), 25 U.C.C.P. 49, and other cases referred to by Mr. McDiarmid.

Although the declarants are possessed of the qualifications entitling them to be placed on the list on making the proper declaration, the making of that declaration is a condition precedent which must be complied with. The Municipal Elections Act, secs. 6 and 7, provides not only that the declaration shall be made, but also the form of it, the particular month in which it shall be made, and that it must be filed with the clerk within twenty-four hours after it is made. That these provisions cannot be ignored will not be disputed; then, surely, neither can the provision directing before whom the declaration is to be made.

The only possible doubt appears to me to arise from the fact pointed out by Mr. McDiarmid that both the Provincial and Municipal Elections Acts use the same expression, viz., "Commissioner for taking affidavits in the Supreme Court," and strictly speaking, there is no such officer known outside of those Acts, the Oaths Act, sec. 1, stating that commissioners appointed under it "shall be styled commissioners for taking affidavits within British Columbia." But that Act goes on to provide that the acts of such commissioners are valid in all Courts of the Province, and it is common knowledge that they are always

B.C.

S. C.
1912

IN RE MUNICIPAL ELECTIONS ACT.

Gregory, J.

spoken of as commissioners for taking affidavits in the Supreme Court, which they in fact are. Neither of the Election Acts state that the commissioners therein named shall be styled in any particular way; and to hold that because of the mere similarity of the expression in those Acts, commissioners under the Provincial Elections Act are the persons named to take declarations under the Municipal Act, would not only greatly enlarge the powers of the former commissioners, in direct antagonism to the express words of that Act, but it would exclude commissioners as generally understood from taking them. I cannot think that the Legislature intended to do any such thing in so indirect a way, and by such uncertain language.

The application will be dismissed, but by agreement between the parties, the city will pay the costs, fixed at $100.

Application dismissed.

B.C.

C. A.
1912

April 2.

McKENZIE v. GODDARD.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. ASSIGNMENT (§ III—28)—ASSIGNMENT OF LAND CONTRACT—EQUITIES—RIGHTS AND LIABILITIES OF PARTIES.

Where a contract for the sale of land has been cancelled by the vendor because of the non-payment by the vendee of all of the initial payment, which, however, the contract recited had been paid in full, an assignee thereof takes subject to all equities between the vendor and vendee, and can not, in the absence of allegation and proof of equitable rights as an innocent purchaser without notice, upon tender of the balance due upon the contract, obtain specific performance thereof.

[*Goddard* v. *Slingerland*, 16 B.C.R. 329, distinguished; *Rimmer* v. *Webster* (1902), 71 L.J. Ch. 561, and *Winter* v. *Lord Anson*, 3 Russell 488, referred to.]

2. ESTOPPEL (§ III D—67)—EQUITABLE ESTOPPEL—RECITAL IN CONTRACT.

Where the assignee of a contract desires to set up a claim against the other contracting party which would not be available if set up by his assignor, *ex. gr.*, his purchase without notice that a part of a sum recited in the contract to have been paid, had not in fact been paid by reason of dishonour of the cheque given therefor, and the estoppel against the other contracting party by reason of the assignee's innocent reliance upon the recital, the onus of proving such claim of equitable estoppel is upon the assignee.

[Halsbury's Laws of England, vol. 13, p. 371, par. 523, approved.]

AN appeal by the plaintiff from the judgment of Grant, Co. Ct. J., who dismissed the action.

The appeal was dismissed.

J. A. Findlay, for appellant.

W. B. A. Ritchie, K.C., for respondent.

Macdonald, C.J.A., concurred in the judgment of Gallihier, J.A.

Irving, J.A.:—It is said that the recital in the deed that the $50 has been paid in full estops the defendant from setting up this non-payment: 13 Hals., par. 365.

That we may assume to be so if the plaintiff innocently acts upon the faith of the representation.

In this case we have no evidence that the plaintiff innocently acted upon the representation.

I think the plaintiff must at least pledge his oath to that fact. In *Rice* v. *Rice*, 2 Drew. 73, evidence appears to have been given.

I would dismiss the appeal.

Gallihier, J.A.:—The learned County Court Judge was under the impression (the case not then being reported) that *Goddard* v. *Slingerland*, 16 B.C.R. 329, decided by this Court, concluded the case at bar, and so decided. That case, however, has no application, as the rights here are *inter partes*.

The plaintiff claims under an agreement entered into between the defendant and one Franks, for the sale to Franks of certain lands in the agreement set out, and which agreement was assigned to him. In the agreement the receipt of $50 is acknowledged as being paid, and the balance $200 is to be paid in monthly instalments. As a matter of fact only $26 of this $50 was paid in cash, and a cheque for $24 payable some months afterwards, which turned out to be worthless, given for the balance.

When the defendant discovered that the cheque was worthless, he notified Franks that the agreement was cancelled, but prior to such notification Franks had assigned to the plaintiff.

The plaintiff some time afterwards tendered the balance due and requested a conveyance, but the defendant refused, claiming the agreement was cancelled.

This action is for specific performance, the plaintiff paying the amount tendered into Court.

Apart from the Land Registry Act, the defendant relies on the fact as he contends that the plaintiff stands in the shoes of Franks, and that his rights are subject to any equities existing between the defendant and Franks.

If the plaintiff is an innocent purchaser without notice, he does not stand in Franks' shoes, and the defendants are estopped from setting up that they did not receive the payment acknowledged in the agreement: Halsbury, vol. 13, p. 371, par. 523; *Rimmer* v. *Webster* (1902), 71 L.J. Ch. 561.

In *Winter* v. *Lord Anson*, 3 Russell 488, cited by Mr. Ritchie, Lord Anson purchased with notice of the plaintiff's claim, and retained sufficient out of the purchase monies to indemnify him.

B.C.

C. A.

1912

MCKENZIE v. GODDARD.

Galliher, J.A.

The cause at bar was submitted to the trial Judge upon the pleadings and certain admissions by counsel. It does not appear from these whether the plaintiff had or had not notice that Franks had not paid the whole of the first payment of $50, nor was the point taken before us; but it appears to me that if the plaintiff is relying on an equitable right, outside of the rights he acquired under the assignment, viz., that of a purchaser without notice, he must allege and prove same.

Having failed to do so, I am of opinion that the appeal should be dismissed.

Appeal dismissed.

B.C.

S. C.

1912

Jan. 31.

HARRIS v. HICKEY AND CO.

British Columbia Supreme Court. Trial before Gregory, J. January 31, 1912.

1. EVIDENCE (§ II M—362*a*)—ESTABLISHMENT OF FALSITY OF CHARGE—FAILURE TO DENY TRUTH OF ALLEGATION—PRESUMPTION—B.C. RULE 13.

The innocence of the plaintiff in an action for malicious prosecution of the charge against him is sufficiently established where the allegation of his statement of claim that the defendants falsely and maliciously prosecuted him, was not denied by the defendants in their defence, the truth of such allegation being thereby admitted under Order XIX., Rule 13, of the B.C. Rules.

2. MALICIOUS PROSECUTION (§ II B—5)—CHARGING THEFT—DOUBT AS TO DEFENDANT'S BELIEF—WANT OF PROBABLE CAUSE—SUFFICIENCY OF PROOF.

Want of probable cause on the part of the defendants is sufficiently shewn in an action for malicious prosecution where the circumstances disclose that, in preferring a charge of theft against the plaintiff, they acted rashly, and the question whether they really believed that the plaintiff intended to steal from them was open to doubt, as honesty and reality of belief in his guilt was essential to the defendant's protection.

3. MALICIOUS PROSECUTION (§ I—2)—EFFECT OF ADVICE OF COUNSEL BEFORE LAYING CHARGE—WANT OF PROBABLE CAUSE.

Advice of counsel before charging a person with an offence, while evidence in the defendant's favour in an action for malicious prosecution, does not constitute a complete answer to a claim of want of probable cause, especially where it appears that the defendants tried to rely on their solicitor without forming an opinion of their own as to the guilt or innocence of the plaintiff.

[*Prentiss* v. *Anderson Logging Co.* (1911), 16 B.C.R. 289, referred to.]

ACTION for malicious prosecution, tried by Gregory, J., at Victoria on the 25th of January, 1912. The jury answered all the questions in favour of the plaintiff, and fixed the damages at $150, but at the conclusion of the plaintiff's case leave was reserved to move for a nonsuit on the grounds that (a) the plaintiff had not proved his innocence of the charge made

against him, and (b) that the plaintiff's own evidence shewed that the defendants had reasonable and probable cause for the prosecution.

The plaintiff recovered judgment.

M. B. Jackson, for plaintiff.

F. Higgins, for defendants.

GREGORY, J.:—In support of the first contention, Mr. Higgins referred to the judgment of Bowen, L.J., in *Abrath* v. *North Eastern Ry. Co.* (1883), 11 Q.B.D. 440, at p. 455, where he distinctly says that the plaintiff must prove that he was innocent, and that his innocence was pronounced, etc. When this case was before the House of Lords (1886), 11 App. Cas. 247, no reference was made by the House to the above remarks of Lord Justice Bowen, and doubt as to its correctness is suggested in Halsbury's Laws of England, vol. 19, where, at p. 677, it sets out the essentials required to be proved by the plaintiff; and at p. 682, note (*q*), reference is made to Lord Justice Bowen's remarks. Mr. Higgins referred to *Watt* v. *Clark* (1889), 18 Ont. R. 602, as following the judgment of Bowen, L.J., but a reference to that case shews that Rose, J., who delivered the judgment of the Court, expressly refrained from pronouncing any opinion on the point. It is also unnecessary for me to express any opinion on the matter, as I think the plaintiff has proved his innocence. In paragraph 5 of the statement of claim, the plaintiff alleges that the defendants falsely and maliciously prosecuted him; and the defendants in their defence, paragraph 4, do not deny the falsity of this charge, but allege that they did so on reasonable and probable cause and without malice. This seems to me to dispose of the matter, for under order XIX., rule 13,* this is an admission of the falsity of their charge, or, in other words, an admission of the plaintiff's innocence, and, supported as it is by the depositions in the Court below, on which clearly the charge against Harris was rightly dismissed, it seems to me that the plaintiff has done all he is required to do under this head, and had my attention been drawn to the pleadings during the hearing of the motion, I would have disposed of it at once.

As to the second point, whether it was necessary for me to leave the questions touching on probable cause to the jury, my own opinion is that there was a want of reasonable and

*Order XIX., Rule 13, of the B.C. Rules, is as follows: "Every allegation of fact in any pleading, not being a petition or summons if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition: Provided that a specific denial may be made of any or all the allegations contained in the opposite party's pleading or of any portion thereof.

B.C.
C. A.
1912
HARRIS
v.
HICKEY & Co.
Gregory, J.

probable cause. In the circumstances disclosed it seems to me that the defendants acted most rashly, particularly with reference to the ink and paper alleged to have been stolen; and it is at least open to doubt if they really believed that the plaintiff intended to steal; and the honesty and reality of that belief is of great importance in actions of this kind; and even if there is an honest belief, it is an elementary principle of law that it does not assist them unless there was reasonable ground for such belief. Their taking advice of counsel is evidence in their favour, but I do not think that our Court of Appeal intended, as argued by counsel, to lay down the doctrine in *Prentiss* v. *Anderson Logging Co. and Jeremaison* (1911), 16 B.C.R. 289, 18 W.L.R. 340, that it is a complete answer to the claim of want of reasonable and probable cause—there are too many strong expressions of opinion against this by many of the great English Judges, and Clerk & Lindsell on Torts, 5th ed., 1909, p. 654, and Addison, 18th ed., p. 256, both say that it is no defence. Roscoe's Nisi Prius Evidence, 18th ed., p. 884, says it is evidence, but he does not say it is necessarily a complete answer. From the evidence given by the defendants before the magistrate, and also on the trial, I would think that the best that could be said is that they tried to rely entirely on their solicitor without forming any opinion of their own on the guilt or innocence of the plaintiff.

Mr. Higgins must fail on his motion, and as the answers of the jury are entirely in favour of the plaintiff, Mr. Jackson's motion for judgment must prevail, and there will be judgment for the plaintiff for $150, with costs.

Judgment for plaintiff.

QUE.
K. B.
1912
Mar. 30.

LAMBERT PHARMACAL CO. v. J. PALMER AND SON, Ltd.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, and Carroll, JJ. March 30, 1912.

1. TRADE MARK (§ II—9)—"LISTERATED TOOTH POWDER"—"LISTERINE"—ARTICLES NOT SIMILAR—DIFFERENT CLASSES OF TRADE.

The putting on the market of an article known as "listerated tooth powder" is not an infringement of a trademark duly registered covering a medicinal substance sold to physicians and chemists under the name of "Listerine" as the two articles are not similar and are not sold to the same class of people or *clientèle*, more especially when the people who buy or use "Listerine" buy it because of its good repute and not because the plaintiff is the manufacturer or compounder of it.

2. TRADE MARK (§ VI—30)—STATUTORY EFFECT OF REGISTRATION—SCOPE OF TITLE.

For a registered specific trademark the Trademark and Design Act gives the right of exclusive use of it only to designate a "class of merchandise of a particular description," and the scope of such title cannot be extended by construction, for all doubts are to be resolved in the direction of freedom and not of the exclusive right.

[*Apollinaris Co.* v. *Herrfeldt*, 4 R.P.C. 478, distinguished.]

QUE.

K. B.

1912

LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.

3. TRADE MARK (§ I—2)—RIGHT TO USE TRADE MARK—PARTICULAR GOODS —GOODS BELONGING TO SAME GENERAL CLASS.

The right to a trademark or trade name is merely a prior right to use such mark or name in connection with the particular goods or business to which it is applied and which it has come to indicate; but the right extends to other goods or business of the same general class as that in which it has been applied.

4. TRADE MARK (§ I—2)—PARTICULAR APPLICATION—SAME NAME OR MARK ON DIFFERENT CLASS OF GOODS.

There is no general right to a trademark or trade name apart from its particular application; and other persons may legally use the identical name or mark in connection with a different class of goods or of business.

[*Eno* v. *Dunn* (1890), 15 A.C. 252; *Australian Wine Importers' Case*, 41 Ch. D. 278; *Eastman* v. *Griffiths*, 15 R.P.C. 105; *Collins* v. *Ames*, 18 Fed. Rep. 561, distinguished.]

5. TRADE MARK (§ IV—15)—WHAT AMOUNTS TO AN INFRINGEMENT—CIRCUMSTANCES OF TRADE OR MARKET TO BE CONSIDERED.

In ascertaining whether there has been a violation of a person's right in such mark the Court will be guided by all the circumstances of the trade and market and of the uses of the mark as well as any meaning or idea which may have been publicly attached to the word mark itself before its adoption as a mark.

6. TRADE MARK (§ II—8*a*)—USE OF NAME OF CELEBRATED PERSONAGE—"LISTER"—DESCRIPTIVE WORDS.

A person who selects the name of a celebrated personage and fastens it upon his trade products must be held to take it with its disadvantages as well as its attractions; the word "Lister," however, has not so far become a mere word of description not susceptible of being appropriated as a trademark by long user.

7. TRADE MARK (§ IV—24)—ESSENTIALS OF INFRINGEMENT—USE CALCULATED TO DECEIVE.

A trademark should distinguish the trader's goods and the essential of an infringement (where the essential particulars are not bodily appropriated) is that the use of the mark upon the defendant's goods is calculated to lead purchasers to buy them when asking for the plaintiff's goods; failing such proof an action for infringement should be dismissed.

8. CONFLICT OF LAWS (§ I E—101)—WRONGFUL INTERFERENCE WITH TRADE —QUEBEC CIVIL LAW—ENGLISH LAW.

Civil law responsibility for wrongful interference with a plaintiff's trade is to be determined by Quebec law and not by English law except in so far as it depends upon statutory construction.

THIS was an appeal from the judgment of the Superior Court, Archibald, J., rendered at Montreal on the 18th June, 1910, dismissing, with costs, the appellants' suit in injunction to prohibit the respondent from selling a tooth-powder under the name of "Listerated tooth power" and for $5,000 damages for infringement of trademark rights.

The appeal was dismissed with costs.

The facts are fully set forth in the following notes of judgment of the trial Judge.

ARCHIBALD, J.:—In this case, the plaintiff asks a writ of injunction to restrain the defendant from infringing a certain trademark belonging to the plaintiff, consisting of the word

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
Archibald, J.

"Listerine," as applied to a certain product, the manufacture of the plaintiff, known by that name, and further, to restrain the defendant from passing off goods, not of the plaintiff's manufacture, as and for such goods, and particularly to restrain the defendant from offering or selling any tooth powder or other toilet, medical, or pharmaceutical preparations bearing the plaintiff's trademark or any colourable imitation thereof, and the plaintiff further prays for damages in the sum of $5,000, and for an account.

The plaintiff alleges that it has been, for many years, manufacturer of and dealer in toilet, medical and pharmaceutical products, carrying on an extensive business throughout the Dominion of Canada and in the United States of America; that the plaintiff has, for many years, but principally since the 1st of May, 1881, together with its predecessors in the same business, extensively used and advertised, in connection with certain of their products for toilet and medicinal purposes, the trademark "Listerine," that this name was more particularly to designate a certain anti-septic, medical preparation manufactured by the plaintiff under a private formula and sold by it, and employed by physicians and surgeons and dentists as well as by the public, during nearly thirty years past; that, on or about the 5th of November, 1888, the said word was registered by the plaintiff as a specific trademark in the Dominion of Canada; that this trademark has become very valuable and has long since come to mean an anti-septic article in the trade, as manufactured by the plaintiff; that the defendant and its auteurs have been carrying on a retail and wholesale business in Montreal, and among other articles, deal in tooth powders and washes containing, or alleged to contain, ingredients of an anti-septic nature; that the plaintiff has recently discovered that the defendant, for a period of time unknown to the plaintiff, but which it has reason to believe extends at least from the 1st of May, 1907, has imported and sold and advertised and exposed for sale, a large quantity of tooth powder, not of the plaintiff's manufacture, under the name of "Listerated Tooth Powder," which is a name so closely resembling the plaintiff's trademark as to constitute an unlawful infringement thereof and to be calculated to deceive the public and to lead them to believe that the goods so sold are goods manufactured by the plaintiff, or that, among the ingredients composing it, there is contained, in some form, the plaintiff's products known and registered as "Listerine;" that the word "Listerated" was designedly adopted and is designedly used by the makers and vendors of the said tooth powder, including the defendant, for the purpose of inducing the public to use, as and for a dentifrice, the powder aforesaid, under that name, in place of the plaintiff's pre-

QUE.

K. B.
1912

LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.

Archibald, J.

paration "Listerine," which is and has been sold and used for the same purpose; that the action of the defendant constitutes a wilful, and fraudulent violation and infringement of the rights of the plaintiff, both in law and under the trademark, and is an unlawful counterfeit and imitation of the plaintiff's trademark, and is of a nature to deceive, and has deceived, the public, and is calculated and has led them to believe that the goods so sold and advertised are goods manufactured by the plaintiff, or containing its products among other ingredients; that, by reason of the inferior quality of the powder, the plaintiff's reputation has suffered and the plaintiff has suffered through the loss of profits.

The defendant pleads, denying the essential allegations of the declaration and alleging that the specific trademark referred to in the declaration was granted for medicinal preparations, and the importation by the defendant of the tooth powder known as "Listerated Tooth Powder," does not constitute an infringement of the plaintiff's specific trademark. The defendant admits a notification of the plaintiff's claim, dated 27th of May, 1907, whereas the action was only served upon the defendant on the 18th of March, 1908. The plaintiff knew of the sale, by the Cheney Chemical Company, in Canada, of Cheney's Listerated Tooth Powder, for years before taking action in reference to the matter, and such action, on the part of the plaintiff, constituted acquiescence.

The defendant then alleges that, in the month of May, 1906, it purchased twenty gross of Cheney's Listerated Tooth Powder in open market, its attention having been directed thereto in the month of April, 1906, by the exhibition of a large quantity thereof in the show-windows of a prominent establishment in a much frequented street in the city of New York, and the defendant has sold and offered the same in good faith in the ordinary course of its business in Canada since that date. The plaintiff's mark "Listerine" was not granted in Canada until the month of April, 1907, and the defendant was the first to sell Cheney's Listerated Tooth Powder in Canada. The defendant denies that the use of the word "Listerated" would be calculated to deceive persons into believing that, in buying Cheney's Listerated Tooth Powder, they were buying goods of the plaintiff's manufacture, and also that any persons have been so deceived. The defendant denies that the plaintiff has been in any way injured. The defendant alleges that Cheney's Listerated Tooth Powder has been publicly and openly sold for a long period of time in the United States without any opposition on the part of the plaintiff. The defendant denies any passing off of Listerated Tooth Powder as goods manufactured by the plaintiff, and the defendant prays the dismissal of the plaintiff's action.

QUE.

K. B.
1912

LAMBERT PHARMACAL CO.
v.
PALMER & SON, LTD.

Archibald, J.

The proof establishes that the *auteurs* of the plaintiff, some time before the year 1888, prepared a medical or pharmaceutical preparation of an anti-septic character, and gave it the name "Listerine," and, in 1888, obtained enregistration of that word, as applicable to that particular material under the description of a medicinal preparation. That specific trade-mark has been registered in many countries and has been widely advertised, and the word "Listerine" as representing that material, has become widely known and appreciated. At first this material was put up in bottles of considerable size, containing 14 oz. It was, at first, sold wholly to professional men, by advertisements in medical or quasi-medical journals, and it was sold wholly in that way. It was put up simply, without any of the decoration or show that usually accompanies toilet articles. Later, a smaller bottle was also used, without, however, discontinuing the larger bottle. No prominence was given in the advertising to the name of the manufacturer, so that the word "Listerine" so far as it has become known to the public, indicates the particular preparation and is not closely associated with the name of the manufacturer. Doubtless, those who have taken the trouble to inquire, would see the name of the Lambert Pharmacal Company on the labels of the bottles, but the proof leaves no doubt that, at the present time, the popularity of "Listerine" depends upon its general acceptance as a proved anti-septic and not upon any particular skill or ability on the part of the manufacturer; that is to say, that the word calls to the mind the preparation itself and not the manufacturer.

Shortly previous to the date when the plaintiff's *auteurs* adopted the word "Listerine," an English surgeon of the name of Lister had commenced to use, in connection with surgical operations, an anti-septic substance, the operation being performed in the medium of a spray of an anti-septic material. This process had been described, at that time, as "Listerism," or as the "Listerian method" in medical journals. The word "Listerine" was undoubtedly adopted by the plaintiff's *auteurs* as being a word which would recall the name of the celebrated surgeon who had first used anti-septic methods in surgery. The termination "ine" in English is usually applied to indicate some substance of which the former part of the word would indicate some attribute or quality.

The Cheney Company, from whom the defendant bought the tooth powder in question, began to manufacture powder calling it "Listerated Tooth Powder" about 1894. It called it "Listerated Tooth Powder" because it used in the manufacture of it the product of the plaintiff, Listerine; that is to say, the company made a tooth powder and treated it with Listerine

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
Archibald, J.

and called it "Listerated Tooth Powder." At first it put upon its packages the words "containing Listerine," which words were subsequently dropped at the request of the plaintiff, the plaintiff saying that it did not desire the defendant to advertise its product. At the time it commenced to manufacture Listerated Tooth Powder, "Listerine" was considered as a good antiseptic, and it was for that reason that the Cheney Company put it into the powder, so that it would exercise anti-septic qualities in connection with the tooth powder. The words "containing Listerine" were kept on the package for about eleven years, up till 1905, and were then taken off.

The Cheney Chemical Company, from whom the Listerated Tooth Powder was bought, first did business in the State of Connecticut, under the name of "The Listerated Tooth Powder Company," and afterwards changed the name of that company to the present name.

When the Listerated Tooth Powder Company began to use that name, as representing the tooth powder which they prepared, they had it registered as a specific trademark in Washington. This was done in 1895 or 1896. After that, interference proceedings were taken in Washington by a person who had been a clerk in the Listerated Tooth Powder Company, claiming that he was the original inventor of "Listerated" Tooth Powder, and these interference proceedings resulted in the transference of the word "Listerated," as applicable to a tooth powder, from the Listerated Tooth Powder Company to another. Since that date, the rights in that enregistration in the United States have been purchased by the plaintiff company and are still held by that company. The Cheney Company has constantly, since 1904 or 1905, notwithstanding the above-mentioned interference proceedings, manufactured and sold a tooth powder under the name of "Listerated Tooth Powder," and the plaintiff has never, in any manner, opposed the manufacture and sale of that article, under that name, in the United States, except that, in 1904 or 1905, the plaintiff objected to the statement made on the label of the Cheney Company, that the tooth powder in question contained Listerine.

There has been no secrecy in connection with the use of the name "Listerated Tooth Powder." Early after the commencement of its use, a demand was made upon the plaintiff company for special terms for the purchase of Listerine which was to be used somewhat extensively in this tooth powder. That demand, however, was not agreed to by the plaintiff, and the Cheney Company had to purchase its Listerine in the usual manner as supplied to the trade. In this correspondence between the Cheney Company and the plaintiff company, conducted entirely within the United States, the right of the

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
Archibald, J.

Cheney Company to use the name "Listerated Tooth Powder" is not questioned. The plaintiff company explains that it thought, at the time of the correspondence, that the Cheney Company was proprietor of a registered trademark "Listerated Tooth Powder," and that it subsequently found that the Cheney Company had been deprived of that mark.

Manifestly, that explanation is of no importance whatever in so far as regards the effect of the plaintiff's action as an acquiescence in the use of the term "Listerated Tooth Powder," because whether the Cheney Company or another, hostile in interest to the plaintiff, was proprietor of the trademark, would be absolutely immaterial. But the plaintiff says that acquiescence in the United States does not constitute acquiescence in Canada. Acquiescence in an infringement of a trademark in the United States might not constitute an acquiescence in an infringement of a trademark in Canada, but acquiescence is rather a mental process than anything else and mental processes are universal. It indicates what was the attitude of the plaintiff's mind towards the subject, which attitude may be readily transplanted from one country to another. Particularly when the question at issue is a doubtful one, Courts would not ordinarily go further in the protection of an individual than that individual deemed that he himself had rights. If the plaintiff was of opinion that the use of the word "Listerated" in the United States, as applied to tooth powder, was not an infringement of its specific trademark there, it would be difficult to see how the matter would be different in Canada; so that, for all practical purposes, a proved acquiescence unexplained in the United States would apply equally to the same matter in Canada. It is quite true that the plaintiff might stand by in the United States and allow manifest infringement of its trademark there without losing its right to object to the same infringement in Canada. Yet, here the question is, so far as the proof in the case goes a question not of the plaintiff abandoning any right which it already had in the States, but a question of its considering in the States that it had no right to object to the word, and therefore, circumstances being the same here, it could have no more right here than it had there.

The defendant purchased these goods in the United States, where they had been sold for years. The defendant did no wrong in purchasing them there and could not have been interfered with by the plaintiff in the United States. He brought the goods into Canada without being aware of any objection to their sale in Canada. When he brought them here, there was no tooth powder registered on this market as the property of the plaintiff. Subsequently, the plaintiff did register Listerine as applied to tooth powder, but it has never, even yet, put on the

market "Listerine Tooth Powder," and no such powder is sold on the market to-day nor ever was.

The plaintiff, for the purpose of making its case, sent a number of people to defendant's store to buy "Listerine Tooth Powder." At the time, as I said, there was no "Listerine Tooth Powder" on the market. They were furnished with "Listerated Tooth Powder" in every case, the defendant probably being wholly unaware of the existence of such an article as "Listerine Tooth Powder," and conceiving probably, honestly conceiving, that the person applying for the tooth powder had simply made a mistake in the name.

Now comes the question whether "Listerated" is an infringement of the word "Listerine," and particularly, whether it is such infringement as applied to a tooth powder put up in the manner in which the "Listerated Tooth Powder" in this case is put up, while "Listerine" was applied to a liquid contained in bottles of a certain size and shape. It may be at once said that, from the nature of the goods and the packages, the one product could not, by any possibility, be mistaken for the other. They are not products of the same class. One is a medicinal product advertised to the profession. The other is a toilet product advertised to the public and expected to be bought by the public. The one is put up in highly ornamented boxes to attract attention; the other, in a simple bottle with an ordinary label. It is true that toilet preparations and proprietary medicines are usually sold in the same store; but so are toilet soaps and sponges and syringes, articles of the most various kinds.

I have had the assistance of a very exhaustive study of the subject by the plaintiff's attorney. He has gone pretty fully over the jurisprudence concerning the subject. A considerable portion of the plaintiff's factum concerns the validity of the plaintiff's title to the exclusive use of the word "Listerine" as applied by plaintiff. I find myself exempted from the necessity of considering closely that portion of the plaintiff's factum, inasmuch as I quite agree with the doctrine which the plaintiff sets up with respect to that. Even supposing the word "Listerine" had not originally been a word of which the plaintiff could have obtained the exclusive use in connection with the product which it manufactured, the fact of its having used it and advertised it in connection with that product for so many years give an undoubted title to the exclusive use of it, and, at any rate, to such a use of it as would prevent any other person from using it in any manner which could induce the public, or any portion of the public, to believe that the goods offered under the name, were goods manufactured by the plaintiff. But, with regard to the word "Listerated" the question would be

QUE.

K. B.
1912

LAMBERT PHARMACAL CO.
v.
PALMER & SON, LTD.

Archibald, J.

different. I do not, however, even intend to question the right to register the word "Listerated," although it seems to me to offer great doubts. The termination "ated" is only the indication of the past participle of some verb to which it is applied. Then Mr. Cheney admitted that his idea was to create the belief that his tooth powder was anti-septic, and that it contained Listerine. He said so in so many words upon his labels and advertisements. So that, whether the word "Listerated" be taken as being derived from "Listerine" it would simply indicate that the tooth powder in question had been "Listered" either to indicate that it had been made anti-septic, as Lister's name then stood for anti-septic processes, or that it had been "Listerated" by putting Listerine into it, and does actually indicate that that is what it did mean; that Listerine had been put into it; that is to say, "Listerated" means, under the circumstances, that it had been mixed with Listerine.

One would suppose that that was a mere description. However, the United States patent office authorized or actually granted registration for "Listerated" as a specific trademark for that tooth powder. There can, I think, be no question in the world that the Cheney Company had the right to buy Listerine from the plaintiff company and to mix it in a powder otherwise suitable for a tooth powder. The plaintiff never has manufactured any tooth powder. All it claims is that its product could be used for a mouth wash, and that they advertised it as suitable for a mouth wash. It never has been advertised as suitable to be used as a tooth powder is used. There is no saponaceous substance in Listerine. It will not make any froth if applied with the brush in the mouth. None of the plaintiff's advertisements or literature indicate that it might be admixed with a powder to constitute a tooth powder. The plaintiff cites a number of authorities to indicate that, when a person adopts a specific trademark applicable to a single substance, that the law will prevent any other person from using that name upon any other goods, of a similar nature, or within the same class. That jurisprudence is founded upon statutory provisions which do not apply to this particular case. In the first place, the word "Listerine" is not applicable to a class. It is applicable to a certain article and actually has grown to constitute the name of that article. Nothing else than the liquid preparation put up by the plaintiff under the name of Listerine is Listerine; so that the jurisprudence to which the plaintiff refers is not applicable to this case.

It is impossible to conceive that the plaintiff could be injured by what the defendant has done. In the plaintiff's factum there is a charge that the name "Listerated" as presently used, is a fraud upon the public, because it indicates that the

tooth powder contains Listerine, whereas it does not contain Listerine. That ground is not, however, set up in the plaintiff's declaration and cannot be made the subject of any condemnation against the defendant. It is, moreover, not a ground on which the plaintiff has any right to complain. The Cheney Company does, as a matter of fact, employ nearly the whole of the elements of Listerine in place of the prepared Listerine which it formerly used.

I am of opinion that the plaintiff's action is wholly unfounded and must be dismissed.

F. J. Laverty (*P. B. Mignault*, K.C., with him), for appellant:—Acquiescence in one country is not a bar to action in another; there is a third party to all trademark litigation, the public: *Hohner* v. *Gratz*, 50 Fed. Rep. 370. The effect of acquiescence would be simply to make the mark *publici juris*. Marks *publici juris* in one country have been protected in another: *Kaiserbrauerrei, Beck and Co.* v. *Baltz*, 71 Fed. R. 695, 74 Fed. R. 222; *Saxlehner* v. *Apollinaris Co.*, 14 R.P.C. 645; *Baglen* v. *Cusenier*, 31 Sup. Ct. Reporter 669; *Lecouturier* v. *Rey*, [1910] A.C. 262, 27 R.P.C. 268.

Listerated is an infringement of Listerine. R.S.C. ch. 71, sec. 11 gives the tests: "(*b*) that it is identical with or resembles one already registered, (*c*) if it appears that the trademark is calculated to deceive or mislead the public." There is no need to allege or prove fraud and the innocence or unintentional passing off or infringement will always be enjoined: Kerley, pp. 14, 15, 397-8-9; 12, 13, 240, 401-2-3; Hopkins, pp. 255-6-7 and 265; *McLane* v. *Fleming*, 96 U.S. 245, 28 Am. and Eng. Ency., pp. 410-417; *Baker* v. *Puritan Food Co.*, 139 Fed. Rep. 680; *American Tin Plate Co.* v. *Licking Roller Mills Co.*, 158 Fed. Rep. 690. The burden of proof that there is no danger of deception is on defendant when mark is imitated: *Mosserol* v. *Tynberg*, 4 Abb. Pr. N.S. 101, ch. 414. In case of doubt the benefit is in favour of the holder of the trademark and the question is to be determined by examining what is the leading idea of the two marks. Kerley, p. 9. It is the duty of the Court to protect the public from all danger or possibility of deception: R.S.C. ch. 71, sec. 11; *Elgin* v. *Illinois Co.*, 179 U.S. 673; *Waukesha Springs Co.* v. *Hygeia Water Co.*, 63 Fed. Rep. 438; *Dehong Hook Co.* v. *Francis*, 139 Fed. Rep. 146; *Heller* v. *Shaver*, 102 Fed. Rep. 882. Listerated tooth powder does not contain "Listerine" and the name is therefore deceptive: 28 Am. and Eng. Ency., p. 389. The guiding principles are laid down in *Australian Wine Importers Case*, 6 R.P.C. 311; *Baker* v. *Harrison*, 138 Off. Gaz. Patent Office, 770; *Church* v. *Russ*, 99 Fed. Rep. 275; *Richards* v. *Williamson*, 30 L.T. (N.S.) 746.

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
Archibald, J.

The fact that Listerine is a liquid used and advertised for other purposes besides as a dentifrice, and that defendant's product is a tooth powder does not affect plaintiff's right. It is sufficient that the two marks be applied to goods of the same general class and description, *e.g.*, beer and rum, *In re Turney's Trademark*, 11 R.P.C. 37; wine and spirits, *In re Australian Wine Importers Case;* fruit salt and baking powder, *Eno* v. *Dunn*, 7 R.P.C. 311, and 10 R.P.C. 261; and to the same effect on other articles, see *Finlay* v. *Shamrock*, 22 R.P.C. 301; *In re Cie. Ind. des Pétroles*, 24 R.P.C. 585; *In re Gutta Percha Co. of Toronto*, 26 R.P.C. 434; *Dunlop* v. *Dunlop*, 16 R.P.C. 12; *Valentine* v. *Valentine*, 17 R.P.C. 673; *Kodak* v. *London Co.*, 20 R.P.C. 337; Hopkins, pp. 268-70; *In re Maltine and Edelweiss Maltine Trademark*, 134 Off. Gaz., pp. 1804-5; *Phœnix Paint Co.* v. *Lewis*, 139 O.C. 990; *Bass* v. *Feigenshan*, 96 Fed. 206; *Godillot* v. *American Grocery Co.*, 71 Fed. Rep. 873; *Walters* v. *Ashton*, 87 L.T.R. (N.S.) 301; *Wamsutta* v. *Allen*, 12 Phila. (Pa.) 535. The French jurisprudence goes even further. Sirey 1891-1-165; Couhin, vol. 3, p. 493; Pouillet, p. 190; Fuzier-Herman, vo. Concurrence Détoyale, no. 459, Maillard, Dict. de la Propr. industrielle, vo. Usage, vol. 6.

Acquiescence is no bar to plaintiff's claim for injunction although it has been held in certain cases to constitute a bar to the recovery of profits or damages: *Standard Ideal and Standard Sanitary*, Que. 20 K.B. 109. This case was reversed by the Privy Council: see *sub nom. Standard Ideal* v. *Standard Sanitary*, [1911] A.C. 78, following the U.S. Supreme Court in *Menendez* v. *Holt*, 128 U.S. 514 and in *McLean* v. *Fleming*, 96 U.S. 245. And see *McIntyre* v. *Pryor*, 173 U.S. 38; *French Republic* v. *Saratoga Vichy*, 191 U.S. 439; *Van Oppen* v. *Van Oppen* (1903), 20 R.P.C. 617. The rights, protection and other incidents of a trademark are territorial: *Smith* v. *Fair*, 3 Can. Commercial Law Reports, 152; *Grigg* v. *Erie Co.*, 131 Fed. R. 359.

Even if no infringement has been proved an absolute case of "passing off" has been established as this powder was furnished to six different persons who asked for "Listerine tooth powder": *Leibig* v. *Chemists' Soc.*, 13 R.P.C. 635-736; *Low* v. *Hart*, 90 N.Y. 457; *Tonge* v. *Ward*, 21 L.T. (N.S.) 480; *Atkinson* v. *Atkinson*, 85 L.T. Journal 229; *Bickmore* v. *Karns*, 126 Fed. Rep. 573.

"Listerine" is a good trademark. An invented word may be descriptive or suggestive: Kerley, 3rd ed., pp. 10, 158, 160; *Vive Camera Co.* v. *Hogg*, 3 Comm. L.R. 344; *The Cyclostyle Case*, 25 R.P.C. 159. Proper names and names of celebrities and their derivatives are good trademarks: Hopkins, p. 139; Sebastian, 4th ed., p. 29; Brown on Trademarks, pars. 225-6. Long

user is a presumption in our favour as to ownership and validity of the trademark: *Cheesebrough Manufacturing Co.'s Trademark*, 19 R.P.C. 342.

A trademark used and registered for one article extends to other articles in the same general class susceptible of the same or some of the same uses and dealt in by the same dealers: *Eno* v. *Dunn*, 7 R.P.C. 711; *Turney's Trademark*, 11 R.P.C. 37; *Eastman* v. *Kodak Co.*, 15 R.P.C. 105; *Dunlop Case*, 16 R.P.C. 12; *Omega Oil Co.* v. *Weschcler*, 71 N.Y.S. 983; *Carroll* v. *Ertheiler*, 1 Fed. R. 688; *Collins* v. *Ames*, 18 Fed. R. 561; *Amos-Keag* v. *Garner*, 54 R.R. 297; *Morgan* v. *Ward*, 152 Fed. R. 690; *Florence* v. *Dowd*, 178 Fed. R. 73; *Montagnac* v. *Halphen*, trib. civil de la Seine, 12 Feb., 185, 20 Ann. de la pro. 95; *In re Purity Laboritics*, Commiss. of Patents at Washington, 13th July, 1909.

A. Falconer, K.C., for respondents argued that the legal propositions of the appellant had no application to the present case. He maintained that there had been no misleading, no deception, that the goods of the appellant and those of the defendant were not similar goods at all and finally that this was a clear case of acquiescence and estoppel by thirteen years' open and public use of the name of Cheney's Listerated tooth powder all through the United States. Kerly, ed. 1908, pp. 420-1-2; *McCaw, Stevenson and Orr Ltd.* v. *Lee*, B. & W. 23 R.P.C. 1.

Laverty, in reply.

CROSS, J.:—The appellant (plaintiff in the Superior Court) carries on the business of a manufacturing chemist. It has for some years made use of the word or symbol, "Listerine," as a trademark upon some of its goods and in particular upon a commodity used as a mouth and tooth wash. In the year 1888 it had the word or symbol, "Listerine," registered in Canada as a trademark.

The object of the present action is to have the defendant company which carries on business as a dealer in articles of toilet and perfumery restrained from marketing tooth powder marked with the word "Listerated."

The defence, in substance, is that the plaintiff's commodity "Listerine" is a medicinal substance sold to physicians and chemists, whereas what the defendant deals in is tooth powder, and, that the plaintiff has no interest to complain of the name by which the defendant calls its tooth powder and offers it for sale. It is also pleaded that if the plaintiff ever had a right to complain, it has lost it by acquiescence.

The questions for decision are whether or not the defendant in selling "Listerated tooth powder" has encroached upon the plaintiff's right to the exclusive use of the word "Listerine" existing in virtue of its having had that word or symbol re-

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
CROSS, J.

gistered as a trademark, or has subjected itself to responsibility in damages for having sold its goods in such circumstances as to have put the buyers under the impression that they were getting the plaintiffs' goods.

The learned Judge, who decided the action in the Superior Court, has found that the plaintiff did not make out a case for the relief claimed and has dismissed the action. (Que. 39, S. C. 64.)

It is contended for the appellant that that finding was erroneous and that the judgment should be reversed and that an injunction should issue and damages be awarded against the defendant.

Though the facts are not very complicated or left much in doubt, the controversy has extended over a somewhat large field, and we have heard elaborate and able arguments upon the questions of what amount of appropriation of one or more parts of a registered trademark will amount to an infringement, and to what extent the owner of a trademark can go in successfully objecting to the use of the name or of part of it upon a commodity not, in fact, identical with that or with those to which he has himself applied it.

It appears that the late Mr. J. W. Lambert, plaintiff's predecessor in title, commenced to make and sell "Listerine" about the year 1881 in the United States. The substance was made up of some half-dozen ingredients according to a formula which was copied upon the labels of the bottles in which it was put up and sold. At that date, the name "Lister" had already become well known as that of a great surgeon, who had demonstrated the advantages of maintaining what I suppose I may call "anti-septic conditions" in and about surgical operations —such words as "Listerism" and "Listerian" were already to be found in medical publications.

The commodity made by or for Lambert was designed to be a proprietary antiseptic compound and was advertised as a medicinal preparation. To give it the name "Listerine" was obviously a happy stroke of commercial policy, and the name and the expenditure of vast sums in advertising have had the effect of building up a great trade in this commodity.

It is not suggested that Lambert obtained from Lord Lister any assignment of the right to use his name in trade.

In the year 1888, the plaintiff procured registration in Canada of the word "Listerine" as a specific trademark, the recital of the specification being that it was to be used in connection with the "sale of medicinal preparations." The article is sold as a fluid in bottles of three sizes, not conspicuously ornamented.

About the year 1894, this commodity called "Listerine" had

become well known to druggists as being frequently prescribed by physicians, and at that date a chemist named Cheney, in business at South Manchester, in Connecticut, commenced to make and sell a tooth powder. He called it "Listerated tooth powder, containing Listerine," and the name was suggested by what he knew of "Listerine." He not only printed the name in these words on the packages, but introduced into his wrappers and advertisements some of the puffery which had already been printed in the Lambert advertisements of "Listerine." He appears to have relied somewhat upon the fact that there was as yet no Listerine tooth powder on the market. He had the word "Listerated" registered as a trademark in the United States. He did business under the style of "The Listerated Tooth Powder Company" for a time and went on selling "Listerated Tooth Powder" till the year 1905, at which date he sent a letter to the plaintiff, asking it to sell "Listerine" in bulk, so that it would not cost him as much as the prices charged him by the chemists from whom he had been procuring it. The plaintiff refused and objected to his use of its trademark on his packages. Thereupon Cheney dropped the words "containing Listerine" from his boxes and wrappers and instead of buying and using "Listerine" in the powder, used a slightly different formula and set of antiseptic ingredients to make up his product and thenceforward called his commodity simply "Listerated Tooth Powder" and printed the name "Cheney" on the packages. It would appear that Cheney was not entitled to have the word "Listerated" registered as a trademark belonging to him, inasmuch as there was an administrative decision in the United States to the effect that one Horton, and not Cheney, was in reality, the person entitled to the exclusive use of the word "Listerated." In the year 1906—after this adjudication in favour of Horton—the plaintiff bought from Horton his right to the trademark "Listerated," and thereupon it had a new registration made of the trademark "Listerine" in the United States as a mark for tooth powder, a thing which it found difficulty in accomplishing so long as the mark "Listerated" stood registered in favour of a third party.

It is proved that in May, 1906, the defendant's manager saw "Listerated tooth powder" offered for sale in New York and then bought some of it, which he brought to Montreal and sold. It afterwards bought two other consignments and became a sales agent of the manufacturer in Canada.

About the year 1908 the plaintiff began to advertise "Listerine tooth powder." Of course it had for many years recommended "Listerine" as a mouth wash, in its advertisements, and it had been used as such.

QUE.
K.B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
CROSS, J.

It was found by the learned trial Judge that the plaintiff had not put upon the market in Canada any tooth powder or offered any Listerine tooth powder for sale, and that, if it had manufactured any, it had not made a quantity sufficient to make it known upon the market. The appellant contends that this finding is erroneous in fact, and has referred us to the testimony of the witnesses Tremble and Hoskin in support of his contention. While these witnesses speak of having seen "Listerine tooth powder," I infer from other portions of their testimony that the time at which they saw it was considerably later than the year 1906, and, therefore, a year or more after the defendant had commenced selling "Listerated tooth powder" in Canada.

It is significant that the plaintiff did not make any specific averment in its declaration that it was a dealer in tooth powder. If it had intended to reply upon injury to the sale of a tooth powder of its own, it should have alleged it. It is only in its answers to plea that it refers to the registration of the mark "Listerine" as being specifically applicable to tooth powder and even there it does not allege that it makes or sells a tooth powder, though it does allege that "Listerine" covers and has been applied to all kinds of preparations used in medicine and surgery, including tooth and mouth washes, powders and dentifrices generally. . . ."

Taking the learned Judge's finding as relating to the time when the defendant commenced to sell Listerated tooth powder in Canada and to anterior time, I consider the finding to be in accordance with fact.

At the trial a number of witnesses testified that calling a tooth powder "Listerated tooth powder" suggests to the buyer that it contains "Listerine," and one or two have testified that it also suggests that it is a commodity made and marketed by the plaintiff, but taking the evidence as a whole, I consider that with the exception of physicians and persons engaged in the trade, it is proved that the persons who buy or use "Listerine" buy it because of its good repute and not because the plaintiff is the manufacturer or compounder of it.

To conclude this summary of the facts it may be added that it is proved that, generally speaking, each manufacturer of drugs and proprietary medicines makes and sells an antiseptic fluid possessing the properties of "Listerine" and serving the same purpose as a medicinal commodity. These preparations go by such names as "Borolyptol," "Euthymol," "Pasteurine," "Borine," "Glycothymoline," etc. They do not appear to have been so happily christened as was "Listerine."

It is now to be decided whether or not, in the state of facts and circumstances which has just been set out, the defendant

has violated a legal right vested in the plaintiff in a way complained of in the plaintiff's declaration.

I consider that it must be said at the outset, and so far as the statutory right resulting from trademark registration is concerned, that the selling of "Listerated tooth powder" cannot be a violation of the legal right of the owner of the mark "Listerine" as a trademark specifically designed and declared to be applicable to medicinal preparations. The defendant, in effect, says: "It is true that I re-echoed the praises of 'Listerine' and also went on to invite the public to buy 'Listerated tooth powder,' but that does not make me a violator of the plaintiff's right."

Looking at "Listerine" as a medicinal preparation designed by the nature of it to serve as an antiseptic or germicide and to go into use whenever and wherever physicians or surgeons might prescribe a drug which would serve such a purpose, and then looking at "Listerated tooth powder," simply as a tooth powder, the defendant's position certainly appears to be well taken because the plaintiff's mark is specific and the statute gives the right of exclusive use of it only to designate "a class of merchandise of a particular description" (secs. 4*b* and 13*z*). But the appellant refers us to the testimony of physicians, who say that medical science and practice comprehends dentistry and treatment of the teeth and mouth. What these witnesses have said is probably accurate, but I consider that it does not prove that tooth powder is a medicine or medicinal commodity. Taking this view respecting the difference in the nature of the things to which the trademark is applied, it becomes unnecessary to consider whether or not the defendant's uses of the word "Listerated" is an infringement of the plaintiff's mark "Listerine," as "Apollinis" was held to be an infringement of "Apollinaris," in *Apollinaris Co.* v. *Herrfeldt* (1887), 4 R.P.C. 478, in an action between rival dealers in table waters.

I consider that the plaintiff cannot extend by construction the scope of its title under the registered trademark in the way contended for. Where an exclusive right is the creation of a statute it is not to be enlarged by construction, and doubt is to be resolved in the direction of freedom and not of the exclusive right. I, therefore, consider that the defendant is not shewn to have infringed the registered trademark "Listerine" or in other words, is not shewn to have violated the statutory title of the plaintiff.

It is to be observed, however, that the same argument is available to the plaintiff in support of his action apart from the effect of the Trademark and Design Act, that is to say, taking it as an action directed against interference with the plaintiff's trade name "Listerine." I now proceed to consider the action as grounded on that basis.

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
Cross, J.

The plaintiff's case is that it has proved that "Listerated" was copied from "Listerine" after it had made "Listerine" publicly known at great expense, and that the acts of the defendant in selling a tooth powder called "Listerated tooth powder," which, in fact, does not contain "Listerine," are representations that it does contain "Listerine," and amount as a passing off of defendant's goods for plaintiff's goods and a deception detrimental to the plaintiff.

It has already been pointed out that the plaintiff does not expressly found, upon the fact that it makes or sells tooth powder, as a ground of action against the defendant, though it does rely upon the fact that "Listerine" has been and is advertised and sold as a mouth wash and to serve the purpose of a tooth powder for those who choose to use it instead of tooth powder.

It is argued for the plaintiff that it is entitled to have any and every other person stopped from using the name "Listerine," or a name liable to be confounded with it, not only upon the medicinal preparation "Listerine," but also upon any commodity "of the same class," such as it contends that tooth powder is.

Besides, as has already been stated, there is the contention for the plaintiff that medicinal preparations include tooth powder on the ground that medical science comprehends dentistry and care and treatment of the teeth.

It is also broadly asserted for the plaintiff that it is owner of the name or mark "Listerine" by actual adoption of it, and (if such adoption were not sufficient) by such long use of it as would make its exclusive title good, and, being such owner, is entitled to prevent use of it by the defendant or any other person.

In support of their argument to the effect that the plaintiff is entitled to have the use of the mark stopped upon goods of the same class as those to which it has itself applied it, counsel for the appellant have cited a number of decisions.

Amonst them special reliance was placed upon the "fruit salt" case: *Eno* v. *Dunn*, 7 R.P.C. 311, and 10 *ib.* 261, wherein the owner of the name "fruit salt," used to designate an effervescing powder, successfully objected to the registration in favour of the defendant of the same words as a name of a baking powder in the form of a lozenge. That case, however, dealt with an application to register, and one can well understand that the registrar might be justified in refusing to register a mark from motives of caution, whereas, in actual use, the name objected to might not be held to involve infringement or danger of deception.

I believe that this distinction was pointed out in the same case of *Eno* v. *Dunn* (1890), 15 A.C. 252, as in *Speer's Case*

(1887), 4 R.P.C. 524. *Turney's Trademark*, 11 R.P.C. 37, was cited to shew that a mark for beer might be infringed by using it as a mark for rum. It is to be observed that *Turney's Case* also arose on an application to register. *The Australian Wine Importers' Case*, 41 Ch. D. 278, was cited to shew that a mark for wine could extend to spirits. *Eastman* v. *Griffiths*, 15 R.P.C. 105, was referred to as shewing that the owner of a mark used on cameras could validly object to the use of it on bicycles. Reference was also made to the comments upon the decisions in Kerly, pp. 33, 537, and Hopkins, pp. 268-270, and to the United States decision in *Collins* v. *Ames*, 18 Fed. Rep. 561, wherein it was decided that the plaintiffs were entitled to have the defendants restrained from using their trademark on iron shovels, though they had not themselves made or sold shovels, but dealt in axes and similar articles. The United States' decision of *Baker* v. *Harrison*, 138 Off. Gaz. Pat. Off., 770, is cited as shewing that the owner of a mark for cocoa might restrain the use of it for coffee. In addition, there has been quoted from 28 Eng. and Am. Enc. of Law, p. 389, a passage which I consider an accurate statement of law, worded as follows:—

"No general right to a trademark or trade name, apart from its particular application, exists. The right is merely a prior right to use such mark or name in connection with the particular goods or business to which it is applied and which it has come to indicate. Other persons may, without wrong, use the identical name or mark in connection with a different kind of goods or business. But the right extends to other goods or business of the same general class as that in which it has been applied. When one has acquired a trademark in connection with particular goods, no one else will be permitted to use such trademark upon goods which, while different, belong to the same general class. There are two reasons for this rule. The first is that if a second trader were to adopt and use the mark of another within the same class of goods, he would thereby acquire exclusive rights to the mark as applied to his particular variety of goods, and if the first user of the mark should subsequently desire to add that particular variety of goods to his general line within the class, he would be unable to use his own trademark upon his own goods. Another reason is that the public cannot know how many varieties of the same class of goods the owner of the mark makes and sells under the mark and if they should see that mark upon other goods of the same class, they would be deceived, and the owner of the mark might be injured in his reputation because of the quality of goods over which he has no control."

I do not consider it opportune to comment in much detail

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
CROSS, J.

upon the decisions cited, for the reason that the circumstances of different cases are susceptible of such great variation that it is unsafe to reason from one case to another, and for the further reason as regards English decisions, that it is uncertain how far the decision in any particular case has been determined by regard for the particular wording of the acts then in force. I shall have occasion presently to refer to some of these decisions (to which, as pronouncements upon statutory construction much respect is due), for the purpose of illustrating the reasoning upon which I proceed.

What I feel safe in laying down as a starting point is that in ascertaining whether there has been on the part of this defendant a violation of the plaintiff's right in the way of "concurrence déloyale," or use of a name upon tooth powder so like "Listerine" as to be calculated to deceive people by making them think that they are getting something made by the plaintiff or something containing "Listerine," we should be guided by a consideration of all the circumstances of the trade and market and of the uses of the marks, not forgetting to take account of any meaning or idea which may have been publicly attached to the word mark itself before its adoption as a mark.

Counsel for the plaintiff has put the case before us as one of deliberate copying and appropriation of its trade-mark by Cheney and has rightly reminded us that when there has been a calculated and intentional copying by a defendant of the plaintiffs' mark, a Court will all the more readily conclude that the defendant's object and purpose is that his commodity will be taken by buyers, in mistake for the plaintiff's goods.

On the other hand, it has been argued for the defendant that the plaintiffs started out by choosing for its commodity a name which not only represented in its entirety the name of a man of world-wide celebrity, but of one whose celebrity consisted in the very association of it in the public mind with antiseptics and antiseptic treatment; that the plaintiff was in fact appropriating to itself the use of a household word descriptive of a thing or process which had come to be known wherever English is spoken.

Speaking for myself, I would say that there is force in the contention of counsel for defendant that a plaintiff who thus selects the name of a celebrated personage and fastens it upon his trade products must be held to take it with its disadvantages as well as its attractions, though I am not willing to go so far as to adopt his contention that the word "Lister" had so far become a mere word of description as not to be susceptible of appropriation as a trade mark by usage extending over a considerable period of years to the extent to which it may have been effectively and publicly used by one trader. I merely

say that it is a circumstance to be taken into account when the plaintiff charges the defendant with deliberate imitation, that the plaintiff itself instead of choosing a name like Apollo out of the limbo of mythology took a word practically composed of the name "Lister" because of the commercial benefit to arise from the fact that that name was already associated in the public mind with antiseptic methods.

Next, as regards the sort of trade user which has been made of the word "Listerine" weight has properly been attached, in the Superior Court, to the facts that the article publicly known as "Listerine" was intended to be used in the preparation and composition of medicines and other toilet commodities rather than as a thing which was to go directly to the consumer or user. That was and is its main characteristic. It is true that there is evidence of the plaintiff or its predecessor in title having made up "Listerine soap" and "Listerine talcum," but these articles figure very inconspicuously in the case.

Then, and quite in accord with the characteristic just mentioned, there is the fact that "Listerine" has been marketed as a liquid in ordinary cylindrical-shaped bottles without much, if any, adornment, whereas "Listerated tooth powder" has been offered in showy packages with the name "Cheney" printed on them, the former being intended to be sold mainly to dealers or upon prescription and the latter to individual ultimate users. There was no possibility in such circumstances of there having been encroachments by means of an imitated "get-up" of the tooth powder.

Finally, there is the fact of what has been called "acquiescence." "Listerated tooth powder" was marketed in the United States by Cheney as containing "Listerine" for about eleven years before the year 1905, and since that date has been marketed under the same name, the words "containing Listerine" being omitted, as above pointed out. It has been pointed out that in the year 1906 the plaintiff took a transfer of Horton's right to use the word "Listerated," and that since then its attitude towards the use of it by Cheney has been one of disapproval. The fact of the long usage in the United States by persons other than the plaintiff is nevertheless significant, possibly not so much in the way of proving acquiescence as in shewing that Cheney's trade in "Listerated tooth powder" did not injuriously affect the plaintiff. If, in fact, the plaintiff did not approve it, he at least took no definite steps to stop the trade in "Listerated tooth powder."

Looking at the collective effect of all the facts of the case, I conclude that the plaintiff has not made out a case for the relief asked for, mainly because it has failed to shew that it and the defendant have been trading in the same commodities or are engaged in a trade competition in the same kind of commodities.

QUE.
K. B.
1912
LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.
Cross, J.

As it is well expressed in a modern treatise, it is of the essence of a trade-mark or trade name that it be applied to a trader's "goods" so as to distinguish them from the similar goods of other traders, and to identify them as his goods or as those of his successors in the business in which they are put forward for sale. The mark should distinguish the trader's goods, and "the essence of an infringement (where the essential particulars are not bodily appropriated) is that the use of the mark upon the defendant's goods is calculated to lead purchasers to buy them asking the plaintiff's goods."

The plaintiff's complaint is to the effect that its trade-mark, specifically applied to the kinds of goods enumerated in its declaration, has been wrongfully appropriated by the defendant. Its exclusive title to the use of that trade-mark has to rest upon proof that it has made the mark its own by uses of it to such an extent as to have made its trade use of it publicly known.

It is said in the work of Kerley, Trade Marks and Trade Names, 3rd ed., at page 536, citing Vaughan Williams, L.J.:—

> A plaintiff never can complain of the uses by the defendant of either the plaintiff's personal name, or of any other name that he chooses to use for the purpose of denoting his goods, unless he first establishes that in the market his goods have come to be known by that name.

That would be a correct statement of our law if the mention of user of the plaintiff's personal name were omitted—a qualification which does not affect the point now being considered—and the proof which is there said to be essential is just the proof which the plaintiff in this action has not made in respect of such toilet trade articles as tooth powder, at all events in Canada, at any date anterior to the time when the defendant had commenced to sell the tooth powder.

The proof can hardly be said to establish that the plaintiff had made its trade name "Listerine" known in Canada in respect of anything except the bottled liquid "Listerine."

That liquid was known as a medicinal preparation and a germicide and anti-septic fluid which some persons did use instead of tooth powder.

It is true that the protected right of use of a trademark is not restricted to the exact kinds of goods to which it has been attached by its owner. The extent of the class of goods to which the right is limited, is a question of fact in each case: Kerley, p. 33. In view of the characteristics above pointed out, I consider that the "Listerated tooth powder" is not comprehended in the class of merchandise which the plaintiff had previously made known to the trade under the name of "Listerine" as goods of its manufacture.

Reverting briefly to some of the decisions cited for the ap-

pellant, it may be said in relation to the case of *Collins* v. *Ames*, 18 Fed. Rep. 576, that it was shewn that the plaintiffs had for many years made and sold edge tools and had continuously marked upon them the trademark "Collins and Co.," a mark which, being the plaintiff's own name at once announced the goods as goods of the plaintiff's make. The defendants, persons of a different name, commenced to sell shovels marked "Collins and Co.," with the proved intention of getting the benefit of the plaintiff's reputation. One can see why, in such circumstances, shovels were held to come within the class of goods denoted by the mark which practically asserted that they were manufactured by the plaintiff.

In addition to what has been said of the "fruit salt" case, it may be added that the specification of one of the plaintiffs' registrations described the commodity as intended for use as a medicinal substance and that of another registration referred to it as intended for a non-alcoholic beverage. The substance claimed for by the defendant came fairly within one or other of the specifications. Regarding the kodak case, *Eastman* v. *Griffiths*, 15 R.P.C. 105, it can be pointed out that it was shewn that the plaintiffs in that case had advertised the cameras as specially adapted to be fitted to bicycles.

I add these references merely to shew that one can readily see grounds for the conclusion that the defendants in the cases mentioned were palpably proposing to profit by use of the plaintiffs' trademarks upon goods which buyers would mistakenly take to have been manufactured by the plaintiffs.

With reference to the authorities cited to us from the law of France, it may be opportune that, speaking for myself, a few observations be added: The law of France upon the subject of trademarks and designs is a creation of modern legislation which was not extended to this country. As the law of France stood when it prevailed in this part of Canada, it was possible to say of it, in the words of the treatise in Dalloz, Rep.:—

> Industrie et Commerce, No. 252: "Mais jusqu'à cette époque, c'est-à-dire la réorganisation du régime industriel les noms et les marques de fabrique résterent, malgré leur importance, sans protection et en quelque sorte à la merci des usurpateurs."

That would indicate a state of our law much like the English common law, under which it could be said: "A man cannot give to his own wares a name which has been adopted by a rival manufacturer, so as to make his wares pass as being manufactured by the other. But there is nothing to prevent him giving his own house the same name as his neighbour's house, though the result may be to cause inconvenience and loss to the latter:" Mayne, Damages, 8th ed., p. 9, citing *Johnston* v. *Orr Ewing*, 7 A.C. 219; *Day* v. *Brownrigg*, 10 Ch. D. 294; *Keeble* v. *Hickeringill*, 11 East 574*n*.

QUE.

K. B.
1912

LAMBERT PHARMACAL CO. v. PALMER & SON, LTD.

CROSS, J.

And I take it that in England to this day, a trader who is put in peril of ruin by a supplanter in the way indicated can but publish his feeble protest of "no connection with the establishment of the same name next door!" When it is realized that this peculiarity of English common law or case law lies at the very foundation of trademark or trade name law, another reason can be seen why we should hesitate to be guided by decisions given in England otherwise than as mere illustrations of statutory construction. Civil law responsibility for wrongful interference with plaintiff's trade is to be determined by our law and not by English law, except in so far as it depends upon statutory construction. The same peculiarity of English law above referred to would seem to constitute the ground of decision in the *Lea and McEwan Applications Case* (or perhaps one should say of the statutory rule there applied) L.J. Weekly, 1912, p. 142, and 28 T.L.R. 258), where marks in use for half a century were refused registration, a case which under our law would be decided in the opposite sense. But why, it may be asked, call attention to such a peculiarity, if the old French law as introduced in Canada is the same? The reason is that our law has developed and broadened, and a defendant who has caused damage to a plaintiff by introducing confusion into his trade subjects himself to responsibility in damages just as he would by commission of any other tort (art. 1053, C.C.). It is upon that footing that the decision in *La Nationale* v. *La Societe Nationale*, cited to us from 3 Couhin, p. 493, and the citations from Pouillet and from Fuzier-Herman, Rep. "Concurrence Déloyale," No. 459 and Sirey, 91-1-165, in so far as not affected by statutory legislation are seen to be reasonable.

The plaintiffs' case, however, does not come within the principles there applied. While I speak for myself in making the foregoing observations, I may say that we are unanimous in dismissing the appeal for the reasons given in the judgment of the Superior Court.

Appeal dismissed with costs.

QUE.

Annotation.

Trade marks and trade names

Annotation—Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.

As implied from the headings this note is confined to cases where the trade mark or trade name is used by traders or manufacturers in different and non competitive lines.

It may be stated that trade marks and trade names are necessarily connected with business which is being carried on or transacted by those using the same, and to which its use is incident.

From the decisions hereinafter referred to it may be taken as well established that the exclusive use of a trade mark or trade name is restricted to a use upon the particular class of goods to which it has been attached or applied, or upon which it has been actually used, and any other

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—**Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.**

trader is at liberty to use the same mark or name in connection with other goods of an entirely different class. This principle is laid down in Kerly's Trade Marks and Trade Names, 3rd ed., p. 31: "The exclusive rights existing in respect of a trade mark are restricted to the class of goods to which it has been attached or applied. It is, therefore, no infringement to apply the same or a similar mark to other goods. This rule was clearly stated in a dictum of Lord Westbury, in the *Leather Cloth Case*, 11 H.L. Cases 523, which has often been cited. "Property in a trade mark," he said, "is the right to the exclusive use of some mark, name or symbol in connection with a particular manufacture or vendible commodity; consequently, the use of the same mark in connection with a different article is not an infringement of such right of property." Thus a trade mark used for flour and bread may be adopted as a new trade mark for carriages.

The question as to whether or not the right to use the trade mark or trade name applied to one article extends to other articles of a different character but belonging to the same general class, is one of considerable difficulty and each case will have to be considered in the light of all the circumstances surrounding the same, as to whether the articles are susceptible of the same use, or of some of the same uses or dealt in by the same dealers.

The following statement of the law is found in Cyc., vol. 38, p. 685:—

"The right to the exclusive use of a trade mark is further limited to a use on the particular class of goods upon which it has been actually used, and other persons may use even the identical mark or name in connection with a different class of goods. But the right extends to other goods of the same general class as that in which it has been applied. When one has acquired a trade mark in connection with particular goods, no one else will be permitted to use such trade mark upon goods which, while different, belong to the same general class. So, where a trade mark has been used on a particular species of goods, it cannot be thereafter appropriated by another as a trade mark for a class of goods which includes such species. Goods are in the same class when the general and essential characteristics of the goods are the same, so that the general public would be likely to be misled if the same mark were used. The same trade mark may be applied by the same person to many different classes of goods and is a valid trade mark for each class."

In England a distinction is made between the same natural class and the same statutory class. A trade mark may be used and registered for particular goods in a statutory class and others may use or register the same mark for other species of goods in the same statutory class: *Hargreave* v. *Freeman* (1891), 3 Ch. 39, 61 L.J. Ch. 23 (discussing and applying *Edwards* v. *Dennis*, 30 Ch. D. 454, 55 L.J. Ch. 125); *Jay* v. *Ladler*, 40 Ch. D. 649, 60 L.T. Rep. N.S. 27; *Edwards* v. *Dennis*, 30 Ch. D. 454, 55 L.J. Ch. 125 (reversing Cab. & E. 428); *In re Brady*, 21 Ch. D. 223, 51 L.J. Ch. 637. In *In re Hargreaves*, 11 Ch. D. 669, 27 Wkly. Rep. 450, there being four trade marks, each consisting of the device of an anchor, registered for different varieties of goods in the same general class, the Court refused the application to register a fifth for still another kind of goods in the same general class.

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.

There are two reasons for this rule. The first is that if a second trader were to adopt and use the mark of another within the same class of goods he would thereby acquire exclusive rights to the mark as applied to his particular variety of goods, and if the first user of the mark should subsequently desire to add that particular variety of goods to his general line, within the class, he would be unable to use his own trade mark upon his own goods: *Collins* v. *Oliver Ames, etc., Corp.*, 18 Fed. 561, 20 Blatchf. 542. But see remarks of Cotton, L.J., in *Edwards* v. *Dennis*, 30 Ch. D. 454, 55 L.J. Ch. 125, and of Jessel, M.R., in *In re Jelley*, 51 L.J. Ch. 639, note, 46 L.T. Rep. N.S. 381, note. Another reason is that the public cannot know how many varieties of the same class of goods the owner of the mark makes and sells under the mark, and if they should see that mark upon other goods of the same class they would be deceived and the owner of the mark might be injured in his reputation because of the quality of goods over which he has no control: *Amoskeag Mfg. Co.* v. *Garner*, 54 How. Pr. (N.Y.) 297; *Wamsutta Mills* v. *Allen*, 12 Phila. (Pa.) 535; see *Edwards* v. *Dennis*, 30 Ch. D. 454, 55 L.J. Ch. 125 (per Cotton, L.J.); *Delaware Etc., Canal Co.* v. *Clark*, 13 Wall. (U.S.) 311, 20 L. ed. 581, Cyc., vol. 38, p. 685.

No one can acquire an exclusive right to affix the trade mark to goods which do not fall within the class indicated by the mark, or in other words, to goods which do not possess the attribute the mark is understood and intended to connote. In *Cotton* v. *Gillard*, 44 L.J. Ch. 90, the defendant had invented a sauce which was prepared from a secret remedy not known to the plaintiff and was called the *Licensed Victuallers' Relish*. The plaintiff had purchased from the assignee in bankruptcy of the defendant's son all his interest in the sauce, and this he contended included the right to the trade mark used with the business. Jessel, M.R., held that this right could not exist or be transferred without the goods with which the mark was connected, and that the plaintiff could have no assistance from the Court to enable him to pass off under the mark as the original sauce an imitation of his own.

"The extent of the class of goods to which a trade mark is properly applicable will vary very much in different cases. If the trade mark means that the goods are made by its owner then it will not rightly be applicable to goods which he has bought to re-sell, and if the mark means that the goods are selected, shipped or sold by the owner then, probably, it may be rightly applicable to many different kinds of goods and to kinds which may vary and perhaps vary widely": Kerly's Law of Trade Marks and Trade Names, 3rd ed., p. 32.

"The rights arising out of the possession of a trade mark or trade name, registered or unregistered are not limited to the exact kind of goods for which the mark has been used, the extent of the class of goods to which the rights are limited is a question of fact in each case, depending to a great extent on the commercial connection between the kinds of goods in question, as for instance, whether they are usually sold by the same class of persons:" Kerly's Law of Trade Marks, 3rd ed., p. 33.

The following cases will indicate the way in which the Courts approach this question:—

In the case of *Eno* v. *Dunn*, 15 App. Cas. 252, affirming judgment be-

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.

low, *sub nom. In re Dunn's Trade Mark*, 41 Ch. D. 439, 7 R.P.C. 711, the plaintiff was proprietor of a medicinal preparation called "Fruit Salt." Defendant applied to register the words "Dunn's Fruit Salt Baking Powder." The House of Lords maintained plaintiff's exclusive right to the words "Fruit Salt," although it was admitted that there was no danger of a person wanting one article being deceived into taking the other; the test was, in the words of Lord Watson, that "there would be a supposed connection between the two articles in the minds of many persons who would naturally assume that the baking powder had been manufactured with the appellant's fruit salt, and purchase it in that belief, and that a batch of badly made baking powder might seriously injure the credit of the effervescing powder."

Lord Herschell based his decision largely on the ground that the use of the words by defendant would be of a nature to make the public believe that plaintiff was connected with the manufacture of the baking powder, and he continues by refuting the argument that an aperient medicine and a baking powder were so essentially different that no one could imagine that one could compete with the other. "I may say at once," he continues, "that in my opinion the plaintiff has no exclusive property in the words 'Fruit Salt,' and if it were proposed so to employ them, that no reasonable person could suppose that they had reference to appellants' preparation, such a use would be perfectly unobjectionable; for example—I cannot conceive of anyone imagining that a 'Fruit Salt Umbrella' was in any way connected with the article manufactured by Eno."

The fact that Dunn attached his own name prominently to the trade mark did not save him from the charge of infringement.

In *Australian Wine Importers Trade Mark and Mason*, 41 Ch. D. 278, 6 R.P.C. 311, the applicant sought to register for champagne a mark consisting of the words "Golden Fleece." He was opposed by the proprietor of the same trade mark as applied to rum and whiskey. A decision was rendered in favour of the opponent, Kay, J., remarking "why on earth should not these people, if they really mean to trade honestly, take a trade mark which differs from this trade mark of Mason?"

In the matter of *Turney's Trade Mark*, 11 R.P.C. 37, applicants desired to register a certain trade mark for rum. Bass & Company successfully opposed the registration on the ground that they possessed a similar mark for beer and stout. A more recent case still is that of *Eastman Photographic Materials Co., Limited* v. *John Griffith Cycle Corporation, Limited* (1898), 15 R.P.C. 105, where the plaintiff company being manufacturers of cameras, brought an action to restrain the use of the word "kodak" for bicycles. There was some evidence that plaintiff company manufactured cameras for use by cyclists, and that many shops dealt in both articles. Romer, J., said as one of the reasons of his judgment, "so great is the connection between the two classes of business that in all probability the plaintiff company may wish hereafter to manufacture and sell cycles specially adapted to carry their kodaks." He continued that the injunction should be granted because there was danger that the public might consider that defendant company was in some way connected with plaintiff company.

In the *Dunlop Case*, 16 R.P.C. 12, plaintiff manufactured bicycle tires,

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—**Trade mark (§ I—2) — Trade name — Use by another in a non-competitive line.**

pumps, etc., and defendant manufactured oils proper for use on bicycles. Plaintiff had never dealt in oils. Defendant had a man named Dunlop associated with him.

Romer, J., said at page 14: "The word 'Dunlop' is put in a very prominent way, and I am satisfied he does that with a view to making customers believe that those goods if they are not the goods of the plaintiffs, are goods used in some way with their sanction, or connected in some way with them so as to get the benefit of plaintiff's name."

He granted the injunction because some day plaintiff might start selling bicycle oils and were entitled to be protected in the interim.

In *Omega Oil Company* v. *Weschcler*, 71 N.Y. Supp. 983, plaintiff manufactured a liniment under the name of "Omega Oil." Defendant began the sale of toilet soap, to which he applied the name "Omega Oil Medicated Soap." He used a certain proportion of Omega Oil in this soap, and claimed the right to use the name adopted by him because liniment was not an article of the same class as soap. The Court found that the two articles were not of such a different character as to permit defendant the use of the name created and made valuable by plaintiff.

"The liniment may have a much broader application than the soap, but it also possesses to a certain extent the qualities of the soap, and is used for many of the same purposes. . . . The adoption of the words Omega Oil by defendant was calculated to deceive the public into the belief that plaintiff's article was being put up for sale in another form—at least into the belief that plaintiff's article was placed on the market by him, or by his consent." The Court based its decision on two cases: (1) that of *Carroll* v. *Ertheiler*, 1 Fed. 688, and (2) *Church* v. *Russ*, 99 Fed. In the former plaintiff manufactured smoking tobacco under the name of "Lone Jack," but defendant was enjoined from calling his cigarettes "Lone Jack" cigarettes. In the latter case plaintiff manufactured soda and defendant baking powder. The defendant was enjoined from using plaintiff's mark.

In the case of *Collins* v. *Ames*, 18 Fed. 561, plaintiff manufactured axes and other edged tools, but had never manufactured shovels. Defendant starting manufacturing the latter implement, using plaintiff's trademark, and was enjoined because in the words of the judgment, "The plaintiff had a right to make shovels, and it had made kindred articles of metal, and its good name and reputation in its business were wholly connected with the use in its trade of its trade mark."

In the case of *Amoskeag* v. *Garner*, 54 How. Pr. 297, plaintiff manufactured cotton goods, but never made prints or calicoes. Defendant started to make the latter articles, marking them "Amoskeag," which was a geographical name. The Court said: "It was contended that the plaintiff's claim was practically of a monopoly in the word Amoskeag. But not so. The word is free to those engaged in other and distinct lines of industry, because there its use conveys no such meaning as when applied to cotton goods. Whether such meaning is conveyed is a question of fact to be determined upon the evidence in each case. The manufacturer of cement, for instance, might apply the word to that article, because when stamped upon cement it would not stand for the Amoskeag Manufacturing Co."

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—**Trade mark (§ I—2) — Trade name — Use by another in a non-competitive line.**

In *Wamsutta Mills* v. *Allen*, 12 Phila. 535, plaintiff manufactured muslin under the name "Wamsutta." Defendant sold shirts stamped "Wamyesta," advertised as made from Wamyesta muslin. It is there stated as follows:—

"Defendants content themselves with alleging that there is no such resemblance between the words as would be likely to mislead the public, and that the muslin of which their shirts are made is of such a different description from plaintiff's muslin that no one having knowledge of the kind of muslin made by plaintiffs and exercising ordinary caution, could mistake one for the other. . . . It is too plain to require any demonstration that if defendants manufacture shirts of a muslin greatly inferior in quality to plaintiff's muslin, and pass them off on the public as shirts made of plaintiff's muslin, plaintiffs may suffer greatly thereby in their reputation as manufacturers, and consequently in their sales of muslin which they manufacture."

In the case of *Godillot* v. *American Grocery Co.*, 71 Fed. 873, plaintiffs had a trademark for fancy French groceries. Defendant started using the same trademark on cigars, whiskey and coffee. Plaintiff's right was maintained to the unrestricted use of its trademark in the whole general class.

In *Morgan* v. *Ward*, 152 Fed. 690, the holding was: "The fact that Sapolio is a cake and Sopono a powder is of no moment. The appeal is made to the same class of customers to use the respective articles for the same general purpose."

In *Florence* v. *Dowd*, 178 Fed. 73, plaintiff manufactured toilet brushes under the name "Keepclean," but had never manufactured tooth brushes. Defendant started to manufacture the latter under the name "Stakleen." It was there stated that, "the complainant had acquired a reputation as the manufacturer of high grade toilet brushes. It certainly had a right to include tooth brushes at any time, and, when it did so, purchasers were acquainted with the high character of its goods and would quite likely purchase its tooth brushes, deeming its previous reputation a guarantee of its excellence."

The Commissioner of Patents at Washington, D.C. in dismissing an appeal from the Examiners' decision under date 13th July, 1909, *In re Purity Laboratories*, on an application to register the word "Hygien-ol" as applied to tooth powder, there already existing a trademark on the register for the word "Hygenol" for an antiseptic or disinfectant powder compound, said:—

"The registered mark is manifestly so similar to applicants' mark as to be liable to cause confusion in the trade if applied to the same class of goods. Applicant contends that tooth powder and antiseptic compounds are manifestly not goods of the same descriptive property. This contention, however, is believed to be not well founded, for applicants' tooth powder is said to be an antiseptic tooth powder, and anyone familiar with the antiseptic compound known as "Hygen-ol" seeing the word "Hygien-ol" upon an antiseptic tooth powder would be led to suppose that this tooth powder contained that compound. In the case of *Walter Baker and Co.* v. *Harrison*, 138, Official Gazette, Patent Office, 770, the Court of Appeals of the district of Columbia, after holding that coffee

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—**Trade mark** (§ I—2)—**Trade name**—**Use by another in a non-competitive line.**

and cocoa were goods of the same descriptive properties, said: "A mark should be denied not only when used upon goods of the same descriptive properties as a similar registered mark, but when used on goods belonging to the same general class."

The leading principle relating to trademarks and trade names as stated by Lord James in *Singer Manufacturing Co.* v. *Loog*, 18 Ch. D., p. 412, is, "No man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby, without making any direct false representation to the purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trademark or trade designation, I am of the opinion that there is no such thing as a monopoly or a property in the nature of a copyright or in the nature of a patent, in the use of a name, whatever name is used to designate goods, anybody may use that name to designate goods; always subject to this, that he must not as I said make directly or through the medium of another person, a false representation that his goods are the goods of another person."

There is a distinction between trade names and trademarks, the latter being always assumed and invented by a trader for the purpose of his goods, and there is no necessity for him to adopt a trademark like that of another trader, except for the purpose of passing off his goods as those of that trader: *Thurton* v. *Thurton*, 42 Ch. D. 128.

There do not appear to be very many decisions covering the exact point involved in this note but the general principle is set forth in the case of *Somerville* v. *Schembri*, 12 App. Cas. 453, which decides that, subject to any statutory regulation, as soon as a trademark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has the right to copy it, or even to appropriate any part of it, if by such appropriation purchasers may be induced to believe that they were getting goods which were made by the firm to which the trademark belonged. But the acquisition of such exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character.

In *Hart* v. *Colley*, 44 Ch. D. 193, it was decided that the owner of a trademark can only sue in respect of an infringement of that trademark in connection with the particular goods or classes of goods for which his trademark is registered.

In the matter of *Lake and Elliott's application for a trademark*, 20 R.P.C. 605, 1903, Kekewich, J., decided that the word "Millennium" registered for carriages, notwithstanding long user of the same word as a registered trademark for bread and flour which had been sold in vehicles so labelled, was properly allowed. That the goods in respect of which the opponents were registered were not the same description of goods as those of the applicants.

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.

In an unreported case of *Re Simpson, Davies and Son*, referred to at p. 97 of Sebastian on Trademarks, 4th ed., the proprietors of a trade-mark registered for coal in class 4 of the Act, successfully opposed the registration of a similar mark for railway waggons in class 22, the opponent's coal being carried in and sold out of the waggons.

A trademark only confers on the person whose mark it is a right to say, "Do not imitate my mark in connection with goods like mine so that yours may be mistaken for mine." There is no exclusive right to the mark except in connection with such goods and to prevent deception or mistake: *Powell* v. *Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54, 68.

In a recent case of *Van Zeller* v. *Mason, Cattley and Co.* (1908), 25 R.P.C. 37, Joyce, J., decided that where a name had long been used by a shipper in connection with port wine made from the grapes of a particular vineyard, after he had ceased to be supplied with grapes from the vineyard he could not properly apply the name to wine made from other grapes.

In *The J. P. Rush Co.* v. *Hanson*, 2 Can. Exch. 557, Lowe, D.M.A., at p. 559, says: "A trademark is a simple and absolute property, the same as a signature, or the name and style of a firm, without any limitation as to country and runs everywhere throughout the domain of commerce. In other words the essential characteristics of a legal trademark are (*a*) Universality of right to use, that is, it is good as a representation of or substitute for the owner's signature all the world over; and (*b*) exclusiveness of the right to use it.

In *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376, it was decided that where the first producer of an article of manufacture has identified with it a particular name, whether his own name or a name which is descriptive of the article itself, such name becomes a trademark and cannot be adopted by another person in advertising a similar article, and such adoption and employment will be restrained by injunction. In the same case it was held that fraud was not necessary to be averred or proved in order to obtain protection for a trademark.

A trade name may be either the name of the manufacturer of goods, or some name by which the manufactured goods have become generally known. There is a kind of property in such a name, and interference with it will be restrained by the Court if there is a prospect of injury to the owner of it: *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449. To some extent trade names are like trademarks. The offence consists in any other person selling goods of his own in such a way as to lead the public to suppose that they are purchasing some one else's goods: Encyc. of the Laws of England, vol. 14, p. 189.

Lord Langdale, Master of the Rolls, well expresses the whole law of trademarks by names in the case of *Collins Co.* v. *Cowen*, 3 Kay & J. 428, 5 Wkly. Rep. 676, 69 Eng. Reprint 1177. He says: "There is no such thing as property in a trademark as an abstract name. It is the right which a person has to use a certain name for articles which he has manufactured, so that he may prevent another person from using it, because the mark or name denotes that article so marked were manufactured by a certain person, and no one else can have the right to put

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—**Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.**

the same name upon his goods, and then represent them to have been manufactured by the person whose mark it is:" *Osgood* v. *Allen*, 18 Fed. Cas. No. 10, 603, Holmes 185, 195, 3 Off. Gaz. 124.

In *Somerville* v. *Schembri*, 12 App. 453, Lord Watson in delivering judgment says: "It is beyond dispute that the cigarettes made by the appellant's firm were favourably known in the markets where they were sold under the term of 'Kaiser-i-Hind.' The use of the term by others as a name of a ship or as a trade mark for hats, soap or pickles could not impede their acquisition of an exclusive right to use it as a trademark for their cigarettes."

A manufacturer of rubber goods who uses the word "Eureka" misleads the public and gains an unmerited advantage from the trade reputation given to such word by another company which used such word in its corporate name, will be restrained from the use thereof, not only in its corporate title, and in connection with competitive goods, but also in connection with non-competitive goods manufactured by it, so long as it continues to manufacture any goods in competition with the company first using the word: *Eureka Fire Hose Company* v. *Eureka Rubber Manufacturing Company*, 72 N.J. Eq. 555. In the above case Emery, V.-C., says: "As to the extent to which the use of the name should be enjoined, the protection of complainant's trade name in connection with the marketing goods manufactured in competition is the limit of its rights. The bulk of defendant's business is in rubber mechanical goods, not dealt in by complainant and for the purposes of this business it has the right to use the word as part of its name or otherwise. But so long as it puts on the market goods in competition with the complainant the use of the word in its name or otherwise in connection with these goods, seems, under the evidence of the case, necessarily calculated to mislead the public and give defendant some advantage of complainant's trade reputation."

In all cases the real question comes to be whether the defendant has infringed the exclusive right which the plaintiff has to the use of the trademark, and this question depends as Lord Kingsdown said in the case of the *Leather Cloth Co., Limited* v. *American Leather Cloth Company, Limited*, 11 H.L.C. 538, upon "how far the defendant's trademark bears such a resemblance to that of the plaintiff's as to be calculated to deceive incautious purchasers."

In *George* v. *Smith*, 52 Fed. Rep., p. 830, the principle is laid down that the first use of the trade terms "Epicure" by complainants as a brand for packed salmon, and the establishment of a business thereunder entitled them to protection against the use of it by defendants for salmon although they had previously used it as a trademark for canned fruit and vegetables, Cox, J., says: "Salmon and tomatoes are both articles of food, it is true, but in other respects they differ as a hat differs from a boot; though both are articles of wearing apparel. A hat dealer having built up a flourishing trade in "Sheridan" hats could not be compelled to relinquish it at the instance of a shoemaker, who, before that, had sold "Sheridan" shoes. A manufacturer who should call his bicycles "Deerfoot" would hardly interfere with "Deerfoot" sausages or "Deerfoot" butter. . . . The reasoning of some of the authorities would indicate that the defendants had a right to use the brand in connection

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.

with other fruits and vegetables, analogous to tomatoes and peaches, but to assert that they have the right to use it on all canned goods is carrying the doctrine far and beyond any reported case. Beer and nails do not belong to the same class of merchandise because both are sold in kegs."

It would appear that the tendency of the Courts at the present time seems to be to restrict the scope of the law applicable to technical trademarks and to extend its scope in cases of unfair competition. The case under consideration falls more approximately under the head of an infringement of a technical trademark rather than under the head of unfair competition, it is advisable to ascertain, if possible, the distinctions as well as the points of resemblance between them. The underlying principle of each is the same, namely, the prevention of that which in its operation and results, and usually in intention, is a fraud upon the public, and an injury to the rival trader. That this is the underlying principle is clearly shewn in a leading case on technical trademark law: *Canal Co.* v. *Clark*, 13 Wall. 311. But, while the idea of fraud or imposition lies at the foundation of the law of technical trademarks as well as the law of unfair competition, it must be borne in mind that fraud may rest in actual intent shewn by the evidence or may be inferred from the circumstances or may be exclusively presumed from the act itself. In the case of unfair competition the fraudulent intent must be shewn by the evidence or inferred from the circumstances, while in the case of the use by one trader of a trademark belonging to another trader, fraud will be presumed from its wrongful use: Bokes, J., in *Church and Dwight* v. *Russ*, 99 Fed. Rep. 276.

The Court will ordinarily restrain the use of the infringing mark without regard to the intent of the defendant. It is, however, a matter of practical importance to establish the deliberate fraud of the defendant where it exists. It was distinctly held by Lord Westbury that an account would only be given with the injunction in respect of any user by a defendant after he had become aware of the prior ownership: *Edelsten* v. *Edelsten*, 1 DeG. J. & S. 185, and in another case, where defendant claimed to have bought counterfeit champagne believing it to be genuine, an accounting was denied because of the absence of proof of guilty knowledge: *Moet* v. *Couston*, 33 Beav. 578. See also *Rose* v. *Loftus*, 47 L.J. Ch. 576; *Millington* v. *Fox*, 3 Mylne & Cr. 338; *Weed* v. *Peterson*, 12 Abb. Pr. N.S. 178. And the fraudulent intention of the defendant must be shewn in an action at law: *Edelsten* v. *Edelsten*, *supra*, or at least to support the recovery of punitive damages: *Faber* v. *D'Utassey*, 11 Abb. Pr. N.S. 399; *Marsh* v. *Billings*, 7 Cush. 322, Cox 118. But the rule is fixed both in England and the United States that proof of fraudulent intent, or actual deception of the public, are alike unnecessary in actions in equity, in technical trademark cases; nor is it necessary in cases of trademark infringement or unfair competition to prove actual deception of purchasers where there is shewn "a manifest liability to deception": *Fuller* v. *Huff*, 43 C.C.A. 453, 104 Fed. Rep. 141, 145, reversing *Fuller* v. *Huff*, 99 Fed. Rep. 439; *Manitowac Malting Co.* v. *Milwaukee Malting Co.*, 119 Wis. 543, 97 N.W. Rep. 389.

For a fuller discussion of the American cases on this point, see the case of *Virginia Baking Co.* v. *Southern Biscuit Works*, 30 L.R.A. (N.S.) 167, where the proposition is laid down that one who has applied the

QUE.

Annotation.

Trade marks and trade names

Annotation (*continued*)—**Trade mark (§ I—2)—Trade name—Use by another in a non-competitive line.**

words "Crown" and "Jamestown" to crackers and small cakes respectively cannot complain that they are respectively applied by another manufacturer to ginger snaps and larger cakes of an entirely different class. See also annotation to that case, 30 L.R.A. N.S. 167-171.

The following cases may be referred to shewing marks held to have or not to have, such resemblance to each other as to be calculated to deceive: "Condi Sanitas" and "Sanitant," infringement of "Sanitas, *Sanitas Co.* v. *Condy*, 4 R.P.C. 195 and 530, 56 L.T. 621; "Apollinis," an infringement of "Apollinaris," *Apollinaris Co.* v. *Hersfeldt*, 4 R.P.C. 478; "Steinberg," an infringement of "Steinway," the words being used with devices shewing a general similarity, *Steinway* v. *Henshaw*, 5 R.P.C. 77; "Emollio," too near "Emolline," *Grossmith's Trademark*, 6 R.P.C. 180, 60 L.T. 612; "Oomoo" not too near "Emu," *Burgoyne's Trademark*, 6 R.P.C. 229, 61 L.T. 39; "Kokoko" too near the common word "Coco," *Jackson's and Co. Trademark*, 6 R.P.C. 80; "Demotic," an infringement of "Demon," *Slazengen* v. *Feltham*, 6 R.P.C. 331; "Dunn's Fruit Salt Baking Powder," too near "Eno's Fruit Salt," *Eno* v. *Dunn*, 15 A.C. 252, 7 R.P.C. 311, and an infringement, *Eno* v. *Dunn*, 10 R.P.C. 261; "El Devino," an infringement of "El Destino," *Pinto* v. *Trott*, 8 R.P.C. 182; "Vincolis," not too near "Wicarnis," where the goods were different in appearance and use, *Coleman* v. *Brown*, 16 R.P.C.; "Savoline,' an infringement of "Savonol," *Field, Ltd.* v. *Wagel Syndicate, Ltd.*, 17 R.P.C. 266; "Ivory," for soap not necessarily calculated to cause the goods to be confused with "Ivy" soap, *Goodwin* v. *Ivory Soap Co.*, 18 R.P.C. 389, the action was dismissed in this case on another ground, and the appeal would apparently have failed also on the ground that the defendants had acquired a right to use the word "ivory," the only point of similarity lay in the names; "Toblones," too near "Tabloids," *Capsuloid Co.'s application*, 23 R.P.C. 782; "Neola," not too near "Pianola," *Pianotist Co. Ltd.'s application*, 23 R.P.C. 774; "Lanco," not too near "Lancashire," in an action for passing off, the goods being somewhat different, *Reddaway* v. *Irwell*, 23 R.P.C. 621, 24 R.P.C. 203; "B.A.S.," too near "B.S.A.," *Birmingham Small Arms Co.* v. *Webb*, 24 R.P.C. 27. See Kerly's Law of Trade Marks and Trade Names, 3rd ed., p. 260.

HAY v. SUTHERLAND.

Ontario High Court, Middleton, J., in Chambers. January 22, 1911.

ONT.

H. C. J.
1912
Jan. 22.

WRIT AND PROCESS (§ II A—16)—SERVICE ON NON-RESIDENT—JOINDER OF DEFENDANTS—ONT. CON. RULE 162 (*g*).

In an action against two parties, one of whom is out of the jurisdiction, an order may be made for service of the writ upon him provided his co-defendant is first served, under clause (*g*) of Consolidated Rule 162, whereby the service of a writ out of Ontario may be allowed where the person sought to be served is a necessary or proper party to an action properly brought against another person duly served in Ontario.

APPEAL by the defendant Sutherland from an order of the Master in Chambers dismissing the appellant's motion to set aside an *ex parte* order authorizing service upon the appellant, out of the jurisdiction, of the writ of summons, and to set aside the writ and the service and all proceedings based thereon.

The appeal was dismissed.

Grayson Smith, for the appellant.

McGregor Young, K.C., for the plaintiff.

MIDDLETON, J.:—A case is within clause (*g*) of Con. Rule 162* when it appears that the defendants are properly joined. The question of joinder must be determined quite apart from the residence of the defendants, and entirely upon the Rules regulating the joinder of parties.

If an action is properly brought against two persons who are both within the jurisdiction, it can be said that either is a proper party to an action properly brought against the other; and so, when either is out of the jurisdiction, an order may be made for service upon him, provided his co-defendant is first served.

This construction of the Rule has been invariably adopted.

Appeal dismissed with costs to the plaintiff in any event.

Appeal dismissed.

*Ontario Rule 162, Consolidated Rules of Practice of 1897, is as follows:

162 (1) Service out of Ontario of a writ or notice of a writ may be allowed by the Court or a Judge wherever (*inter alia*):—

(*g*) A person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario.

SASK.

S. C.
1912

April 4.

COTÉ v. OLSON.

Saskatchewan Supreme Court. Newlands, Johnstone, Lamont, and Brown, JJ. April 4, 1912.

1. ASSIGNMENT (§ I—14)—INTEREST IN LAND PURCHASE CONTRACT.

Neither party to a contract of sale of lands can assign over the burden thereof, and when one party to the contract has assigned his interest therein, he remains liable to perform his part of the contract; the other party cannot sue the assignee either for the specific performance or for damages for breach of the contract, unless he has accepted the assignee as occupying the assignor's place in respect to the fulfilment of the contract.

[*Tolhurst* v. *Associated Portland Cement Mfrs.*, [1902] 2 K.B., 660.]

2. COVENANTS AND CONDITIONS (III C 1—38)—PERSONAL COVENANT—LAND CONTRACT.

A covenant to pay the purchase money in a contract for the sale of land is a personal covenant and not a covenant running with the land.

[*Haywood* v. *Brunswick Building Society*, L.R. 8 Q.B.D. 403, and *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, specially referred to.]

3. VENDOR AND PURCHASER (III—39)—ASSIGNEE OF PURCHASER—LIABILITY.

The assignee of a purchaser under a contract for the sale of land is not personally liable for the unpaid instalments of the purchase-price provided for in the contract, either to his assignor or to the original vendor, in the absence of a promise on his part to pay the same, though he took the assignment with knowledge that the purchase-price had not been paid.

APPEAL by defendant from the judgment of WETMORE, C.J., *Coté* v. *Olson*, 19 W.L.R. 156, in favour of plaintiff in an action to recover an instalment due under a contract of sale.

The appeal was allowed and the action dismissed.

The facts of this case were as follows:—

On the 17th April, 1909, one William J. Page, by an agreement in writing, agreed to sell to one Carl Radke, lot 2 in block 1, and lots 12 and 13 in block 2 Maryfield, in consideration of which Radke agreed to pay to Page the sum of $4,000 in four payments of $1,000 each on the first day of November, 1910, 1911, 1912, and 1913, with interest at 7 per cent. on so much of the principal as might be from time to time due.

On the 7th March, 1910, Radke by an instrument in writing sold, assigned and transferred to the plaintiff for the consideration of $4,000 all his interest in said agreement of sale; and on the 11th April, 1910, the plaintiff, by an instrument in writing, sold, assigned and transferred to the defendant for the consideration of $4,000 all his interest in said first mentioned agreement of sale, and in neither case was the $4,000 paid.

Afterwards, on the 19th of May, 1910, Carl Radke, by an instrument in writing, assigned all his interest in the agreement of sale from himself to the plaintiff to the said William J. Page, and Page, by an instrument in writing dated 1st November, 1910, assigned all his interest in the agreement of sale from himself to Radke and from Radke to Coté to the plaintiff.

The first payment set out in the agreement of sale from Page to Radke fell due, but was not paid by the defendant to Page, and was afterwards paid by the plaintiff to Page, and the plaintiff brought this action to recover the same from the defendant.

E. L. Elwood, for appellant, defendant.

D. Mundell, for respondent, plaintiff.

NEWLANDS, J.:—The action was tried before the learned Chief Justice, who inclined to the opinion that the covenant to pay the purchase-money contained in the agreement of sale from Page to Radke was a covenant running with the land, but that it was not material whether it was or not, because the defendant purchased and went into possession with the full knowledge that the instalments of purchase-money had to be paid and that in equity he was bound to pay all that fell due during his possession, and he gave judgment accordingly against the defendant for the amount due and paid by the plaintiff to Page. From this judgment the defendant appeals.

Now there is no question, but that if the defendant wishes to retain this land he must pay the amount due, and that he must either give up the land or pay the money, but I am of the opinion that he is not personally liable to either the plaintiff or Page for the amounts payable under said first mentioned agreement of sale. He is not so liable to the plaintiff under the instrument of 11th April, 1910, from the plaintiff to himself because there is no promise on his part to pay anything to the plaintiff; as to the amount mentioned in that instrument as the consideration, being the amount due Page, it was evidently the intention of the parties that this amount should be paid to Page and not to the plaintiff. Nor could Radke assign to the plaintiff or the plaintiff to the defendant, the burden of the agreements they had entered into with Page and Radke respectively, the burden of a contract not being assignable.

Williams on Vendors and Purchasers, 2nd ed., on p. 501, says:—

> Of course, neither party to the contract can assign over the burden thereof. It follows that when one party to the contract has assigned his interest therein, he remains liable to perform his part of the contract; and the other party cannot sue the assignee, either for the specific performance or for damages for breach of the contract, unless he has accepted the assignee as occupying the assignor's place in respect to the fulfilment of the contract: *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K.B. 660, 668.

The instrument of 17th March, 1910, from Radke to the plaintiff being similar in form to that from the plaintiff to the defendant, Radke could not by assignment give Page any better claim against the plaintiff than he had himself, nor could Page by the assignment to the plaintiff give him any better claim

SASK.

S. C.
1912

COTÉ
v.
OLSON.

Newlands, J.

than he himself had, and therefore, the assignment from Page to the plaintiff only assigned to the plaintiff what Page himself had, and that is his claim against Radke, Page, under the above authorities, having no claim against the subsequent assignees.

The covenant contained in the agreement of sale from Page to Radke is, in my opinion, a personal covenant, and not a covenant running with the land. It is a covenant similar to the covenant of a mortgagor to pay the mortgage-money to the mortgagee, and the conveyance of the equity of redemption did not make the assignee thereof liable personally to pay the mortgage money to the mortgagee.

Robbins on Mortgages [Coote on Mortgages, 8th ed.] p. 964:—

> Covenant to pay by the mortgagor does not run with the mortgaged property so as to give to the mortgagee any right of action on the covenant against the assignee of the equity of redemption: *Butler* v. *Butler*, 5 Vesey 534; *Re Errington, ex parte Mason*, [1894] 1 Q.B. 11; *Thorne* v. *Cann*, [1895] A.C. 11., at p. 18, 64 L.J. Ch. 1, 71 L.T. 852.

That the defendant took with knowledge that the payments due would have to be paid does not make him personally liable, but it charges the land with the burden of these payments, and the defendant cannot get the land without first making the payments.

The plaintiff cannot, therefore, in my opinion recover in this action from the defendant, and the appeal should be allowed, with costs.

JOHNSTONE and BROWN, JJ., concurred with NEWLANDS, J.

LAMONT, J.:—This is an appeal from the judgment of the learned Chief Justice in favour of the plaintiff in an action to recover an instalment of purchase money under an agreement for the sale of land. The registered owner of the land was, and still is, one W. J. Page. By an agreement in writing dated April 17th, 1909, Page sold the land in question to one Radke for $4,000, payable $1,000 on the 1st day of November, in each of the years 1910, 1911, 1912 and 1913. On March 17th, 1910, by writing under seal, endorsed on the agreement from Page, Radke assigned to Alphonse Coté, the plaintiff herein, all his interest in "the within written instrument." Coté entered into possession of the premises, and on April 11th, 1910, he in turn by writing also indorsed on the original agreement assigned all his interest in "the within written instrument" to the defendant Olson for an expressed consideration of $4,000. In neither of these assignments was there any covenant by the assignee to pay the said $4,000. On May 19th, 1910, by an instrument in writing, Radke assigned to Page all his (Radke's)

interest under the assignment to Coté Then, on November 1st, 1910, the day on which the first instalment of purchase money fell due under the agreement of April 17th, 1909, a new agreement was entered into between Page and the plaintiff Coté, in which, after reciting that no money had been paid to Page under the original agreement it was agreed that Coté would pay $3,250 to Page by instalments, and upon the payments being made Page would convey to him the said land. The agreement also contained a clause by which Page assigned to Coté all his claims against Radke under the agreement of April 17th, above-mentioned except the right to collect interest on $4,000 therein mentioned from April 17th, 1909, to March 17th, 1910, which Page reserved to himself. The defendant had paid $100 when he took the assignment from the plaintiff, but made no further payments. On these facts the plaintiff brought this action, and claimed judgment for the instalment of $1,000 and interest falling due on November 1st, 1910, either by virtue of his assignment to the defendant or by virtue of the assignment to him of the contract made between Page and Radke. The learned Chief Justice, in giving judgment for the plaintiff, was rather of opinion that the covenant to pay the purchase-money contained in the original agreement was a covenant running with the land so as to bind the defendant, because it was made by Radke for himself "and his assignee," but he held that in any event it was a covenant enforceable in equity against the defendant during his possession, because he had taken the assignment with notice that the instalments to Page had not been paid; and he cited as authorities the cases of *Morland* v. *Cook*, L.R. 6 Ex. 252 and *Cooke* v. *Chilcott*, 3 Ch. D. 694. With very great deference, I am of opinion that this is not one of the cases in which the covenant can be said to run with the land. In *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, Farwell, J., stated what I believe to be the law as follows:—

> Covenants which run with the land must have the following characteristics: (1) They must be made with a covenantee who has an interest in the land to which they refer; and (2) they must concern or touch the land.

That is, as was said by Bayley, J., in *Congleton* v. *Pattison*, 10 East 130:—

> In order to bind the assignee the covenant must either affect the land itself during the term such as those which regard the mode of occupation or it must be as such as *per se*, and not merely from collateral circumstances, affects the value of the land, at the end of the term.

Now, I am of opinion that a covenant to pay the purchase-money in an agreement for the sale of land cannot be said to affect the land either as regards its mode of occupation or its value. It places no restriction on the mode of occupation nor

SASK.
S. C.
1912
COTÉ
v.
OLSON.
Lamont, J.

does it increase or diminish the value of the land. It is not, therefore, under the above authorities one of the covenants which may be said to run with the land.

Neither does it seem to me that this is a case in which the defendant can be held liable in equity because he took an assignment of the plaintiff's interest with notice that the instalments set out in the original agreement had not been paid. In *Haywood* v. *Brunswick Building Society*, L.R. 8 Q.B.D. 403—which, it will be noted, was the case of a grant and not that of a lease—Brett, M.R., stated that the rule as to covenants which would be enforced in equity against an assignee taking with notice in the following language:—

> Now the equitable doctrine was brought to a focus in *Tulk* v. *Moxhay* [2 Ph. 774, 18 L.J. Ch. 83, 13 Jur. 89, 41 Eng. Reprint 1143] which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule, is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. . . . But it is said that if we decide for the defendants we would have to overrule *Cooke* v. *Chilcott*, 3 Ch. D. 694. If that case was decided on the equitable doctrine of notice I think we ought to overrule it.

In the present case the covenant to pay does not, as I have already pointed out, place any restrictions on the mode of using the land, nor does it impose a burden which may be enforced against the land itself. The vendor may have a lien on the land for the purchase-money, but he does not obtain that lien by virtue of the covenant of the purchaser to pay the purchase-price. The covenant is something entirely apart from the vendor's lien, and is not by itself a charge upon the land. A covenant to pay the purchase-money, like a covenant by a mortgagor to pay the mortgage-money, is a personal covenant. In reference to a mortgagor's covenants, I find in Fisher's Law of Mortgages, 6th ed., paragraph 809, the following:—

> The burden of such a covenant does not run with the equity of redemption, and therefore the mortgagee cannot sue the assignee of the equity either for principal or interest.

See also *Aldous* v. *Hicks*, 21 O.R. 95. The plaintiff, therefore, cannot recover by virtue of his being the assignee of the original agreement between Page and Radke. Can he recover by virtue of the assignment to the defendant from himself? That assignment does not contain any promise on the part of the defendant to pay, nor was it executed by him. There was no express promise at all by the defendant that he would pay the purchase-money. But it was agreed that even if there was no express promise the defendant was under an implied promise

SASK.

S. C.
1912

COTÉ
v.
OLSON.

Lamont, J.

to indemnify the plaintiff in case he had to pay Page. Whatever may be the rule as to indemnity, it can have no application in this case, because the plaintiff himself was under no obligation to Page for the purchase-money until he entered into the agreement of November 1st, 1910. By assigning his rights in the land, the plaintiff cannot impose any burden upon the defendant in the absence of an express or implied consent on his part to assume those obligations. The effect of such a unilateral agreement is to confer certain rights upon the defendant. It gives him first, an equitable interest in the land to the extent of the purchase-money he has paid, and second, a right to receive title on payment of the purchase-money in full. If he does not pay the purchase-money the plaintiff can close out his interest in the land. But the plaintiff has no right to sue the defendant for the purchase-money unless the defendant has either expressly or impliedly agreed to be responsible for the same. In this case I hold he has not done so. I am, therefore, of opinion, that the appeal should be allowed, with costs.

Defendant's appeal allowed, and action dismissed.

NIXON v. DOWDLE.

(Decision No. 2).

MAN.

C. A.
1912

April 8.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. April 8, 1912.

1. BROKERS (§ II B—14*a*)—COMPENSATION—OPTION TAKEN FROM PARTY FROM WHOM COMMISSION CLAIMED.

A real estate agent who had been attempting to sell a certain tract of land for the owner, and who afterwards took from the latter an option for its purchase made in his own favour, which contained no stipulation that if the agent produced another purchaser to take his place under the instrument the agent was to have a commission for the sale of the land to the substitute, and there was no other contemporaneous agreement to that effect, cannot claim any commission after the transfer of the property to a new purchaser, especially where it is shewn that the owner, upon being so requested, refused to stipulate in his contract of sale with the substituted purchaser that the agent should have a commission, and the latter then abandoned his claim rather than have the sale fall through.

[*Nixon* v. *Dowdle*, 1 D.L.R. 93, reversed on the facts.]

2. ESTOPPEL (§ III A—41)—WORDS AND CONDUCT—RELIANCE BY OTHER PARTY.

A party may, without pleading it, take advantage of the estoppel derived from the rule that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

[*Freeman* v. *Cooke*, 18 L.J.Ex. 11 Ruling Cases 82, followed.]

THE plaintiffs are partners doing business as real estate agents in Winnipeg. As the plaintiff Gough took no part in

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Statement

the transactions in question, the plaintiff Nixon is meant when referring to "the plaintiff."

The plaintiff learned that the defendant, who lived at Swift Current in Saskatchewan, had a section of land near that town, which he was subdividing so as to sell it in town lots. The plaintiff and the defendant met at Swift Current and discussed the question of the plaintiff selling the land for the defendant according to the subdivision. The plaintiff decided that he would not undertake selling it in this way.

Afterwards the plaintiff agreed to try to sell the land for the defendant at $55.00 an acre. He claimed that at one or both of these interviews he was promised a commission of 5 per cent. if he made a sale.

The plaintiff interested Mr. Prout, of Winnipeg, in the property and Mr. Prout, who was able to buy at the $55, became ready and willing to do so, and went to Swift Current for that purpose, but discovered, when there, that the defendant had raised his price to $250 an acre; so that nothing came of the negotiations at that time.

Later the plaintiff went to Swift Current, and he and Mr. Macdonald, a bank manager, remonstrated with the defendant as to the price he was asking and finally persuaded him to sell for $55 an acre.

An option in writing was then drawn by Mr. Macdonald and signed by the defendant, giving the plaintiff the right to purchase at $55 an acre within a limited period. The option, on its face, purported to be given for the consideration of $100, paid at the time of giving it. The plaintiff claimed that the option was made only to enable him to shew Prout that he could now carry out the sale to him. He said that at this interview it was stated to and understood by the defendant that he, the plaintiff, was taking this option merely to enable him to turn it over to Mr. Prout at the same price of $55 an acre, and that it was really a sale from defendant to Prout. Both the defendant and Mr. Macdonald denied that anything of the kind was said. Mr. Macdonald said that he (Macdonald) knew that it was being taken for Prout, but that nothing was said which would lead the defendant to suppose that. All parties agreed that in these last negotiations, which ended in the giving of the option, there was no mention whatever of any commission to be paid to the plaintiff.

After getting the option the plaintiff communicated with Mr. Prout, who went again to Swift Current. The plaintiff then told the defendant that the sale was to be carried out to Prout. The latter paid down at once $500 on the purchase and took a receipt which says at the end "given in pursuance of option . . . made between J. E. Dowdle and S. O. Nixon." Apparently the plaintiff knew the wording of that receipt. He set it out and relied on it in his statement of claim.

A formal agreement was signed later on carrying out the sale as from defendant to Prout. While it was being prepared, Prout suggested that there should be a provision put into it, that the defendant was to pay the plaintiff a commission on the sale. The defendant, Prout and Smyth (in whose office the agreement was prepared) agreed that the defendant thereupon positively refused to pay the plaintiff any commission, saying that, so far as he was concerned, the plaintiff had dealt with him as a purchaser, in taking the option.

The defendant and Mr. Smyth both said that, on the above happening, the defendant went out and shortly returned with the plaintiff, the parties then present being the plaintiff, the defendant and Mr. Smyth. Mr. Prout appeared to have left the office before the defendant returned. The defendant and Smyth swore positively that on the plaintiff and defendant so coming to the office the question of the plaintiff claiming a commission was discussed and that the defendant then declared positively that he would not go on with the sale if the plaintiff claimed any commission from him, and that the plaintiff thereupon agreed that, rather than stop the sale, he would abandon all claim to a commission.

The sale ultimately was carried through without any such provision being made in the agreement, and the plaintiff, according to his own evidence, went back to Winnipeg and thereafter went east. During all this time he made no claim whatever for a commission. He did not instruct the suit to be brought for it, but discovered, on his return from the east, that his partner, Mr. Gough, had caused the present action, which is for that commission, to be brought.

The action was tried before Mr. Justice Macdonald. He held that the original agreement to pay the commission was binding upon the defendant, and gave judgment in favour of the plaintiffs (1 D.L.R. 93) and the defendant appealed. The appeal was allowed.

Messrs. *A. B. Hudson* and *J. E. Adamson*, for plaintiff.

Messrs. *A. C. Galt*, K.C., and *C. S. Tupper*, for defendant.

RICHARDS, J.A.:—Whether the plaintiff would have been entitled to a commission if he had done nothing further than procure Mr. Prout, in the first instance, to buy at $55 an acre, need not now be considered. There is much to be said in favour of the contention that he would. But, with the utmost deference, I think the learned trial Judge has overlooked the effect of the plaintiff taking the option of purchase to himself. Such an action would ordinarily do away with his previous right to a commission, and put him in the position of a purchaser, in which case he would be dealing at arm's length with the defendant and could not claim that he was his agent and entitled to a commission.

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Richards, J.A.

It is true, I think, that, although the plaintiff took the option as he did, he would not be prevented from shewing, if the fact was, that as a part of the same transaction it was agreed that it was merely taken for the purpose of enabling him, as the defendant's agent, to carry out the sale to Prout, and that it was specifically agreed that he was to have a commission; but after taking an option to himself the onus was very strongly upon the plaintiff to prove that state of affairs.

He admits that he did not make any arrangement for a commission when taking the option or carrying out, in pursuance of that option, the sale to Prout. He claims that the defendant knew that Prout was really the purchaser intended by the giving of the option; but the evidence of Macdonald, which I do not think the learned Judge has intended to discredit, contradicts this flatly, and corroborates the evidence of the defendant.

Then there is the evidence as to the interviews when the formal agreement with Prout was being drawn. Prout, who was called by the plaintiff, admits that the defendant positively refused to go on with the sale if he was to be liable to pay a commission to the plaintiff. Prout does say that the defendant stated to him that he supposed the plaintiff would have to have a commission, but he admits that, at what was apparently the same interview, the defendant absolutely refused to, himself, pay any commission. The only conclusion I can draw from that is that the defendant thought that someone else than himself should pay the commission. He may have had Mr. Prout in his mind as the person who should pay it.

Then again there is the interview at which Mr. Smyth and the plaintiff and the defendant are said to have been present, and there again the defendant's story is corroborated by Mr. Smyth's evidence. The plaintiff denies that this interview took place, though he admits having been in Mr. Smyth's office a number of times. Carefully reading the plaintiff's evidence, and bearing in mind that the learned trial Judge had the witnesses before him and the advantage of seeing their demeanour, I am, nevertheless, with regret, obliged to differ from him as to his conclusion that this interview did not take place. It seems to me that the evidence very strongly shews that it did.

Then, there is further the fact that the plaintiff went away and made no claim for commission, acting in all respects as a man would who had expected none, and not as one would have expected him to act if he thought himself entitled to it. I quote shortly an answer, towards the end of his evidence, when called in rebuttal. The question and answer are:—

> Q. You never did claim any commission?
>
> A. Emphatically no, I never did. I never claimed any after that I told Mr. Dowdle I never asked for any commission and I came into this thing when my partner, Mr. Gough, put this matter in the hands of Mr. Adamson.

Mr. Adamson is the solicitor who brought the action.

With the utmost deference to the learned trial Judge, it seems to me that, in deciding this matter, he has overlooked the way in which the onus of proof was affected by the taking of the option to the plaintiff himself.

As the matters in issue are questions of fact, except the point of law as to the effect of the taking of the option on the onus of proof, I have hesitated to disagree with the learned trial Judge, but I can see no other course than to conclude that the plaintiffs have failed to make their case.

I would allow the appeal with costs; set aside the judgment in the Court below, and enter judgment for the defendant there with costs.

PERDUE, J.A.:—This action is brought to recover a commission in respect of a sale of land. Dowdle, the defendant, who resides at Swift Current, Sask., had purchased a section of land at that place, making a small payment in cash. It was his intention to divide the land and sell the lots. Mr. Macdonald, the manager of the Royal Bank of Canada at Swift Current, was looking after the interests of one of the prior vendors of the land. Macdonald, who was acquainted with the defendant, urged him to resell, there being some doubt as to Dowdle's ability to carry through the purchase. Macdonald then introduced Nixon to the defendant as a real estate dealer. Nixon resided in Winnipeg, but had come to Swift Current on business. This was about the 1st of April, 1911. Some negotiations took place between the parties, the evidence in regard to which is contradictory. I prefer, therefore, to take the evidence of Macdonald, who appears to have been a man of standing in the community and a disinterested witness. He says: "I think they agreed that Nixon was to go and look over the property, and the next day or immediately after that they did go and look at the property, and Mr. Nixon told me as a friend that there was nothing doing, that he would not recommend any purchaser to buy these lots. . . . So far as my knowledge goes things were at an end then."

Nixon returned to Winnipeg and Dowdle, having subdivided the property, went to work to sell it in lots. At the time of the negotiations with Nixon, Dowdle had promised to pay Macdonald a commission of $500 if the latter made a sale for him. Shortly after Nixon's return to Winnipeg, Macdonald received a telegram from Nixon, on receipt of which Macdonald saw Dowdle and arranged that Dowdle would sell for $50 an acre. Dowdle almost immediately changed his mind and demanded $55 an acre, and this offer was transmitted to Nixon. Prout, the person who eventually became the purchaser, then came to Swift Current. Prout saw Macdonald and told him he was the purchaser. Macdonald then saw Dowdle, but the latter refused to carry out

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Perdue, J.A.

the sale and asked $250 an acre. When this was communicated to Prout the latter returned to Winnipeg. There is no evidence that Prout's name was mentioned to Dowdle at or before this occasion.

A week or two after Prout's visit, Nixon came to Swift Current and renewed negotiations with Dowdle. Both Macdonald and Nicholson, the manager of the Union Bank, to which bank Dowdle was indebted, were drawn into the transaction, and they used their influence with him to induce him to accept an offer of $55 an acre. Dowdle finally agreed to accept the offer, he stipulating that he was to have $9,600 clear profit to him. At the interview that took place the four persons, Macdonald, Nicholson, Nixon and Dowdle were all present. Macdonald, Nicholson and Dowdle all state that Prout's name was not mentioned, and that the understanding was that Nixon himself was the purchaser.

Immediately after this interview a document was drawn up by Macdonald, signed by Dowdle and delivered to Nixon. The document is as follows:—

> In consideration of the sum of one hundred dollars, receipt of which is hereby acknowledged, I, John E. Dowdle, of Swift Current, do hereby agree to give to S. O. Nixon, of Winnipeg, the right to purchase all of my right and interest in land as follows:
>
> South half of sec. 19-15-13 w. 3rd,
> East half of sec. 18-15-13 w. 3rd,
>
> in the Province of Saskatchewan, for the price or sum of $55.00 (fifty-five dollars) an acre, this option to be valid only until and including the thirtieth day of April, in this year 1911 A.D., said sale to be subject to the provisions of agreement made the thirtieth day of March, 1911, between Thos. E. Pugh, of the city of Regina, and myself.
>
> It is further understood that this option is only binding if a clear title to the properties above mentioned can be given, otherwise the consideration of one hundred dollars is to be returned to the said S. O. Nixon.
>
> It is further agreed that in the event of the said S. O. Nixon exercising his right under this option to purchase the above-mentioned properties, payments are to be made as follows:
>
> The sum of five thousand dollars cash on the execution and delivery of the agreement of the sale from the said J. E. Dowdle, the sum of forty-five hundred dollars on the thirtieth day of April, 1912, and the balance as follows:
>
> May 1st, 1911, five hundred dollars.
> August 1st, 1911, one thousand dollars.
> Nov. 15th, 1911, three thousand dollars.
> Feb. 15th, 1912, eleven hundred dollars.
> May 15th, 1912, eleven hundred dollars.
> Aug. 15th, 1912, nine hundred dollars.
>
> Six annual equal payments of three thousand dollars each, to be paid on the 25th day of February, 1912, 1913, 1914, 1915 and 1916 and 1917. Interest to be at the rate of seven per cent. per annum.

IN WITNESS WHEREOF the parties to the agreement have set their hand and seal this twenty-seventh day of April, nineteen hundred and eleven.

J. E. DOWDLE.
S. O. NIXON.

Witness:
C. D. MACDONALD.

The above document was put in evidence by the plaintiff, who attempted to prove by it that he had made a sale of the land. The document on its face shews that Nixon himself was the purchaser and that he paid $100 for the option given by it to him.

The learned trial Judge makes, in regard to the above document, the following finding:—

I am satisfied that the defendant knew that the plaintiff Nixon was not the purchaser at the time of giving him the option, and that the option was given for the purpose of enabling Nixon to conclude a sale with Prout, which he succeeded in doing.

I must say, with great respect, that in making this finding the learned trial Judge completely overlooked the evidence of Macdonald and Nicholson, two witnesses of high standing, both of whom had no interest in the subject matter of this suit.

Macdonald's evidence on this point is:—

Q. And from the conversation that took place can you just give us your idea as to whether Mr. Dowdle was in any way given to understand that Nixon expected a commission?

A. Not in any way.

Q. From the tone of the conversation and the agreement as it was made, previous to signing the option, who was the prospective purchaser of this property as far as you remember?

A. From the tone of the conversation Mr. Nixon was purchasing the property.

Q. That is what anyone would understand from the conversation?

A. That is what Mr. Dowdle would understand.

Q. When you say Mr. Dowdle, do you mean that you had any further information yourself?

A. I knew, of course, from what had passed previously that Nixon himself was purchasing for another party.

Q. Was that explained to Dowdle in any way at that time?

A. No, it was not.

In Nicholson's evidence, after stating that Nixon, Macdonald and Dowdle came to his office on the occasion in question, he was asked certain questions and gave answers as follows:—

Q. What took place?

A. Mr. Nixon said he was contemplating buying this property and as we were interested, should like to let us know that he was going to do something. Now, the price set, I think, was $10,000 on that.

* * * * * *

Q. What was the upshot of the thing?

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Perdue, J.A.

A. Well, the upshot of the thing was, I told Mr. Nixon I didn't think the bank wanted to stand in the way of Mr. Dowdle if he wanted to sell, if he wanted the sale to go through, and we were perfectly willing to let him sell it if he cared to sell it to him, and immediately after that Mr. Dowdle, Mr. Nixon and Mr. Macdonald went over to the Royal Bank.

Q. There is no doubt in your mind that Mr. Nixon was there, the gentleman in the room now?

A. Oh, there is no doubt about that.

Q. He was there in the room?

A. Yes.

Q. Was there any suggestion made of any kind of anybody being interested but Nixon?

A. But Nixon?

Q. Yes?

A. Suggested how?

Q. That he was interested otherwise than as a purchaser?

A. No.

From a careful study of the evidence I have come to the conclusion that Dowdle never heard of Prout in the transaction until after the option was given to Nixon.

On 1st of May Prout appeared and took up the option Nixon had secured. The money required by the option to be then paid was paid by Prout, and the following receipt was given:—

Swift Current, May 1st, 1911.

Received from Geo. W. Prout, through S. O. Nixon, $500.00 (five hundred dollars), being payment on purchase money of S. ½ of 19-15-13, also E. ½ of 18-15-13, at $55.00 (fifty-five dollars) an acre, given in pursuance of option dated the 27th day of April, 1911, made between J. E. Dowdle and S. O. Nixon.

(Sgd.) J. E. DOWDLE.

Dowdle states that he did not meet Prout on that occasion, but he signed the above receipt prepared by Macdonald, in which Prout's name appears, and he must be taken to have received notice then that Prout was taking the place of Nixon under the option. The receipt shews on its face that it is given in pursuance of the option granted to Nixon.

On 17th May a formal agreement was executed by Dowdle at Swift Current in the office of Mr. Smyth, a solicitor. Mr. Smyth gives a very clear account of what occurred on that occasion. Prout proposed that a clause should be put in the agreement that Dowdle should pay Nixon a commission. Dowdle, who was present, objected strongly to this. Mr. Smyth says that he then suggested that an interview should take place between Dowdle and Nixon to arrange the matter. Accordingly Dowdle went out and after an hour or less returned with Nixon. Prout was not then present. Nixon claimed he was entitled to a commission, but Dowdle refused to sign the agreement if this was insisted upon. Finally Nixon said that he would not let the question of commission stand in the way of the deal going through and to go ahead

with the papers. Dowdle then executed the agreement. The evidence of Smyth as to this interview is corroborated by Dowdle, and, to a certain extent, by Prout.

In reference to Smyth's evidence as to what took place at this interview, the trial Judge says: "I cannot but believe that the witness Smyth is mistaken, or that he has confused Prout and Nixon." With great respect, I must say that there is, in my opinion, no ground for such an inference. Smyth had first met Prout as the purchaser from Dowdle, and the terms of the agreement were discussed between Prout and Dowdle in Smyth's presence at his office. When the question of commission arose Nixon was brought by Dowdle to Smyth at the office of the latter to discuss this question. I cannot believe that there was any such confusion as the learned trial Judge suggests.

The trial Judge appears to have been much impressed with a statement made by Dowdle that Nixon never claimed a commission and that he never heard of such a claim except through the Court. No doubt Dowdle does make that statement, but he took the ground all along that Nixon had not asked for a commission and that he (Dowdle) had never agreed to pay him one. I think Dowdle meant his statement only to apply to what took place prior to the meeting of 17th May. He distinctly states that at this interview in Smyth's office Nixon "told Mr. Smyth if the deal would not go through with commission to call it off, that he was not looking for anything and didn't want any."

I think, with respect, that the trial Judge, in dealing with the question, overlooked the effect of Nixon taking an option to purchase in his own name, an option which in fact was simply transferred to Prout. Even if the trial Judge's finding that Dowdle had agreed at the first interview to pay Nixon a commission if the latter made a sale, be adopted, the taking of the option in Nixon's name imposed on the latter the onus of proving that, although he appeared as purchaser, Dowdle had again agreed that he should receive a commission. Far from establishing this, Nixon admits that when the option was taken nothing was said about commission, and no claim was made for commission until the sale had gone through. Further, when Nixon was questioned as to his visit to Smyth's office on the occasion above referred to, the following strange and damaging passage is found in his evidence:—

> Q. What business were you there on?
>
> A. I could not tell you that, nothing to do with this case. I was sent for and asked for with regard to this case, but I didn't go there for that. The case went out of my hands after that.
>
> Q. You never did claim any commission?
>
> A. Emphatically no. I never did. I never claimed any after that. I told Mr. Dowdle I never asked for any commission and I came into this thing when my partner, Mr. Gough, put this matter in the hands of Mr. Adamson.

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Perdue, J.A.

In endeavouring to establish his case Nixon is unfortunate enough to be contradicted on important points, not only by the defendant and by three independent witnesses, Macdonald, Nicholson and Smyth, witnesses filling important positions in their community, but also by the document forming the very foundation of the sale, a document which shews Nixon as a purchaser from Dowdle and not as an agent of Dowdle.

I think Nixon completely failed to alter this position and to shew that notwithstanding the statements in the document he was really an agent for the vendor, and that notwithstanding his appearance in the guise of a purchaser he had a contemporaneous agreement that the vendor would pay him a commission when another man was produced willing to take his place as purchaser.

I think the appeal should be allowed with costs; the judgment already entered set aside, and a judgment entered for the defendant with costs in the Court of King's Bench.

CAMERON, J.A.:—According to Nixon's evidence he first saw Dowdle at Swift Current with reference to the property in question about the 1st of April, 1911. Dowdle then spoke to him about subdividing the property and selling it in Winnipeg. It was suggested that Nixon should represent Dowdle in the matter. Nixon, however, advised against this project of subdivision and it was dropped. A few days after this Nixon says he saw Dowdle again and arrangements were then concluded to sell the property at $55 per acre. "And if I made a sale of the property—it was stated in general terms—that if I made a sale of the property I was to receive 5 per cent." A day or two after this Nixon returned to Winnipeg and succeeded in interesting D. W. Prout in the property. Prout went up to Swift Current to see Dowdle and the property and Nixon went with him either on this or a subsequent visit. When Prout came back he told Nixon that the price had been raised to $250, but that he was willing to give $55. Nixon then went to Swift Current again where he saw Dowdle and Dowdle alone. He says:—

> I got talking to Mr. Dowdle again about the property and I told him then that Mr. Prout would still take the property if he would sell it at $55 an acre, and after some talking and discussing the matter, considerable talking and discussing the matter or deal, Mr. Dowdle decided that he would take $55 an acre for the property.
>
> Q. And what was done?
>
> A. Mr. Prout said that he would not go back to Swift Current again unless he had something tangible, something to shew him that the property could be delivered, and Mr. Dowdle decided that he would take $55 for his property, sell it to Mr. Prout for that much money, and an option was drawn up.

The option was drawn up by Mr. Macdonald, the manager of the Royal Bank, in Nixon's favour, and Nixon says of it:—

> The option was drawn at the suggestion of Mr. MacDonald, and he simply drew the option and drew it in that form, the idea of the

option was just simply that I might have something definite or tangible to shew Mr. Prout that we could deliver the property.

He further says that at the time the option was given Prout's name was mentioned repeatedly in Dowdle's presence, and that all concerned understood that Prout was the real purchaser.

The option is dated April 27th and is expressed to be for the consideration of $100 then paid and to be valid up to and inclusive of April 30th only.

Nixon says he then telegraphed Prout, who came up and paid Dowdle $500, taking from him a receipt in the following form:—

Swift Current, May 1, 1911.

Received from Geo. W. Prout through S. O. Nixon five hundred dollars, being payment on purchase money of S. ½ of 19-16-13, also E. ½ of 18-15-13 at fifty-five dollars an acre, given in pursuance of option dated the second day of April, 1911, made between J. E. Dowdle and S. O. Nixon.

J. E. DOWDLE.

The formal agreement was executed May 17th by Dowdle (at a subsequent date in Winnipeg by Prout) without any reference to Nixon, who was not present and did not consider himself interested in the transaction, so he says, after the payment of the $500 (p. 21).

The foregoing is the history of the case from Nixon's point of view, which the learned trial Judge adopted. His claim is that he had an express bargain for a commission on the sale of the property, that he secured a purchaser and is therefore entitled to his remuneration. The option made out in his name was, he says, so expressed for the purpose of holding Dowdle to his offer and of thereby satisfying Prout of his ability to secure a proper agreement from Dowdle and for no other purpose, and that he was not and never intended to be a purchaser of the property; of all of which Dowdle was aware.

Nixon says, on cross-examination, that:—

The option was given for the express purpose of shewing that I could deliver the land, and when Mr. MacDonald drew the option he knew Mr. Prout was the purchaser. Mr. Dowdle knew that Mr. Prout was the purchaser, and when Mr. Prout came upon the scene he gave him $500 and I had nothing more to do with it.

Nixon is a clergyman of the Presbyterian denomination who, owing to illness, had discontinued his active connection with the church and had diverged into the real estate business, though not to the extent of wholly renouncing his former vocation, as the evidence shews. The story told by him in the witness box covers a short period of time, comprising three visits to Swift Current and a few interviews with Dowdle, the vendor, and Prout, the purchaser. Yet that story is challenged at practically every material point by other witnesses and in some particulars

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Cameron, J.A.

by his own evidence. It is also at variance with the documentary evidence, as it is manifest that the option (or agreement for sale) made by Dowdle as vendor directly to Nixon as purchaser is absolutely destructive of any agency agreement previously existing, if there had been such. If we are to accept Nixon's story that the option was merely a means to an end and this to Dowdle's knowledge, and that its effect is inoperative so far as any previous agreement of agency is concerned, then it is surely necessary that the plaintiff's claim as set out in the pleadings be satisfactorily and conclusively established, and that the evidence nullifying the effect of the documentary evidence be of the most convincing character before we can disregard it.

The account of the transaction given by Dowdle is very different from that of Nixon. When asked if he remembered the conversation in the course of which Nixon said he had promised him 5 per cent. commission on the sale of the property in question, he said: "If I was to be struck dead this minute I never mentioned a 5 per cent. commission to him."

Dowdle says Mr. Macdonald introduced Nixon to him as a prospective buyer, that a couple of days after the introduction he went with Nixon to the office of the Union Bank, where he, Nixon, Nicholson, the manager of the Union Bank, and Macdonald, the manager of the Royal Bank, talked the matter over, and he (Dowdle) states that the amount of $10,000 profit arising out of the transaction to be nett to him, was mentioned at this conference. Dowdle says that he and Nixon and Macdonald then went to the office of the Royal Bank, where Macdonald drew up the option at $55 an acre, which gave Dowdle $9,600 nett, instead of $10,000, whereupon objection was made by Dowdle, who says he finally agreed to take the $9,600. Dowdle swears he said at the time, "I will take the $9,600, $9,600 nett profit to me, no commission to be paid and no commission to you (Nixon)." He further stated to the presiding Judge that the option was made out in Nixon's name and that he sold the property to him (Nixon) at $55 an acre nett, and that Nixon never asked for commission until proceedings were taken.

Mr. Nicholson says that he was present at the interview with Nixon, Macdonald and Dowdle, and that Nixon there and then stated that he was contemplating buying the property. Mr. Nicholson states positively that it was not suggested that Nixon was interested other than as purchaser.

Nixon's statement is that he told Dowdle that Prout was the purchaser.

> A. Mr. Dowdle knew that the option was being drawn and that the property was to be purchased by Mr. Prout, notwithstanding that the option was being drawn in my name and Mr. MacDonald knew that and I knew it.
>
> Q. How did Mr. Dowdle know that?

> A. Because I had mentioned Mr. Prout's name to him right at the very start, when I got into contact with him.

This last answer is difficult to understand. If the last "him" refers to Dowdle, the answer is clearly erroneous according to Nixon's own evidence in chief. If it refers to Prout it must also be erroneous according to Nixon's evidence, because he (Nixon) did not go up to Swift Current to see Dowdle until after Prout's return with the information that Dowdle had raised the price of the land to $250 per acre. Dowdle says, on the other hand, that when the option was signed he did not know of Prout's existence (p. 48). Macdonald says that at the meeting when the option was signed Nixon was taken as the purchaser and that it was not explained to Dowdle in any way that Nixon was purchasing for another party. Nicholson says that Nixon was the purchaser and there was no suggestion of any one else being interested (p. 117).

Dowdle's statement (p. 43) that Nixon never asked him for a commission until the commencement of the action is contradicted not only by Prout (p. 28) and by Nixon, but by Smyth, who says that Nixon did ask him on the occasion when Nixon and Dowdle met in Smyth's office at the time of the execution of the agreement by Dowdle, about May 16th or 17th, and that Nixon then abandoned his claim to any commission rather than interfere with the consummation of the sale. As to this statement Nixon says, when recalled, he never made any such agreement to abandon, and (p. 131) "never for one moment" understood that he had abandoned his claim. Nixon at p. 15 said he had never spoken about his commission to any one but Dowdle, but he did not adhere to this story (p. 16), as he says he discussed it with Macdonald. He (at p. 21) denied that any of the parties had seen him with reference to the agreement when it was being drawn up and concluded. When asked the question:—

> I want you to be very particular about the time that this agreement was executed, because we have some evidence to the contrary, that one of the parties, Mr. Dowdle, absolutely declined to sign this thing unless it was perfectly clear that you were not entitled to any commission. Did anybody go out to see you about that?
>
> A. No.
>
> Q. To see you about that at all?
>
> A. No, I don't remember the first thing about it.

This was in Nixon's original cross-examination. Smyth, in his evidence, gave a circumstantial account of what took place in his office on the occasion of the meeting above referred to when Nixon, on the one hand, claimed a commission, but Dowdle, on the other, declared that he had given the option to Nixon, that if he (Nixon) had substituted anyone else it was none of his (Dowdle's) business, that the price was a nett price, and that "if they were not satisfied with it in that way that the deal was

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Cameron, J.A.

off and that he (Dowdle) would keep the property." Finally Nixon said, "He would not let the question of commission stand in the way of the deal going through." After Smyth had given this evidence, Nixon, recalled, was cross-examined as follows:—

Q. You also told me yesterday you never attended any meeting in Mr. Smyth's office in connection with this agreement?

A. Neither I did.

Q. What Mr. Smyth has told us this morning is all wrong, is it?

A. Mr. Smyth is absolutely wrong in this statement that he makes about Mr. Dowdle and I discussing the commission.

Q. Were you present in his office?

A. I may have been in his office once or twice, but I was not there officially, I was never there directly in connection with this business.

Q. It was not true what you said yesterday that you were not there?

A. Directly in connection with this matter, and that is what I understood.

Q. You told me yesterday that you were not there?

A. Yes.

Q. Now you admit that you were there?

A. Yes, but not in connection with this business, to discuss the business of commission with Mr. Dowdle.

On his cross-examination Nixon said distinctly that he never spoke to anybody about this commission except to Mr. Dowdle. Later, he admitted, however, that there had been a discussion on the subject by him with Macdonald—"the suggestion was made to me, in fact, in connection with that commission, by Mr. Macdonald, suggesting that clause himself." But Macdonald's evidence is that Nixon repeatedly asked him to see the solicitors and see that a clause was inserted that the usual commission of 5 per cent. was paid. Confronted with this statement Nixon gave it a positive denial.

There are two other important points on which there is a conflict of evidence. Dowdle says that after the option was drawn up by Macdonald he noticed that the sale for $55 per acre did not give him $10,000 nett, but $9,600, and objected, but that Nixon said that $9,600 was over $9,000 and was called $10,000. Thereupon Dowdle said, "I will take the $9,600, $9,600 nett profit to me, no commission to be paid and no commission to you." This is positively denied by Nixon (p. 19). But Macdonald is clear on this (p. 105). Nicholson's evidence is apparently to the same effect (p. 118). Dowdle also states that Nixon found fault with his title to the property (p. 43). Nixon denies this (p. 132).

Q. You remember raising the question of the flaw in the title?

A. No, I did not, I never did. Why, no, I never raised it, I knew nothing about the title.

Q. Did you never make any suggestion as to the title?

A. No, I could not and never did in my life.

Nicholson, however, says it was Nixon who suggested a flaw in the title (p. 117).

At the interview when the option was drawn up and signed there were present, according to Nicholson (p. 116), Dowdle, Nixon, Macdonald and himself. Nicholson gives in detail what then occurred and what Nixon then stated. Originally Nixon denied seeing Nicholson at all (p. 20). But at p. 130 Nixon, when recalled, explains why he and Dowdle went "to explain to Mr. Nicholson the facts of the prospective sale of the property." On cross-examination Nixon gave the following evidence:—

Q. I think you also told us that you never met Mr. Nicholson in your life about this matter, didn't you?

A. So far as the sale of the property was concerned.

Q. So far as anything was concerned?

A. No, I never said that I never met Mr. Nicholson, I never said that I never met Mr. Nicholson, I never said that, but not in connection with the sale of this property.

Q. You don't deny now that you met him, that you were present at that interview with Mr. Nicholson and the others in the Union Bank, or do you?

A. I think it is already explained.

Q. I am asking you the question?

A. I am trying to answer your question, Mr. Galt, that the suggestion was made, not by me at all, but by either Mr. Dowdle or Mr. MacDonald, I can't tell you which, but Mr. Nicholson was interested as a matter of fact and that appeared on some previous conversation with Mr. Nicholson that Mr. Nicholson was interested as far as Mr. Dowdle was concerned.

Q. I am not asking you about that, I am asking you if you were present at that interview that has been spoken of, were you present?

A. I was present when they went up to see Mr. Nicholson, if he would consent to the sale of the property, and he was satisfied.

It is the fact that Prout says that Dowdle told him he expected to pay Nixon a commission (p. 28). This was on the occasion of the third of the three visits that Prout made to Swift Current in this matter after the receipt but before the formal agreement was given. Subsequently he (Prout) says he drew attention to the fact that there ought to be some clause in the agreement about Nixon's commission. He was asked:—

Q. Now do you remember what Mr. Dowdle said to that?

A. Mr. Dowdle said that he didn't expect to pay Nixon a commission.

And later:—

Q. Mr. MacDonald suggested that to you?

A. Yes, Mr. MacDonald suggested that to me.

Q. Mr. Nixon didn't?

A. He may have suggested it. I mean he may have discussed it.

These two statements were apparently made, according to Prout, while he was having the title to the property put in order,

MAN.

C. A.
1912

NIXON
v.
DOWDLE.

Cameron, J.A.

and he says they were at least a day apart. It is difficult to see how it can be said that Prout's evidence corroborates the plaintiff's story.

As to the meeting in Smyth's office, on his cross-examination, Nixon denied having seen any of the parties with reference to the matter after the option was obtained and specifically denied, when recalled, any abandonment of his commission in Smyth's office. Dowdle states positively that Nixon was present at this meeting (p. 90) and that Nixon there told Smyth "if the deal would not go through with commission to call it off, that he (Nixon) was not looking for anything and didn't want anything." Smyth (p. 121), as I have noted, goes at considerable length into the details of this conference and fully corroborates Dowdle. On cross-examination Nixon did not adhere to his story that he had not seen any of the parties after the option was signed. An extract from his cross-examination is given above. At the conclusion of his cross-examination when recalled he is asked by the trial Judge:—

Q. You do recollect being in Mr. Smyth's office?
A. Yes.

And later on by Mr. Galt:—

Q. You have heard Mr. Smyth swearing that you were in his office?
A. I am not swearing I was not.

Now, there was no allusion at that meeting by Nixon to his claim for commission as originally made. And if any claim arose whether at the inception, during the progress or at the conclusion of the transaction, if Nixon told Dowdle that he abandoned his claim in order to allow Dowdle to bring it to a determination on that understanding, then it would be singular indeed if the plaintiff could be permitted to press his claim to a successful conclusion.

The events connected with the meeting in the office of Smyth and Begg, taken as established, can be looked at in two ways. In the first place, there was the failure of Nixon to press his claim for commission on the basis of the original agreement as alleged by him. In the second place, there was a distinct waiver or abandonment by him of any claim for commission, as a result of which Dowdle proceeded to, and did, complete the transaction, which he would not otherwise have done. It seems to me that there can then be no escape from the conclusion that it is not now open to the plaintiff to assert a claim under the original alleged agreement or otherwise. It is true that this matter of defence is not pleaded as such, but the facts have been placed in evidence, and are before us for consideration. Besides an estoppel *en pais* in general need not be pleaded to make it obligatory: *Freeman* v. *Cooke*, 18 L.J. Ex. 114; Ruling Cases, XI., 82. The party, without pleading it, may take advantage of

the estoppel derived from the rule laid down in *Pickard* v. *Sears*, 6 A. & E. 474. See Williams Saunders, 325 a. note d. Even if that be not the rule, under our present system of pleading, there would be no difficulty in making an amendment to conform with the evidence.

I have much hesitation in differing from the learned trial Judge in his findings. No doubt he had advantages at the trial that are not available to us in appeal. But it does seem to me that the plaintiff has not adequately met the requirement to establish beyond a reasonable doubt the existence of the agreement to pay a commission alleged by the statement of claim, a requirement primarily imposed by the admission of documentary evidence introduced by himself. And this requirement is strengthened by the nature of his own evidence and of the antagonistic evidence put in by the defence.

I have not lost sight of those portions of the evidence that point in favour of the plaintiff's contention. It is true that Macdonald looked upon Prout as the real purchaser, but he does not go so far as to say that Dowdle knew this. Macdonald says that the option was drawn at his own suggestion and for the purpose indicated by Nixon, and the fact that Nixon telegraphed Prout, and that Prout forthwith came to Swift Current, together with the fact that the option was for three days only, all these go to support the plaintiff's view. It is also the fact that Dowdle's evidence is in places open to the charge of inaccuracy, and is wanting in clearness. Notwithstanding these facts, which cannot be gainsaid, I must express my humble opinion that the plaintiff has not met the necessities of this case, that he has not succeeded in displacing the effect of the documentary evidence, that his own evidence is unsatisfactory and inconsistent with itself in important particulars, and that his halting and uncertain denial of the meeting in Smyth's office cannot be accepted. I think that the learned trial Judge did not attach sufficient weight to the effect of the documentary evidence and that the plaintiff has not given such a clear, straightforward and convincing account of the circumstances as enable him to surmount the formidable obstacles standing in the way of his success in this case.

HOWELL, C.J.M., concurred.

Appeal allowed.

SASK.

S. C.
1912

Mar. 5.

LOCK (plaintiff, appellant) v. SNYDER (defendant, respondent).

Saskatchewan Supreme Court, Brown, J., in Chambers. March 5, 1912.

1. APPEAL (§ VII—I—346)—SECURITY FOR COSTS—DISCRETION.

Leave to appeal from a Local Master's disposition of costs on the dismissal of an application for security for costs is not necessary under rule 622 of the Saskatchewan Rules of Court, 1911.

[*Foster* v. *Edwards*, 48 L.J.Q.B. 767, followed.]

2. APPEAL (§ VII—I—346)—DISCRETIONARY MATTERS—COSTS.

On an appeal from a Local Master's disposition of costs on refusing an application for security for costs under Rule 622 of Saskatchewan Rules of Court, 1911, though no leave to appeal is necessary, the order should be dealt with on the same principle as a discretionary order where leave to appeal is necessary and has been obtained, and on such appeal the appellate Court will not interfere with the discretion exercised by the Court below unless there has been a violation of principle or a misapprehension of facts.

[*In re Gilbert*, 28 Ch. D. 549; *Young* v. *Thomas*, [1892] 2 Ch. 134, specially referred to.]

AN appeal by the plaintiff from an order of the Local Master at Moose Jaw imposing the payment of costs on the plaintiff after dismissing an application made by the defendants for an order for security for costs.

The appeal was dismissed.

J. A. Allan, for plaintiff, appellant.

N. Mackenzie, K.C., for defendants, respondents.

BROWN, J.:—This is an appeal from an order made by the Local Master at Moose Jaw on an application for security for costs. By his order the Local Master dismissed the application of the defendant, and ordered the plaintiff to pay the costs; and the plaintiff appeals, claiming that the Local Master is wrong in ordering him to pay the costs. It is objected on behalf of the respondents that the question of costs is in the discretion of the Local Master, and that by virtue of Rule 646 there is no appeal except by leave. No leave was obtained in this case. The appeal is taken under Rule 622, and it has been held under a similar English rule, with which holding I agree, that no leave is required: *Foster* v. *Edwards*, 48 L.J.Q.B. 767. The order as to costs is within the power of the Local Master (Rule 620), and it is discretionary with him (Rule 709).

I am, therefore, of the opinion that, although no leave is necessary, yet the order should on appeal be dealt with on the same principle as a discretionary order where leave is necessary and has been obtained under Rule 646. In such a case the Appeal Court will not interfere unless there has been a violation of principle or misapprehension of facts: *In re Gilbert*, 28 Ch. D. 549; *Young* v. *Thomas*, [1892] 2 Ch. D. 134.

In this case I fail to find any such ground for interference. The writ was issued on January 13th, 1912, and the plaintiff's address and occupation is given in the statement of claim and other proceedings in the section as of Calgary, Alberta, rancher. The plaintiff's solicitors at Moose Jaw issued a writ under in-

structions from his solicitors at Calgary. In the instructions the Calgary solicitors described the plaintiff as of Calgary, rancher. The Moose Jaw solicitors issued the writ believing that the plaintiff's place of abode was Calgary, and they were not aware of any change in the plaintiff's address until January, 29th, 1912. As a matter of fact the plaintiff was not at the time of the issue of the writ resident at Calgary; he had changed his residence from Calgary to Moose Jaw as far back as April 6th, 1911, nine months before the issue of the writ. The defendants' application was dismissed owing to the fact that at the time of the application the plaintiff was resident within the jurisdiction. But the application proved abortive, and the costs in connection with same were incurred because of the wrong address given in the plaintiff's proceedings. This, it is true, was done in mistake, but it was a mistake which should not, in any degree, be saddled upon the defendants. If the change in address had been made after the issue of the writ and before the application for security, there would be force in the argument that the costs of both parties should be costs in the cause; but the case here is entirely different. It is contended on behalf of the appellant that the defendants' solicitors knew that the plaintiff was resident in Moose Jaw before they made the application for security for costs, and the affidavit of the plaintiff is relied upon to support that contention. That affidavit does not go as far as contended for. It simply shews that the defendants' solicitors acted for the Canadian City and Town Properties, Limited, a company doing business at Moose Jaw, and of which the plaintiff was the manager at Moose Jaw; and that by virtue of the business done for that company in their office they (the defendants' solicitors) should have known that the plaintiff was the same person as the manager of the said company.

It also sets out that the plaintiff, before application was made for security, telephoned the defendants' solicitors informing them that he and the manager of the company were one and the same person. There is, however, nothing in this affidavit which shews that the defendants' solicitors knew or ought to have known that the plaintiff had changed his place of abode from Calgary to Moose Jaw. He may have been doing business in Moose Jaw as manager of that company without that place necessarily being his place of abode. And, in view of the address given by the plaintiff in his proceedings, the defendants' solicitors would quite naturally assume that Calgary was still his proper place of abode. The plaintiff has not shewn that the defendants or their solicitors knew or ought to have known of the change; I am, therefore, of opinion that the order of the Local Master is right, and have no hesitation in saying it is one that I should not interfere with.

The appeal will be dismissed with costs.

Appeal dismissed.

MAN.

K.B.
1912

May 7.

ROSS v. WEBB.

Manitoba King's Bench, Robson, J., in Chambers. May 7, 1912.

1. STAY OF PROCEEDINGS (§ I—12)—WANT OF AUTHORITY TO PLAINTIFF'S SOLICITOR—MOTION BY DEFENDANT.

Notice of an application by the defendant to stay the action on the ground that the solicitor purporting to act for the plaintiff is not authorized to do so, must be served upon the plaintiff personally as well as upon the solicitor who is prosecuting the action, and the Court will so order although no objection to the want of notice is taken by the solicitor whose authority is in question.

[*Thatcher* v. *D'Aguilar*, 11 Ex. 436, and *Barrie* v. *Weaymouth*, 15 P.R. (Ont.) 95, specially referred to.]

APPLICATION by defendants to stay the action because, as alleged, brought by a solicitor without plaintiff's authority.

The motion was adjourned to be brought up again on serving the plaintiff personally, as well as his solicitor.

C. H. Locke, for defendants.

G. A. Elliott, for solicitor.

ROBSON, J.:—The notice of the application was served on the solicitor who commenced the action. The solicitor appeared on his own behalf on the hearing of the application. No one represented the plaintiff. It does not appear that he was notified of the application. Objection of want of notice to the plaintiff was not taken. "When an application is made by a defendant to stay proceedings on the ground that the solicitor is prosecuting the action without the plaintiff's authority, the practice is to make the plaintiff a party to the motion: *Thatcher* v. *D'Aguilar*, 11 Ex. 436," cited in *Town of Barrie* v. *Weaymouth et al.*, 15 P.R. 95. The fact that objection was not taken does not, in my view, justify proceeding without notice to plaintiff. I direct that the motion stand over until a subsequent day, of which notice must be given to plaintiff personally and to the solicitor.

Motion stands adjourned.

GREENWOOD v. BANCROFT.

B.C.

C. A.
1912

April 1.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 1, 1912.

1. CONTRACTS (§ I C 2—37)—LEASE—FORBEARANCE TO BRING ACTION—SUFFICIENCY OF CONSIDERATION.

Where a landlord in misconception of his legal rights *bonâ fide* believing that a lease had been terminated, forbears bringing an action to enforce this claim against a tenant who is in possession claiming to have exercised an option to renew contained in the original lease, for a further term of five years, by an unsigned notice in writing, such forbearance is sufficient consideration to support the compromise effected whereby two years of the alleged renewed term was surrendered.

[*Callisher* v. *Bischoffsheim* (1870), L.R. 5 Q.B. 449, followed; see also *Cook* v. *Wright*, 1 B. & S. 559, and *Brandon Elec. Light Co.*, v. *Brandon*, 1 D.L.R. 793.]

2. ESTOPPEL (§ III G 2—94)—ACQUIESCENCE OF TENANT IN FIXING TERM.

A tenant after having given notice of the exercise of an option to renew a lease, but which notice is unsigned, and who agrees in writing to surrender two years of the renewal term of five years, is estopped from asserting that the renewed term was to exist for more than three years.

[See, also, *Brandon Electric Light Co.* v. *Brandon*, 1 D.L.R. 793.]

3. LANDLORD AND TENANT (§ II C—24)—LEASE—NOTICE OF EXERCISE OF OPTION TO RENEW.

A notice by a lessee, purporting to exercise an option to renew the existing term, pursuant to a condition in the original lease for a "notice in writing" of exercising such option, is of no legal effect unless it is signed. (*Per* Irving, J.A.)

AN appeal by the plaintiff from the judgment of Gregory, J., dismissing the action.

The appeal was dismissed.

J. A. Aikman, for the appellant, plaintiff.

H. A. Maclean, K.C., for the respondent, defendant.

MACDONALD, C.J.A.:—I would dismiss the appeal.

IRVING, J.A.:—The defendant, by an agreement under seal, dated 4th September, 1902, obtained from Mr. Redfern a lease of the premises known as 45 Government street for a term of five years, to date from the surrender of the then tenants, rent payable monthly in advance, with the option to take the premises for a further term of five years at an annual rent of $1,080, to be payable and paid in the same manner; and it was stipulated that if he should elect to exercise the option aforesaid, he should give six months' notice in writing of his intention.

The defendant took possession on 22nd December, 1902, I gather, and the term would expire on the 23rd of December, 1907, and on the 4th or 6th March, 1907, delivered to E. Crow Baker a written notice, dated 4th March, 1907, of the exercise by him of his option. The notice was not signed.

B.C.
C. A.
1912
GREENWOOD
v.
BANCROFT.
Irving, J.A.

On the 22nd November, 1906, Mr. Redfern conveyed to Messrs. Edgar Crow Baker and A. C. Flumerfelt, and on the 17th November, 1909, they conveyed to the plaintiff, who, on the 21st March, 1911, brought this action. His claim was that no proper notice of the exercise of the option had been given after the lease had expired, and that later, namely, on 8th February, 1908, the defendant had agreed to accept in lieu of the five-year extension a three-year extension which did terminate on 23rd December, 1910. The defendant wrote the letter, Ex. B., p. 45:—

> I agree to take off from my lease two years on the premises that I occupied known as old No. 45, New No. 1013, Government St. Redfern's Block, City of Victoria, B.C.
>
> Yours very truly,
> ART BANCROFT.

The plaintiff on 8th March accepted two months' rent at $90.00 for the interval between 23rd December, 1907, and 23rd February, 1908.

The defendant says that he delivered on the 6th March, 1907, duly signed notices, and that the consideration for the letter (Ex. 2) was a verbal promise by E. Crow Baker, that if he would knock off two years from the extension, he (Baker) would build certain additions which the defendant was anxious to have, and which had been discussed in 1907; for these additions the defendant was to pay $25.00 extra.

The defendant says that this promise has never been fulfilled; that in April, 1908, E. Crow Baker told him that he could not carry out his agreement.

All the documentary evidence is against this statement of facts made by the defendant, and the trial Judge quite rightly declined to accept his story.

The defendant did not give the notice required by the original lease, an unsigned notice did not bind him.

The case of *Fenner* v. *Blake*, [1900] 1 K.B. 426, seems to me to be an authority in the plaintiff's favour on two grounds, (1) that there was a surrender by operation of law; and (2) the letter of 8th February, 1908, creates an estoppel which prevents the tenant from saying that his tenancy was to last longer than three years.

I would dismiss the appeal.

GALLIHER, J.A.:—I think the appeal should be dismissed. I accept the evidence of the witness Crow Baker that the only time when it was agreed that he and his co-owner should erect an addition to the premises for which the defendant was to pay extra rent was in 1907, when the new lease was prepared and tendered, and which lease the defendant on advice of counsel refused to sign.

This being so, it forms no part of the consideration for the document, Exhibit B, as alleged by defendant.

It was contended by appellant that other than this promise to improve the premises, there was no consideration for this document which is in effect a release of two years of the renewal term under the agreement between Redfern and the defendant.

I agree with the learned trial Judge that while Mr. Crow Baker misconceived his legal rights, he made his claim honestly and *bonâ fide* believing the term had ended, and the forbearance to bring action to enforce that claim was a good consideration for the compromise which was effected: *Callisher v. Bischoffsheim* (1870), L.R. 5 Q.B. 449.

Mr. Aikman also contended that the surrender of a portion of a term granted by instrument under seal must be by writing under seal, but this is, I think, fully covered by the words of our statute ch. 20, sec. 3, of 1903-4, which are "by deed or note in writing signed by the party . . . surrendering the same."

The further objection was raised by Mr. Aikman that it was not shewn that Crow Baker had any authority to bind his co-owner Flumerfelt, but as this point was not taken in the Court below, and is not raised on the pleadings, or in the notice of appeal, I decline to consider it.

Appeal dismissed.

CONSUMERS CORDAGE CO. (plaintiffs, appellants) v. BANNERMAN (defendant, respondent).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. February 20, 1912.

1. LANDLORD AND TENANT (§ II B—12)—COVENANT TO REPAIR—RESCISSION OF LEASE—DISCRETION OF COURT.

Where a lessee, by *mise-en-demeure*, has demanded the execution of repairs by a lessor, and the lessor, in accordance therewith, has proceeded with the repairs, which, though still unfinished at the date of the commencement of the lessee's action for rescission under article 1641 of the Civil Code of Quebec, are yet completed before the trial thereof, the Court has a discretion to refuse rescission.

2. COVENANTS AND CONDITIONS (§ III A—28)—BREACH OF COVENANT TO REPAIR—CONTINUANCE—RESCISSION.

The cause for the rescission of a lease for breach of a covenant to repair, claimed under article 1641 of the Civil Code (Que.), must exist at the moment when rescission is pronounced. (*Per* Brodeur, J.)

3. CONTRACTS (§ II A—127)—CONSTRUCTION AS A WHOLE—CIVIL CODE, QUEBEC, ARTICLE 1641.

In an action for rescission under article 1641 of the Civil Code of Quebec, the contract must be looked at as a whole, and the relative importance of the result of any single breach thereof must be considered in determining whether the party injured is entitled to rescind. (*Per* Idington, J.)

CAN.

S. C.
1912

CONSUMERS CORDAGE CO. v. BANNERMAN.

Statement

APPEAL by the plaintiffs from the judgment of the Court of King's Bench (appeal side) of the Province of Quebec, refusing to rescind a lease made to the plaintiffs on the ground of the failure of the defendant, the successor in title to the lessor, to make the necessary repairs to the leased premises originally used as a rope factory but not so used by the plaintiffs. The plaintiffs had allowed the leased premises to remain unoccupied for a long time and had then sub-let them for use as an electric light and power station.

The appeal was dismissed with costs.

Messrs. *T. Chase-Casgrain*, K.C., and *A. Geoffrion*, K.C., for appellants.

Messrs. *E. Lafleur*, K.C., and *J. J. Beauchamp*, K.C., for respondent.

SIR CHARLES FITZPATRICK, C.J.:—I agree that this appeal should be dismissed with costs.

DAVIES, J.:—I am for dismissing this appeal with costs.

IDINGTON, J.:—The appellant certainly founded, as its *factum* shews, its action on article 1641 of the Code. The first paragraph thereof deals with the remedies of a lessee relative to non-repair and non-compliance with stipulated ameliorations and after giving several alternatives ends by saying:—

> or, if the lessee so declare his option, to obtain the rescission of the lease in default of such repairs or ameliorations being made.

It seems from this that a lessee seeking to rescind must take such rescission on such terms as the Court may grant relative to a compliance by the lessor with his covenants to repair or make such ameliorations. True, the *factum* puts forward sub-section 2 of said article. But clearly that as the language indicates relates to "failure on the part of the lessor to perform any other of the obligations arising from the lease or devolving upon him by law." But what other can there be in this case, for the non-repairs alone are referred to as founding ground for complaint against respondent.

The Code in each of a variety of cases provides against lessees being, unwittingly perhaps, induced to enter upon the use of dwellings or other structures in fact not fitted for the use intended or becoming so. The fundamental error in the appellant's argument here in resorting to any of these provisions or the obligations they expressly or impliedly provide, is that this is a case of a lease which on its face was clearly not to secure the use of all that it is now sought to make the premises and all therein bear. It was clearly contemplated by the terms expressed that the entire machinery might be removed and then the conduct of the appellant foiled in this was such for nineteen years as to

demonstrate it never intended to use but keep from being used on the premises in question the machinery that it now fears might shake the building down. The conduct of the appellant in asserting in early litigation between the parties the illegal purpose it had in view, leaves no doubt of this purpose.

The agreement in the lease supplemented as it was by another agreement, was still a contract between the parties liable to dissolution for persistent disregard of its obligations. The parties chose to make it wear the form of a lease, and the appellant surely cannot complain if the resolutory provision appropriate thereto is held as that alone to which it can resort. But whether it is confined thereto or not the protest made by appellant, as clearly as anything can, demonstrates it so understood its rights to be, not to rescind whether lease or other contract for any and every trifling breach of obligation or grave ones temporarily existing, but only for the persistent disregard of appellant's rights and respondent's own obligations. The appellant never in truth was injured by these breaches that existed and though entitled to insist, as it did by its protest, on the obligations entered into with it by the respondent clearly it was not entitled to lull him into security by such a course of conduct as it adopted for eighteen or nineteen years assuring thereby the respondent of its entire approval and suddenly turn round and ask for a dissolution of the contract for reasons it alone is responsible for bringing about. It seems to me also that the contract must be looked at as a whole and the relative importance of the result of any single breach of a contract must be looked to in determining whether or not the party suffering therefrom is entitled to complain and demand dissolution of the entire contract. Tested in any way one can look at this case, and call the contract lease or what you will, and observing the bearing of the appellant throughout, and remembering that it suffers nothing but in the payment of rent for getting what it had desired and truly bargained for, I see no reason to justify the claims set up or to reverse the judgment appealed from.

I think the appeal ought to be dismissed with costs.

DUFF, J.:—I agree that this appeal should be dismissed with costs.

ANGLIN, J.:—Assuming that the relations between the parties should be deemed to be those of lessee and lessor and that the provisions of the law relating to leases are applicable, I am not satisfied that the evidence establishes such a case of destruction, total or partial, of the leased premises that articles 1660 and 1065 C.C. could have been successfully invoked by the appellants.

But, in view of the fears and character of the protest made by them and of the circumstances in which they brought this action, I am convinced that they relied not upon those articles

CAN.

S. C.
1912

CONSUMERS CORDAGE CO. v. BANNERMAN.

Anglin, J.

but upon article 1641 C.C., presenting the case not as one of partial destruction rendering the premises totally unfit for the use for which they were intended and *ipso facto* effecting a cancellation of the lease, but as one of failure by the lessor to make repairs with a consequent right in the lessees to claim immediate resiliation.

The action appears to have been treated at the trial as based on article 1641 C.C. It is, I think, too late for the plaintiff, when his case is in appeal, for the first time to assert rights under articles 1660 and 1065.

Having regard to all the features of the contract between the parties, and particularly to their conduct in regard to the leased premises during the nineteen years for which the lease had subsisted before this action was begun, to the nature and extent of the repairs demanded and to the season when the demand was made, the plaintiffs were not in my opinion entitled to the relief of resiliation without first giving to the lessor a reasonable opportunity to make the necessary repairs. Arts. 1067 and 1641 C.C.

I agree in the following "*considérants*" found in the judgment of the Court of King's Bench:—

> Considering that under the circumstances the putting in default (*mise-en-demeure*) was necessary, it should have been made at the season when the repairs could have been properly made and that it is proved that part of these repairs could not be completed at the date of the institution of the action.
>
> Considering that these repairs were finished in the month of August, 1909, and that then the buildings were in a better state than they had been at the time of the lease in 1890.

I have not overlooked the fact that in the protest served by the appellants on the respondent they specified only a date for the commencement of the repairs. None was named for their completion. The respondent appears to have begun the repairs at the date specified and to have made such progress with them as weather conditions permitted before the present action was brought.

I am not prepared to differ from what I conceive to be the view of the majority of the Judges of the Court of Appeal, that where the lessee has made a formal demand upon the lessor for repairs but has allowed for them a period which the Court deems insufficient and has then without further *mise-en-demeure*, brought suit for resiliation under art. 1641 C.C., the Court may in its discretion allow the lessor what it deems a reasonable time within which to execute the repairs demanded or adjudged by it to be necessary and may decree resiliation in the event of his failure to repair accordingly. In the exercise of this discretion, should the Court find that the requisite repairs have been actually made before the trial, it may refuse the relief of resiliation (if, indeed, the defendant is not entitled as of right to such a judg-

ment), in that event disposing of the costs of the action as it may deem just. Upon the record now before us it is impossible in my opinion to hold that this discretion was not fairly and reasonably exercised by the Court of King's Bench in favour of the defendant, if the judgment of dismissal was not exigible as of right.

For these reasons I would dismiss this appeal with costs.

BRODEUR, J.:—It is useless for me to examine all the respondent's contentions in regard to the nature of the relations of the parties and the interpretation of the contracts between them.

The conclusion I have come to as to the respective rights and obligations of the plaintiff, appellant, and the defendant, respondent, upon the facts as established by the written evidence and by the trial Judge, render it unnecessary for me to examine these contentions.

The plaintiff company asks for the rescission of a lease entered into between the defendant's predecessors and itself because the defendant has not made the necessary repairs to the leased premises. It alleges that by a protest in January, 1909, it duly put the defendant in default to begin them within eight days and that at the time of the institution of its action in April, 1909, they had not yet been made. It proceeds under provision of article 1641 of the Civil Code, which reads as follows:—

> 1641. The lessee has a right of action in the ordinary course of law, or by summary proceeding, as provided in the Code of Civil Procedure:
>
> 1. To compel the lessor to make the repairs and ameliorations stipulated in the lease, or to which he is obliged by law; or to obtain authority to make the same at the expense of such lessor; or, if the lessee so declare his option, to obtain the rescission of the lease in default of such repairs or ameliorations being made;
>
> 2. To rescind the lease for failure on the part of the lessor to perform any other of the obligations arising from the lease or devolving upon him by law;
>
> 3. To recover damages for violation of the obligations arising from the lease or from the relation of lessor and lessee.

The defendant, respondent, pleads that he conformed to the notice to repair by beginning the repairs at once and that he would have completed them all if it had been possible to do them properly during the winter, but that he is ready to finish them and he offers by his conclusions to finish them as soon as the proper season arrives.

It has been proved at the trial that the repairs were made and finished in the course of the summer.

Are there grounds for rescinding the lease under these circumstances?

A lease creates respective obligations for the lessor and the lessee; the lessor's failure to make repairs gives rise to a dissolu-

CAN.
S.C.
1912
CONSUMERS CORDAGE CO. v. BANNERMAN.
Brodeur, J.

tion of the contract only if there has been a putting in default (*mise-en-demeure*).

One of the obligations of the lessor in the present case was to see not only to the greater repairs but even to tenant's repairs.

The lessee who was in possession of the premises could alone see if repairs became necessary and then its duty was to inform the lessor of the fact and to put him in default to make them or else to obtain authorization from the Court to make them itself.

Fifteen years or more pass and there is no putting in default of the lessor.

The leased premises had been used as a rope factory but they had not been utilized for this purpose by the lessee. The fact is that they had remained unoccupied excepting for three years when the plaintiff had sub-let them for the installation of an electric station.

The Court of first instance therefore was in error in deciding that no formal putting in default was necessary and that as the defendant had neglected to make the necessary repairs he was by this very fact in default and the right to have the lease rescinded became an absolute one: art. 1067 C.C.; Fuzier-Herman, Code Civil, art. 1146; Aubry & Rau, vol. 4, p. 95, p. 308 note 2; Colmet de Santerre, vol. 5, No. 62, bis. 11; Laurent, vol. 16, No. 242; Demolombe, vol. 24, No. 516.

The jurisprudence is in the same sense: *Charbonneau* v. *Duval*, 13 R.L. p. 309; *Fitzpatrick* v. *Darling*, R.J.Q. 9 C.S. p. 247; *Leduc* v. *Finnie*, R.J.Q. 11 C.S. p. 490; *Rae* v. *Phelan*, R.J.Q. 13 C.S. p. 491; *Town of Richmond* v. *Lafontaine*, 30 Can. S.C.R. p. 155; Sirey, 1892-1-117.

The plaintiff itself has not considered this alleged negligence as conferring upon it the right to ask the cancellation of the contract. And if it had this right it renounced it by its protest in which it declares that if the repairs are not begun within eight days it will demand a rescission of the lease.

The lessor began the repairs at once and would have finished them before the 17th of April, the date on which the action was instituted, if the climate had allowed. He therefore complied with the protest.

The offer which he has made by his plea to complete the repairs as soon as the weather permitted should be allowed.

It is in evidence that at the time of the trial all the repairs had been made and this without causing any damage or prejudice to the lessee. The dissolution of a contract for failure to perform the obligations involved is a judicial act and it is consequently subject to the discretion of the Courts which according to circumstances may maintain or dissolve the contract.

In the present case the defendant had executed his obligations when the Court was called upon to pass on the demand for rescission. Consequently there was no ground for pronouncing

the cancellation of the lease. The cause of cancellation must exist at the moment when the Judge pronounces it: Demolombe, vol. 25, No. 515.

If the lessee has at any time prior to judgment the right to prevent the rescission of the lease by paying the rent due the same right exists for the lessor to prevent rescission by making prior to the judgment the repairs which he is bound to make.

Art. 1641 of the Civil Code provides that the lessee may ask for the rescission of the lease if the lessor is in default to make the repairs. The defendant in the present case was carrying out his obligation and the Court of Appeal has decided rightly in holding that the circumstances did not justify the Court in pronouncing the rescission of the contract.

The appeal should be dismissed with costs.

Appeal dismissed.

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER COMPANY.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 17, 1912.

1. ELECTRICITY (§ IV—41)—COMPENSATION FOR WATER POWER USED TO OPERATE ELECTRIC POWER PLANT.

Under an agreement between the Queen Victoria Niagara Falls Park Commissioners and a power company licensing the latter to exercise certain rights in the park and in the water of the Niagara river for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park and requiring payment therefor at a specified annual rental and "in addition thereto, payment at the rate of the sum of one dollar per annum for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power" the extra payments are to be made as the electricity is generated at a rate greater than 10,000 horse power as shewn by the meters, and do not continue when the generation falls below such rate.

2. ELECTRICITY (§ IV—41)—GENERATION OF LIGHT AND POWER—CONTRACT.

The extra price provided for in an agreement between the Queen Victoria Falls Park Commissioners and a power company licensing the company to operate an electric power plant in the park and in the water of the Niagara river, for which the Park Commissioners, a public body, was to be paid "for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power," includes power used by the power company for its own purposes as well as that sold to others.

APPEAL by the plaintiffs from the judgment of Riddell, J., *Attorney-General (Ont.)* v. *Canadian Niagara Power Co.*, 1 O. W.N. 127, construing that portion of an agreement between the Queen Victoria Niagara Falls Commissioners and the Canadian Niagara Power Company providing for extra payments above the stipulated rental.

ONT.

C. A.
1912

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

Statement

The judgment was varied.

That portion of the agreement which was in dispute is as follows:—

> The said agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable, is hereby amended by providing that from and after the 1st day of May, 1899, the rent payable under the said agreement, in lieu of that specified in paragraph 4 thereof, shall be up to the 1st day of May, 1949, the sum of $15,000 per annum payable half-yearly on the same days and times as specified in said paragraph 4 of said agreement and, in addition thereto, payment at the rate of the sum of $1 per annum for each electrical horse power generated and used and sold or disposed of over 10,000 electrical horse power up to 20,000 electrical horse power, and the further payment of the sum of 75 cents for each electrical horse power generated and used and sold or disposed of over 20,000 electrical horse power up to 30,000 electrical horse power, and the further payment of the sum of 50 cents for each electrical horse power generated and used and sold or disposed of over 30,000 electrical horse power; that is to say, by way of example, that on generation and use and sale or disposal of 30,000 electrical horse power, the gross rental shall be $32,500 per annum payable half-yearly, and so on in case of further development as above provided, and that such rates shall apply to power supplied or used either in Canada or the United States. Such additional rentals as shall be payable for and from such generation and sale or other disposition as aforesaid to the Commissioners shall be payable half-yearly, at the rate above specified, on the 1st days of November and May in each year for all power sold in the said several half-yearly periods from the day of sale; and, within 10 days after said 1st days of November and May in each year on which such additional rentals shall be payable respectively, the treasurer, or, if no treasurer, the head officer of the company, shall deliver to the Commissioners a verified statement of the electrical horse power generated and used and sold or disposed of during the preceding half-year, and the books of the company shall be open to inspection and examination by the Commissioners or their agent for the purpose of verifying or testing the correctness of such statement; and, if any question or dispute arises in respect of such return, or if any statement delivered at any time by the company to the Commissioners of the quantity or amount of the electrical horse power generated and used and sold or disposed of, or of the amount payable for such additional rentals, the High Court of Justice for Ontario shall have jurisdiction to hear and determine the same and to enforce the giving of the information required.

Sir Æmilius Irving, K.C., Messrs. *C. H. Ritchie*, K.C., and *C. S. MacInnes*, K.C., for the plaintiffs.

Messrs. *Wallace Nesbitt*, K.C., *A. Monro Grier*, K.C., and *A. M. Stewart*, for the defendants.

Moss, C.J.O.:—The question for decision upon this appeal arises under an agreement, or rather a series of instruments which, for the purposes of the appeal, are to be treated as em-

bodying an existing agreement, between the plaintiffs on the one part and the defendants on the other.

They are all summarised or referred to in the judgments of Riddell, J., by whom the case was tried.

The main, and indeed save a very minor one, the only, question is as to the method or basis upon which to ascertain the amount of rentals or payments to be rendered by the defendants to the plaintiffs under the terms of the agreement.

It is, of course, necessary to refer to and consider to some extent all the instruments, but the dispute hinges upon the true construction of clause 2 of the agreement of the 15th July, 1899, which deals with the rentals or payments to be rendered by the defendants for the rights, interests, powers, and privileges granted or secured to them under the agreement. It may not be necessary to define with precision the nature of the rights, interests, powers, and privileges in respect of which the rentals or payments are to be rendered. They are first conferred by the instrument of the 7th April, 1892, by which, after reciting an application by certain individuals (called "the company"), whose position the defendants now occupy, to the plaintiffs the Commissioners, for the right to take water from the Niagara river at a certain point or points in the park, in order that the company might thereby generate and develope electricity and pneumatic power for transmission beyond the park, and the desire of the company to secure the right to construct their works in the park, there was granted to the company a license "to take water from the Niagara river . . . and lead such water by means of the natural channel . . . and the further extension of the channel to supply works to be erected and constructed by the company in buildings and power houses on the mainland within the park" on a location of which the limits were specified in a general way—"such location of buildings and power houses from time to time to be erected to be settled by the Commissioners" within the limits referred to.

The company was also given "the further right to excavate tunnels to discharge the water led from the Niagara river to the said buildings and power houses, so that such water by means of such tunnels shall emerge below the Horse Shoe Fall at or near the water's edge of the Niagara river." The 8th clause gives the company the power of temporarily constructing coffer-dams and an incline, and at all times to maintain a submerged dam for diverting water from the river to the natural channel. All these privileges, or (to adopt the terms used in the 13th clause) liberties, licenses, powers, and authorities, are granted for the purpose—as expressed in the beginning of clause 1—of generating electricity and pneumatic power to be transmitted to places beyond the park.

ONT.

C. A.
1912

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

MOSS, C.J.O.

It is obvious that the grant contained in this instrument is more than a mere license to take water. Besides those already mentioned, other rights are granted, for example, a right or liberty to the company to occupy with its buildings and power houses land belonging to the Commissioners, and a further right or easement over the Commissioners' lands for the tunnels required in order to discharge the water brought by the company to the buildings and power houses, and to maintain the submerged dam. The parties evidently understood that they were contracting for something more than a mere license; for, while in the 4th clause it is called a license, in the 5th clause it is termed a lease, the expression being, "In case the company desire to terminate the lease . . ."

But, whatever may be the precise nature of the interests granted, whether lease, license, powers, or privileges, they are the rights for which the defendants are obligated to render payment, whether it be or be not strictly "rent" or "rental," as it is called interchangeably in the instruments.

The plaintiffs are not selling electrical horse-power or horse-power, or yielding to the defendants any commodity measured or ascertained by standards of horse-power.

They have granted to the defendants the rights and interests covered by the agreement. In them is included the right, power, privilege, or whatever it may be, of taking and using that which the plaintiffs have and the defendants need "for the purpose of generating electricity, and pneumatic power," viz., the agent by means of which the creation of electrical and pneumatic power is made possible for them. And it is for and in respect of all the rights and interests granted, and not in respect of some or a part, that rentals or payments are to be rendered.

The matter is thus reduced to the one question of amounts to be paid according to the agreement made in relation thereto. Under the instrument of the 7th April, 1892, no real difficulty on this head could have arisen. Clause 4 provided that the term should be twenty years from the 1st May, 1892, at a clear yearly rental of $25,000, during the first ten years, paid and payable in the manner and at the times specified; and, as to the rental for the second ten years of the term, it should be payable half yearly on the 1st days of May and November in each year; the yearly rental to be $26,000 for the 11th years of the term, to increase by $1,000 each succeeding year, the rental for the 20th year being $35,000.

If this method of payment had been adhered to, much of the trouble and difficulty now experienced by the parties would never have arisen. But in the agreement of the 15th July, 1899, a new method was adopted; and, by clause 2, "the agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable," was amended.

Clause 2 is set out in full in the judgment of the learned trial Judge, and need not be repeated here. The term over which the payments are to extend is fixed as from the 1st May, 1899, to the 1st May, 1949; a fixed sum of $15,000 per annum is made payable absolutely every half year on the 1st days of May and November, and additional rentals or payments are to be made according to what appears to be intended to serve as a rate or scale for determining the times when and the circumstances under which such additional payments are to commence. The clause does not say that the plaintiffs are to be paid for each electrical horse-power generated and used and sold or disposed of, but says that they are to receive as part of the rentals or payments to be rendered for the interests, privileges, and powers granted to the defendants, payment at the rate of $1 per annum for each electrical horse-power generated and used and sold or disposed of by the defendants over 10,000 electrical horse-power up to 20,000 electrical horse-power, and the further (i.e., additional) payment of the sum of 75 cents for each electrical horse-power generated and used or sold or disposed of over 20,000 electrical horse-power up to 30,000 electrical horse-power and the further (additional) payment of the sum of fifty cents for each electrical horse-power generated and used and sold or disposed of over 30,000 electrical horse-power.

Even if the provision stopped here, there would be difficulty in determining the meaning of the contract for payment. The payments to be made in addition to the half-yearly payment of $7,500 are based on generation, use, sale, or other disposal of electrical horse-power, but the times or periods over which such generation, use, sale, or disposal is to extend, during each half-year, are not specified.

There is no practical difficulty in ascertaining every few minutes the exact quantity of electrical horse-power generated, and—as generation involves use in some form either by the defendants themselves or by purchasers or takers from them—the exact quantity used and sold or disposed of during the half-yearly periods. The clause appears to be pointed at providing for what is to happen if at the end of a half-yearly period it is found that the output has been such as to call for payments in addition to the $7,500. If the output has been under 10,000 electrical horse-power, the rental or payment to be rendered for that period is to be $7,500. The difficulty arises the moment it appears that the output is over 10,000. If under 20,000—say, for example, 18,000—electrical horse-power is generated, used, and sold or disposed of, the rental or payment called for would amount to $7,500 plus $4,000, that is, $11,500. If over 20,000 and under 30,000—say 26,000—the rental or payment would amount to $7,500 plus $5,000 plus $2,250, that is $14,750. The

ONT.

C. A.

1912

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

MOSS, C.J.O.

illustration given "by way of example," viz., that on generation and use and sale or disposal of 30,000 electrical horse-power, the gross rental shall be $32,500 per annum payable half-yearly, and so on in case of further development, indicates that the view of the parties was that attainment to that stage of development at least would fix the rental at the figures mentioned until there had been further development.

But as to whether the generation, use, sale or disposal beyond the 10,000 electrical horse-power must be continuous over the whole semi-annual period, or be represented by an average or by half-hourly or shorter or longer intervals in the readings of the meters on the generators, nothing is said. It is apparently assumed that it can be ascertained, and that, as soon as it appears that the generation, use, sale or other disposal exceeds 10,000 electrical horse-power, the rental or payment will thereafter regulate itself in accordance with the rates chargeable for the excess.

But upon the important question of the point of time from which the reckoning of the excess is to count, there is no light from the instrument, save that which is supplied by the illustration. I find great difficulty in gathering from the terms expressed in the clause what was in the minds of the parties with respect to the mode of ascertaining the amounts of the additional payments. Doubtless all parties were familiar with the usual forms of agreements for the supply to purchasers or consumers of electricity for power, light, or heat. If I were at liberty to surmise, I would say that they in all probability had in their minds the system known as the peak-load, as the simplest and most convenient for adoption in this case. It appears to me that, if they had had in mind the elaborate and somewhat complicated system embodied in the formal judgment, they would have endeavoured to give clearer expression to it in the instrument. The illustration is not consistent with the method indicated in the formal judgment. Nor does the provision as to the payment of "additional rentals," following the illustration, assist to that conclusion.

Upon full consideration, however, I am unable to say that the parties have agreed to the adoption of the peak-load system of measurement, as the mode of ascertaining the payments. It is apparent that the change in the payments was being made for the benefit of the defendants. They were being relieved of an obligation to render an annual payment or rental which was to increase from year to year without reference to increase or decrease of development.

On the other hand, it may be said that the plaintiffs were under obligation not to deal with the water power so as to disable them from furnishing the defendants with the quantity

needed for their present and future purposes up to the limit of their right of development.

The defendants were naturally desirous of only being called upon to pay according as they developed their capacity; but equally the plaintiffs might not be willing to hold without compensation a large reserve for the defendants' use. And probably it would not have been unreasonable to arrange that, as soon as the defendants had demonstrated their ability to develop beyond 10,000 electrical horse-power, and so needed to have always at their command for use the necessary power, that should be deemed a new stage of development, and they should begin to render the increased payment or rental upon the footing of that development, and continue to do so until a further stage of development was reached.

But I am unable to gather from the words of the clause an agreement to that effect. The literal reading of the earlier part of the clause appears to me to be more in accord with an intention that payments are to be rendered according to the actual generation as shewn by the meters; and I do not find, in the later parts, language of that definite nature which is necessary in order to effect a clear alteration of meaning.

And to this extent I am in favour of affirming the judgment appealed from.

A minor question, to which, however, not much importance was attached by either side, is, whether the plaintiffs are entitled to have included in the quantities upon the footing of which payments are to be rendered, any quantity used by the defendants for their own purposes. I am unable to perceive any good reason why they should not.

The words "generated and used and sold or disposed of" appear to me to cover and include all the electrical horse-power produced. Since generation involves use or other disposition by the producer, it does not appear to be material to the plaintiffs to consider by whom it is used or to whom it is sold or disposed of. The gauge by which they are to be governed is the shewing of the meters at the generators.

I am of opinion that in this respect the judgment should be varied. The details may be settled in Chambers, in case the parties differ as to them. I venture to express the hope that the parties may be able to agree upon some convenient and simple mode of working out the results, and adopt it for the future, and thus avoid, if possible, all further question as to the amounts to be rendered and received.

Under the circumstances, there should be no costs of the appeal.

GARROW, J.A.:—The dispute between the parties is really confined within a very narrow compass. The defendants say, "we

ONT.

C. A.

1912

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

GARROW, J.A.

are willing to pay for the electrical power (over the minimum, for which we pay $15,000), which is actually generated, and used and sold, or disposed of" in the words of the agreement; and that by means of the meters, the total quantity so generated can be accurately ascertained.

The plaintiffs do not deny this, but say that the measurement is not to be made as of a continuous supply, by the "peak" or highest point of generation, occurring in each period of six months; that, in other words, horse-power hours is not the basis, but horse-power capacity simply.

There are undoubtedly several modes for the measurement of electrical power in use, including the "peak" method, each of which probably has its advantages according to the use to which the power is to be applied. Where the supply is to be uniform and continuous, a flat rate is apparently the most suitable, but where such is not the case the "peak" method would probably be adopted, because up to the "peak" the contractor is bound to be always ready to supply the demand of the customer.

The contract, whether it be called a lease, or only a license, a matter, it seems to me of little consequence, authorized the defendants to take water flowing in the River Niagara which would otherwise pass over the Falls, through certain conduits, pits and machinery, constructed and supplied by the defendants, and to convert the water-power thus obtained into electrical power. What the defendants thereby part with is, of course, not electrical power, but water-power, which might have been measured and paid for as water-power if the parties had so agreed.

And the plaintiffs do not even undertake for the continuance of a sufficient supply of water, but simply (par. 11) that if the supply at the point of intake is diminished the defendants may deepen the intake at their own expense to an extent sufficient to restore the supply required for the purposes of the defendants.

The circumstances, therefore, do not seem to be appropriate for the application of the "peak" method unless justification can be found in the express words of the contract, or by necessary inference therefrom.

On the contrary, the agreement seems to me to rather explicitly impose the other method, namely, a method by which the defendants shall pay for what they actually got or use over the minimum of 10,000 horsepower, which is specifically provided for, and for no more. For such 10,000 horsepower they agree to pay $15,000 per annum whether they take it or not. Then for each additional electrical horsepower "generated and used and sold or disposed of" over that quantity, they are to pay the additional sums prescribed in the agreement. Those additional sums are to be calculated "at the rate of" a named sum per annum, payable half-yearly for each additional horsepower;

and I see no reason why this may not reasonably mean what, under the circumstances, it seems to me to say, a horsepower, not occasionally, but continuously, supplied. The record from the meters is taken every half-hour. I do not understand the plaintiffs to complain that it should be taken more frequently. And the result the defendants say is to arrive, not simply, at an average, but at the actual quantity of power continuously produced as nearly as may be. Nor is this, so far as I can see, complained of in itself, the defendants' complaint being that the highest recorded point or "peak" in each period should be taken, and not the total production.

The question of the defendants' liability to pay for electricity which they themselves use was treated on the argument as of minor importance, as no doubt it is, but whatever may be its importance, I feel bound to say that I can find no justification in the agreement for the defendants' contention that they were not to pay for it.

I, therefore, while agreeing in the main with the judgment of Riddell, J., think it should be varied to that extent. And I would otherwise dismiss the appeal without costs.

Maclaren, J.A., concurred in the result.

Meredith, J.A. (dissenting):—The rights of the parties depend entirely upon a proper interpretation of the agreement, in writing, between them in respect only of the mode of calculation of the amount to be paid for the water-power contracted for in the agreement; that is, according to the contention of each of the parties to this appeal, they so depend; though it may be added, that there may be another view of the matter, one which was not discussed but, as far as mentioned upon the argument, was apparently repudiated by both, namely, whether the parties were ever really "at one" as to such mode of calculation, or ever expressed any agreement in a way that can be understood.

On the one side it is urged that the actual amount of power generated, etc., by the respondents, is to be ascertained, as nearly as can be, by half-hourly readings of the meter, and from these readings the average or mean quantity is calculated—that is an amount the same as that which would have been used constantly, if there had been no variation from time to time in the quantity used and the same total quantity, in the same period, had been used—and that that equivalent of a constant quantity is that which is to be paid for.

On the other side it is said that the maximum amount of power generated, etc., at any time during the half year, as shewn by the meter "readings," is that which the respondents are to pay for; that is, that that which is well known as the "peak load" method of measurement is to prevail.

ONT.

C.A.

1912

ATTORNEY GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

Meredith, J.A.

If the parties really knew what they meant, and if they were really at one as to such meaning, the least that can be said of it is that they chose a very awkward way of expressing that meaning, whatsoever it may have been.

In the first place, that which is to be paid for is described as "horsepower generated and used and sold or disposed of;" and one of the contentions for the respondents—the minor one—is that these words do not include power generated and used by the respondents themselves, because not sold; the words employed by the parties are, to say the least of them, unfortunate; but, if this contention of the respondents be correct, what was the use of inserting the word used at all, why not be content with the words generated and sold? And no reason has been suggested why the power generated and used by the respondents should not be paid for as well as that which they sold, why they should get something for nothing. My interpretation of these words is that the respondents are to pay for all the power which they generated, and as well as all that they generate and sell or otherwise dispose of; and that interpretation involves no violation of the grammatical construction of the words used—if, indeed, strictly, they can be said to be, in any manner, capable of grammatical construction—whilst doing only that which is reasonable and just between buyer and seller. I see no reason, grammatical or otherwise, why the words generated and may not be "understood," between the words "and" and "sold," so that the agreement extended would be "all power generated and used and" generated and "sold or disposed of;" if it were intended that that which was used, as well as that which was sold, were to be paid for there would naturally be an inclination to use the word "and" instead of the word "or," which might have been thought to indicate one or the other, not both; whilst the necessity for supplying words to complete sentences grammatically is so common nowadays that few words are said, and indeed few written, except in some literary efforts of a more or less pedantic character, in which some other words are not to be "understood;" it is an age, especially in the business world, of clipping and omitting in that sense. If only that which was used, as well as sold, was to be paid for, the expression would have been generated, sold and used; but it is impossible to believe that all that was sold was to be followed up and shewn to have been used by the buyer and short of that the word "used" appears to have been useless unless it meant use irrespective of sale; if excluded, if the words had been confined to generated and sold, that which the respondents contend for would have been effected, power used, but not sold, would have been free from the rent provided for; as it is I can see no reasonable use of the word used if not intended to cover

what the respondents used, disposed of, would include any given away or otherwise disposed of by the respondents without using it themselves.

This interpretation was, however, hardly gainsaid, and it affects only a very small amount of the great sum involved in this controversy; the other question is the only very substantial one in so far as the pecuniary rights of the parties are affected; but this question accentuates the lack of plainness and clearness in the way the parties have expressed themselves in the agreement in question.

Then as to the main point: to those unfamiliar with the subject, and at first sight, the respondents' contention is a captivating one; they say we have calculated as nearly as is practically possible the whole amount of the power which we have sold and used, and we are willing to pay for that; why should we pay for more? If we had been buying coal, or firewood, at so much a ton, or cord, no one would suggest that we should pay more upon any fair and reasonable contract. But it requires very little knowledge of the subject, and very little thought, to perceive the fallacy of that position, at all event from the point of view of the seller. The commodity sold cannot reasonably be compared to coal, or wood, or any such like tangible substances. That which was sold in this case—the water-power—when not used by the buyer was lost power to both buyer and seller; the coal and wood, when not used, remained steadfast for the benefit of buyer or seller; the power not used to-day is gone power to-morrow, and none the less so because to-morrow new power of precisely the same kind comes; the wood or coal not used to-day remains and could as well be used to-morrow, there would be no loss to either buyer or seller. And so, or for the like reason, electric light, power and heat are commonly sold according to the peak load. The seller must generate, and be prepared at all times to deliver the maximum quantity; it is largely immaterial to him whether it is used by the customer or not; the seller must do all that would be needed to supply at all times the maximum quantity—the peak load. Because that is not always done, but a seller may take advantage of and trade upon the intervals of lesser user by one customer to supply another, and so get paid for more than he actually generates does not alter the legal right of buyer or seller; the risk of failing to supply any call up to the maximum and to be obliged to pay damages for such failure is taken by the seller—and these things do not apply to this case for in all things the appellants have supplied and continue to supply the maximum quantity of the power and gain nothing by the respondents' failure to use it at all times. The adoption of the respondents' method of calculation would not relieve the appel-

ONT.

C. A.

1912

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

Meredith, J.A.

lants in any manner from their obligation to supply the maximum amount at all times; and it cannot truly be said that anyway the seller loses nothing because the power would be wasted anyway; that is not so, he could sell to others if not under obligation to supply, at all times, to the buyer to the full extent of the peak load.

For these reasons it may, I think, be said that the peak load method of charging for water, and electric power, is generally adopted, and considered fair to all parties to the contract, by those who know, though often looked upon as an outrage by those who are ignorant of the subject.

The contract upon which this greater question depends, is that each electrical horsepower shall be paid for at so much per annum; this provision is very far from being unambiguous; it would have been very easy, by example, or otherwise, to have made that which each side contends for quite plain, if the parties were really agreed as to either method.

It is to be observed that there is no provision in the agreement for making any of the calculations necessary in arriving at the amounts to be paid, if the respondents' contention be right; there does not seem to be anything in the agreement that even hints at such computations. A verified statement of the amount generated, etc., is to be given by the respondents to the appellants half-yearly, and the books of the respondents are to be open to the appellants for the purpose of verifying or testing the correctness of the statement, things which are, of course, quite consistent with the peak load method of charging; and no calculations are involved in the statement or in the books; it is, therefore, of some moment that the agreement is entirely silent as to any calculations, averages or means, and, therefore, it seems to me, is more in keeping with the appellants' contention which requires only an accurate entry in the books of all the meter readings, regularly and truly taken and entered, and the verified statement, half-yearly, provided for.

And the parties have in the agreement given an example which helps very much to clear up the ambiguity of the words I have been considering, and adds much weight to the appellants' contention; it is in these words:—

> that is to say, by way of example, that on generation and use and sale or disposal of 30,000 electrical horse-power the gross rental shall be $32,500 per annum half-yearly, and so on in case of further development as above provided.

In making provision for the rent, progressive development was that which was in mind and being provided for; it was a new undertaking; a fixed amount was agreed upon until more than 10,000 horse-power should be developed, after that the increased rental was to be at certain rates increasing as additional power was developed up to 30,000 horse-power, and so on.

The fair grammatical and reasonable reading of this example, in my opinion, is, that, as soon as the development reached that stage when 30,000 horse-power was generated, etc., the increased rent should be paid; and I can find no justification for interpreting it as meaning that, although development had reached that stage, there was to be no increased rent unless that quantity was generated, etc., continuously night and day throughout the year, or that some process of calculation should be adopted by which an average or mean amount throughout the year could be approximately ascertained and that the increased rent should come into force only when such average or mean quantity reached the 30,000. And, as I have before mentioned, there is no reason why such an agreement could, or should, not have been made; indeed, it would have been quite too one-sided a contract, for any reasonable business man to make, that the one should be bound to constantly supply 30,000 horse-power but that the other should be obliged to pay for only as much as he chose actually to use, to be calculated in the way the respondents now desire; whilst it would be quite in accord with the most general method of buying and selling, in such things, to pay according to the peak load, a method very largely adopted by the respondents in selling the electricity developed by them from this water-power; so that they were exacting from others that which they refuse to pay themselves; and I cannot but think that if that which the respondents contend for had been the agreement, the method of measurement would have been that generally, and so much more conveniently adopted, namely, per kilowatt hour.

The fact that as the rent is payable half-yearly, and, if so paid, might not be the same in any two half years, of any one year, is one that makes quite as much against the respondents' as against the appellants', contention, if not in practice more so; but in neither case does the fact appear to me to be a very momentous one.

Still in much doubt whether the parties were ever really quite in agreement in respect of the matter in controversy here, as well as whether either of them quite know what the words in question really meant—if indeed anyone really can—I would have been at least as well satisfied with an adjudication giving effect to such doubts, and leaving it to the parties to try again to agree and plainly express their agreement, the respondents in the meantime to pay on a *quantum valeat;* but as neither of them will admit of any such doubt, and each insists upon the bond and nothing but the bond, I can reach no other conclusion than that the appeal should be allowed, and that judgment should be entered for the plaintiffs for the amount due to them according to the peak load method of measurement.

ONT.
C. A.
1912
ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.
MAGEE, J.A.

MAGEE, J.A. (dissenting):—The action is brought by the Attorney-General on behalf of the Commissioners of the Queen Victoria Niagara Falls Park. The Commissioners were in 1887, by 50 Vict. ch. 13 (Ont.), created a corporation, and the lands of the park, including lands covered with water, were vested in them.

On 14th April, 1892, the defendant company was incorporated by 55 Vict. ch. 8 with power to construct, maintain and operate works for the production, sale and distribution of electricity and pneumatic power for the purposes of light, heat, and power; and to construct, maintain, and operate intakes, tunnels, conduits and other works in, through and under the lands and watercourses constituting the park, but only in the manner and to the extent required for the purposes of the company; and the company was thereby authorized to acquire an agreement entered into on 7th April, 1892, with the Commissioners by Messrs. Shaw, Stetson, and Rankine, three of its incorporators on behalf of the intended company. The Act confirmed and declared valid the agreement. That agreement recites that the company had applied to the Commissioners for the right to take water from the Niagara river at certain points in the park (that is the park proper), in order that the company may thereby generate and develop electricity and pneumatic power for transmission beyond the park, and that the company decided to secure the right to construct their works in the park. And then by the agreement, the Commissioners granted to the company for 20 years from 1st May, 1892, but four times renewable at the company's request, a license irrevocable, save as therein stated, to take water from the Niagara river at a stated locality, and lead such water by a certain channel, natural and extended, to supply works to be constructed by the company in buildings and power houses on the mainland within the park at a specified location, and the company was given the further right to excavate tunnels to discharge the water below the Horse-Shoe Fall, and also to convey the electricity and power in conduits beneath the surface of the park; and at all times to erect and maintain a submerged dam for the purpose of diverting water from the river to the said channel. And for the purposes of construction the company was authorized to construct cofferdams across both upper and lower ends of the said natural channel and erect a temporary incline. The agreement provided that the company might during the first 20 years terminate the "lease" upon three months' notice in writing.

Thus we have the Commissioners, as a corporate landed and riparian proprietor, granting the right to occupation of land belonging to their corporation, and these various easements,

rights and privileges upon, in and through and over their adjoining land. I think this fairly establishes the propriety of the use of the word "rents" in respect of the payments to be made by the company therefor, although such propriety was challenged for the defendants.

The company's right to take water was expressed to be subject to their rights under their existing agreements by the Commissioners, one with the town of Niagara Falls, another with a railway company and the third with Mr. Macklem; but the agreement provided that the Commissioners should not grant or confer upon any other company or person any right to take or use the waters of the Niagara river within the limits of the park, so long as the agreement should be in force, and should not themselves engage in making use of the water for like purposes. It also provided that the company would begin the works by 1st May, 1897, and would by 1st November, 1898, have completed water connections for the development of 25,000 horse-power. Both parties agreed to aid in procuring the incorporation of the company with such capital as should be deemed sufficient to carry out the agreement and construct and operate the works. The share capital authorized by the legislature was $3,000,000, with a bond issue of $5,000,000.

Here, then, was a very large undertaking for a practically new purpose on the scale projected, obtaining a monopoly of the advantage of the unique situation of the park for the development of power. The question would at once arise, what should be paid for such advantages. It was an experiment in almost all ways, but especially so in the finding of purchasers within the distance of profitable transmission. There was no recognized standard for basing the considerations which should be paid for such powers on such a scale. Obviously, any sort of bargain might be made and upon any basis. But it was recognized that the company's business would require time for growth—and what the parties did agree upon was that the company should pay in half-yearly instalments fixed, but gradually increasing annual sums as rental to be computed from 1st November, 1892, and whether it was ready to sell power or not, being $25,000 each year for the first ten years, and then increasing $1,000 per annum during the next ten years, and then during any renewal terms $35,000 per annum. Thus the company was to pay rent. These payments were for what was practically a monopoly.

So matters remained for seven years. Then in April, 1899, by 62 Viet. ch. 11, secs. 35, 36, the Commissioners and the company were authorized to enter into an agreement for the surrender and abandonment of the sole or exclusive right to use the waters of the Niagara river granted by the agreement of

ONT.
C. A.
1912
ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.
MAGEE, J.A.

7th April, 1892, upon such terms and conditions as to abatement or rent an extension of time for completion and other purposes as might be considered necessary or in the public interest and the Commissioners were authorized to enter into agreements with others to take water for like purposes.

Under this authority the agreement of 15th July, 1899, now sued upon, was entered into between the Commissioners and the defendant company, and the whole question involved if not a simple one turns solely upon its construction. By it, among other provisions, not affecting the present question, the company's time for completion was extended nearly five years, the Commissioners' agreement not to grant or confer upon others any right to take water was annulled, but they still agreed not to engage in using the waters for outside power purposes, and they also agreed that the rentals to be charged to others for the right to use the water would not be less than those charged the defendant company, except for specified reasons such as increased expense; and should not give undue advantages to others. And the company in turn agreed not to enter into amalgamations or combining agreements with others. And it was agreed that if from any cause the supply of water at the point of intake thereby defined should be diminished, the company should have no claim against the Commissioners, but might deepen the point of intake sufficiently, and that the granting or licensing of rights should not give the company any right of action against other licensees or grantees of the Commissioners in respect of any diminution not substantially interfering with the supply necessary for the company, nor so long as the necessary supply could be obtained by deepening at the intake.

Thus, whatever monopoly the company would have had under the original agreement was put an end to and other companies or persons might be granted similar privileges, but the Commissioners were not to give the others undue advantages and were not themselves to compete, and the company as grantees or licensees would have no claim against other grantees, licensees, for diminution of the water supply, if not substantial or if it could be remedied by deepening. Perhaps such deepening might not in fact affect other companies' works.

Under these changed conditions, a modification of the rentals was necessary, and this time a different basis was adopted. Instead of fixed sums to be paid whether electricity was developed or not—the payments were to have a closer relation to the growth or conditions of the company's capacity, needs and business.

In dealing with the sale or supply of electricity, there are several recognized plans of charging therefor, any one of which may be adopted. The quantity required by the purchaser is

seldom constant—it is higher at some times than at others—but whenever the higher or highest quantity is needed, the purchaser expects that it will be supplied. The vendor may well say to him, if you expect me to have a high power ready for you at any time I will charge you according to that which I have to prepare to give you, and you must pay me at the rate of the highest point you need in your requirements—that is called the peak load system. In point of fact, where there are a large number of customers they do not all require the highest quantity at the same time, although there are, no doubt, in actual experience, certain parts of the day when the general demand calls for higher power than at others. But to a large extent the highest individual requirements do not all come together, and the vendor is thus enabled to supply the maximum to one while another is using the minimum. Thus the parties have opportunity to make what may be called a fairer bargain, that is to pay according to the total amount of power actually used irrespective of its variations from time to time. A third method may be used in which the vendor guesses the probable requirements of his various customers and charges each a certain sum and lets him use whatever he requires.

The question here is which one of the first two methods was adopted between the Commissioners and the defendant company. Now there is this difference between the position of the commissioners and that of the company. Both, it is true, are entitled to sell to different purchasers, but while the latter expect to deal with a very large number of individual customers, whose highest needs come at different times, the Commissioners only deal with a very few—three, four or five customers—and those are companies whose greatest needs as fixed by their many individual purchasers all come at the same times or seasons. Their maximum requirements would practically all come together. One would, therefore, be prepared to expect that the peak load method of charging would be more readily adopted in dealing with what I may call the wholesale purchaser than in his dealings with the retail customer—and that it might be said to be less unfair in the one case than the other—Of course any bargain may be said to be fair if both parties are free to make it and understand it, and it might well be that where the peak load system is adopted with the individual, the company may be able to reduce the rates charged, so that the profits are no greater. All I wish to say is that the peak load system would seem to be more nearly in accord with the requirements in the case of a sale to the company than in the case of a sale by them. I am not overlooking the fact that the commissioners were not in fact selling power, but they were giving facilities from which

ONT.
C. A.
1912
ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.
Magee, J.A.

the company could derive it, and for which it would not be unreasonable that the company should pay on a basis similar to what would be adopted if power were actually supplied. The plaintiffs say the peak load plan was adopted here. The defendants say not and that it was the total they were to pay for, however irregular their requirements might be.

Now, what have the parties put in writing? Both are here standing upon the letter of the agreement and neither is asking any quarter in the shape of reformation. Let us bear in mind that this agreement is entered into as a part of and variation of the other. Clause 2 reads: "The said agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable is hereby amended by providing that from and after the first day of May, 1899, the rent payable under the said agreement in lieu of that specified in the said paragraph 4 of said agreement and in addition thereto payment at the rate of the sum of $1 per annum, for each electrical horse-power generated and used or sold or disposed of over 10,000 electrical horse-power up to 20,000 electrical horse-power and the further payment of the sum of 75 cents for each electrical horse-power generated and used or sold or disposed of over 20,000 electrical horse-power up to 30,000 electrical horse-power and the further payment of the sum of 50 cents for each electrical horse-power generated and used and sold or disposed of over 30,000 electrical horse-power."

Just here it is well to note that this is an amendment of a clause as to yearly rentals—and these payments per horse-power are in addition to those yearly rentals. They are themselves yearly rentals, and the clauses specifically state that the extra payment is to be at the rate of $1 or 75 cents or 50 cents per annum for each horse-power generated and used or sold or disposed of. For the present nothing turns upon the use of these four participles—any one of them will do for the consideration of the present question. The electrical power is not generated unless it is used or sold or disposed of. They may, for the present, be deemed synonymous. Let us take the word generated. The company is to pay not at the rate of $1 for each horse-power generated for a year, but at the rate of $1 per annum for each horse-power generated—and this per annum rate is in addition to $15,000 per annum which is to be paid whether they generate any or not. There is no more unreasonableness in paying for what is used only for a short time in the year than for what is not used at all. Once 10,000 horse-power is generated that is a proof of the strength of the stream which the company is obtaining from the commissioners, and as this maximum increases it is a test of the advance of the company's business, and shews that they have customers who require that

quantity, and that the electrical engine which is being used by them is of that power. The instant 10,001 horse-power has been generated, if only continued for a moment, it has been generated and the additional rent of $1 per annum becomes payable. A horse-power does not mean the exercise of the power of the theoretical horse for a year—it may be used only for a second, but none the less it is a horse-power which has been used. If we stopped here the plaintiff should, I think, succeed. The words "at the rate of" do not help on either side as they or some equivalent were necessary in either view.

But the agreement goes on to illustrate what it means by way of example that—

> on generation and use and sale or disposal of 30,000 electrical horse-power, the gross rental shall be $32,500 payable half-yearly, and so on in case of further development as above provided.

It seems to me that "on generation" or "on sale" cannot be interpreted to mean on generation for a year or on sale for a year—when generated it was a horse-power and it was sold. It may be that the company undertook with their customers to collect payment only once a month or once in two years, or only to collect payment for it by averaging it in with less quantities required by the customer, but none the less it was sold. Then "on generation," etc., "the gross rental shall be $32,500 per annum." Not at that rate, for each minute or half hour you are generating that quantity—but so soon as it is generated, the yearly rental becomes so much. Then the example proceeds "and so on in case of further development. That word "development," I think, also makes in favour of the plaintiffs, as it involves not the idea of continuance but of readiness and it is noticeable that there is no reference to reduction of development.

The clause goes on, however, to provide that such additional rentals as shall be payable "for or from such generation and sale or other disposition" shall be payable half-yearly at the rate above specified on the first days of November and May . . . for all power sold in the several half-yearly periods from the day of sale. Here we have the word "from" twice, meaning, as I think that from thenceforward that rent shall be payable —There is no suggestion that it shall be payable from thenceforward so long only as that amount of power is used—Why should the yearly rental in respect of horse-power sold be payable from the day of sale unless the rental was intended to continue although the use of the power might never be used after that day? It seems to be that the defendants have to interpret the word horse-power as meaning the continuance of exercise of that amount of power for one year, in order to arrive at the interpretation which they wish to put upon it—whereas it is

ONT.

C. A.

1912

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER CO.

Magee, J.A.

manifestly not the exercise of that amount of power which the draughtsman had in mind but the capacity for such power as evidenced by the actual user of electrical power derived from it.

If the construction put forward by the defendants had been intended, one would have looked for more specific provision as to record and statements of the length of continuance of user of the horse-power asked. In either view, of course, such a verified statement as the agreement calls for would be necessary, but a fuller one would be required if the defendants were only to pay on the basis they contend for.

On the main question, therefore, I am of opinion that the appeal should be allowed.

There is another one raised as to whether the defendants should pay additional rental in respect of power which they use for their own purposes, and do not sell or dispose of. They contend—or perhaps I should say suggest—that the word "used" means by others, and that to increase the rent, the power must be "generated and used and sold or disposed of." One might point to the provision that the additional rates apply to power "supplied or used either in Canada or the United States." But even without this clause it is, I think, manifest that the words "and used and sold" throughout were not intended to require that both sale and user must have taken place, but that the payment was intended to be called for in respect of the power used "and" in respect of that sold. I would take it that the draughtsman was intending to save repetition of the word "generated," and that the words should be read as horse-power "generated and used and generated and sold or disposed of." The use of the word "sold" alone, and the words "generation and sale or other disposition" in the clause already quoted might lend some colour to the defendants' argument, but the omission here of the word "use" or "used," cannot, I think, control the obvious intention that all generated and made use of in any way should be counted.

In this question also I think the plaintiff should succeed.

I would allow the appeal with costs.

Judgment below varied, MEREDITH and MAGEE, JJ.A., *dissenting.*

KLOCK v. THE MOLSONS BANK (No. 1).

Quebec Court of Review, Guerin, Martineau and Bruneau, JJ. January 27, 1912.

QUE.

Court of Review.

1912

Jan. 27.

1. PLEDGE (§ I—6)—EXTINGUISHMENT—MISUSE OF THING PLEDGED.

The pledgor cannot claim the restitution of the thing given in pledge until the debt is wholly paid except in cases of misuse by the pledgee of the thing pledged.

2. JUDGMENT (§ II A—66)—QUESTION OF SET-OFF DETERMINED ON TRIAL—PLEA OF PAYMENT—RES JUDICATA.

When, upon a demand for restitution of the thing given in pledge, the issue turns upon the payment of the debt and the debtor without succeeding in proving payment in full establishes that the debt has been reduced by payment or compensation (set-off), the Judge may adjudicate on the fact and embody the finding in the *dispositif* of the judgment in which case *res judicata* will be established between the parties.

THE judgment inscribed for review is reported in vol. 39, Que. S.C. 435.

The opinion of the majority of the Court was delivered by

BRUNEAU, J.:—Stripped of all its accessory conclusions, which are quite foreign to the question we are going to decide, the present action asks that the plaintiff be declared proprietor of and put again in possession of the rights to timber licenses and to other property given in pledge to the defendant as an accessory guarantee for the payment of a debt of $271,788.08; that the balance which the plaintiff owed to the defendant be declared paid, compensated and extinguished by a sum of $225,000 which the defendant owes him; that in consequence of this payment the defendant has no further rights over the aforesaid objects given in pledge.

In other words the plaintiff claims the restitution of the thing given in pledge. His action is based on article 1975, Civil Code, which says:—

> The debtor cannot claim the restitution of the thing given in pledge until he has wholly paid the debt in principle, interest and costs; unless the thing is abused by the creditor.

This provision is taken from title 7 of book 13 of the Digest, L. 9, paragraph 3: "Omnis pecunia exsoluta esse debet, aut eo nomine satisfactum esse, ut nascatur pignoratitia actio." This may be translated "All money must have been paid to the creditor or he must have been satisfied in order that the pignoratitian action can lie."

Pothier in his "Treatise on Pledge" Nos. 43 to 45, comments on this law in the following terms which constitute according to the commentators a very good explanation of the first paragraph of art. 2082 of the Code Napoleon, to which our art. 1975 corresponds:—

> Il n'y a ouverture à l'action *pignoratitia directa* pour la restitution de la chose donnée en nantissement, que lorsque le créancier à qui elle a été donnée, a été entièrement payé de la dette, ou qu'il a été satisfait.

QUE.

Court of Review. 1912

KLOCK v. THE MOLSONS BANK (No. 1).

Bruneau, J.

The law says *omnis*:—

Pour peu qu'il reste quelque chose de dû de la créance pour laquelle la chose a été donnée en nantissement, il n'y a pas ouverture à l'action *pignoratitia directa;* et le débiteur n'est pas encore recevable à demander la restitution, ni de ce qu'il a donnée, ni même de la moindre partie de ce qu'il a donnée en nantissement.

La raison est que le droit du gage ou nantissement est quelque chose d'indivisible.

and the different consequences which Pothier deduced from this indivisibility, from the point of view of the heirs both of the debtor and of the creditor, have been reproduced in our law by art. 1976, Civil Code.

The rights of a pledgee comprise:—(1) The right of privilege (art. 1969 C.C.); (2) The right of retention (art. 1970 C.C.); (3) The right to cause the thing pledged to be seized and sold (art. 1971 C.C.).

The present litigation only relates to the defendant's right of retention. This right consists in the fact that it can retain the thing in its possession until the complete payment of the debt which is guaranteed by the pledge in principal, interest and costs (art. 1975 C.C.). It is the result so to speak, of possession; it is natural that the creditor should have the right not to give up the thing given to him as a pledge as his consent in regard to the principal obligation was only given on this condition. Under the terms of art. 1975 C.C., the pledgee has the right of retention so long as he is not wholly paid. It goes without saying that if the debt were extinguished by compensation, as the plaintiff pretends in this case, the right of retention would also cease to exist; this, indeed, would simply be an application of the maxim that the accessory follows the principal, and the pledge cannot survive the debt whatever be the way in which the latter is extinguished. But the right of retention exists, and this is the essential point in deciding the present case, so long as the whole debt with its accessories is not extinguished, for the pledge is indivisible (art. 1976 C.C.).

There can be no doubt therefore, that the debtor can only insist on the restitution of the thing pledged when the debt which it guarantees is wholly extinguished by payment or by compensation which would have the same effect.

We are unanimously of the opinion with the Court of first instance, and for the reasons given in its judgment, that the plaintiff has not proved, as he is obliged to do under the text of the law cited above, the full payment of the debt for which he pledged the thing he claims by the conclusions of his action. His right arises from a full and not from a partial payment. That is why the Court of first instance, although it recognized rightly in one of the reasons of its judgment that the plain-

tiff had paid the sum of $156,750.00, nevertheless dismissed his action with costs.

The action was considered premature and it was dismissed for this reason, for the present and saving the plaintiff's recourse (*sauf recours*) that is to say, when the plaintiff shall have completed the payment of the debt for which the defendant is entitled to exercise its right of retention as pledgee of an immoveable (*créancière antichrésiste*).

As the rights given to the defendant in pledge were immoveable, the contract which resulted between the parties was in effect a contract of *antichrésis: Watson* v. *Parkins*, 18 L.C.J. 261; articles 1599, 1600, 1601, R.S.Q. 1909; articles 1966, 1967 C.C.; *St. Aubin* v. *Desmarteau*, 20 Que. K.B. 398.

The plaintiff asks us to at least modify the *dispositif* of the judgment of the Court of first instance mentioned above, by adding to it the reason by which that Court declared the defendant was legally obliged to deduct from the amount for which it held the pledge the sum of $156,750.00 which had been duly paid to it by the plaintiff. The Court of first instance was certainly not obliged, as the plaintiff pretends, to grant him *acte* of this payment of $156,750.00 by interposing a declaration to this effect in its judgment, because this partial payment, which it considers to be the only one proved, did not under the law give rise to the right which the plaintiff claims by the conclusions of his action. In order to oblige the Court to state this fact in the *dispositif* of its judgment we would have to decide that the reason in question constitutes *res judicata* as regards this payment of $156,750.00. But the reason for a judgment does not constitute *res judicata*. All the authors and the jurisprudence are in this sense (Larombière art. 1351, note 18; Aubry and Rau, vol. 8, par. 769, pp. 369 and 370; Dalloz, vo. Chose jugée, n. 21; Griolet, pp. 102 and following; Demolombe, vol. 7, n. 289 and following; Laurent, vol. 20, n. 29 and following; Garsonnet, vol. 3, par. 465, pp. 239 and 240; Hue., vol. 8, n. 310; Lacoste, n. 213 and following; S. 1851-1-650; D. 1851-1-235; S. 1867-1-328; D. 1874-1-470; S. 1879-1-68; D. 1879-1-231; S. 1882-1-12 and 405; S. 1889-1-151; S. 1891-1-248; S. 1900-1-264).

A decision may have the authority of *res judicata* although it may not be formally expressed in the reasons for judgment if the *dispositif* confirms it implicitly (Cassation, S. 1873-1-292).

It is evident that this decision cannot apply to the present case.

Indeed the principal object of the plaintiff's action is not to have it declared that he has paid $156,750.00 on account of his debt; this payment only constituted one of the grounds in support of his conclusions without his taking any particular

QUE.

Court of Review. 1912

KLOCK v. THE MOLSONS BANK (No. 1).

Brunean, J.

or subsidiary conclusions on this point. The Court of first instance had doubtless the power to mention it in the *dispositif* of its judgment in virtue of art. 113, Code of Procedure, but it was under no duty or obligation to do so. The fact that the defendant has lost in the contestation relative to this payment of $156,750.00 cannot constitute a special reason for authorizing the Court to compensate the costs according to art. 549, C.P. The jurisprudence to which I shall refer in a moment in support of the decision of the majority of this Court upon the question of costs is equally applicable to that of the Court of first instance.

Although we consider the judgment well-founded should we, nevertheless, modify it by declaring in the *dispositif* that the defendant has been paid $156,750.00 and that it should deduct this amount from what the plaintiff owes it, solely because one of the reasons for judgment establishes this fact or puts forward this legal pretension? I consider that we are no more obliged by law to do this than the Court of first instance, and this for the same reasons as those which justified that Court in not doing so. Like that Court we have the power to do so, but are not bound to do so. This power is derived not only from art. 113, C.P., but also in my opinion from art. 1208, C.P., which permits us to provide for all cases in which the law affords the party no special remedy.

In order to induce us to exercise this power the plaintiff would assimilate his demand to one for the radiation of the registration of a real right; in support of his contention he cites a decision of the Cour de Cassation of January 11, 1847 (D. 1847-1-125), deciding that the debtor who makes a partial payment can ask that the inscription be reduced as to that sum, unless there is a special agreement to the contrary. This decision was rendered under the provisions of articles 2157 and 2158 of the Code Napoleon.

The first paragraph of art. 2148 C.C. reproduces art. 2157 C.N. Those who are entitled to ask for the radiation of the registration of the real right (art. 2149 C.C.) can also doubtless ask that the hypothecary debt which is registered be reduced upon partial payment to the amount of the balance remaining due. But there is a great difference in my opinion between such an action and the present one. The former in effect is based on the fact that the hypothecary debt is registered while there is nothing of the sort in the present case. These timber limits and timber licenses are not registered; nor was the agreement of September 19, 1901, creating the pledge; at least there is no allegation or evidence to this effect. This does not mean of course, that the action would not lie for the reduction of the amount of the debt established by a contract of *antichrèsis*

QUE.

Court of Review. 1912

KLOCK v. THE MOLSONS BANK (No. 1).

Brunean, J.

which was duly registered. I consider on the contrary for the reasons given in the judgment cited above and approved by Laurent (vol. 31, p. 171, No. 202), that the inscription could be reduced in accordance with the partial payment, but this is not the case which we have to decide. The present action is for restitution of a thing pledged; it has not for its object the radiation, even partial, of the registration of a real right, although the contract from its nature confers real rights since it relates to rights of immoveables.

Does it follow, however, that we must necessarily refuse the plaintiff's request? He has asked by the conclusion of his action that we should declare the debt for which he has given the pledge to be wholly paid, compensated and extinguished. Instead of proving the entire payment which alone would entitle him to his full conclusions he has only proved a partial payment of $156,750.00. In declaring by the *dispositif* of our judgment that he has only paid this amount we grant him part of what he has demanded, since the $156,750.00 was comprised in the total amount which he claims to have paid. We grant him less than he asks. It is not a decision *ultra petita*.

Thus, a definitive demand can be reduced to a provisional one (Carré and Chauveau, vol. 4, p. 330, q. 1746); a petition in revocation of judgment (*requête civile*) will not lie if the court or tribunal has granted less than was asked (Garsonnet, vol. 6, par. 2358, p. 461, note 2). The Court may restrict the conclusions and only grant a part of them (art. 113 C.P.). We have, therefore, the power to grant the plaintiff *acte* of his partial payment of $156,750.00 and to modify in consequence the *dispositif* of the judgment of the Court of first instance.

It seems to me that both parties are equally interested in having their true position as creditor and debtor declared in the present case. This declaration flows from their pleadings and their respective pretensions; if it is true, and with the Court of first instance we consider it to be so, it cannot injure the defendant because it only establishes the certain payment which it has received from its debtor, while the latter may be greatly benefited thereby in his credit and in his business by the improvement of his financial position. We put an end also to the dispute in regard to this sum of $156,750.00 which the defendant has specially contested but in regard to which it has failed.

I am therefore, of opinion to modify the *dispositif* of the judgment by adding that the plaintiff has nevertheless paid the defendant the aforesaid sum of $156,750.00.

There remains the question of costs.

The action is none the less dismissed; the plaintiff loses.

QUE.
Court of Review.
1912
KLOCK v. THE MOLSONS BANK (No. 1).
Bruneau, J.

Does the fact that he has succeeded in having the judgment modified after contestation oblige us to make the defendant pay the costs?

The following are some of the decisions applicable to this question.

The appellant who loses upon some of the points at issue may nevertheless be condemned to pay all the costs (Cassation, January 9, 1882, D. 1882-1-117). Now the plaintiff has lost on all points except one. There is therefore no reason why the principle of this judgment should not be applied to him. Furthermore, it is the constant jurisprudence in France that the party who succeeds on one head may be condemned to pay all the costs when he loses on the other heads; this is simply the exercise of the discretionary power which Judges have in appreciating the respective burdens of the parties (Cass. 10th April, 1839; 11th January, 1841, Dall. No. 48; 6th July, 1864, J. Av. vol. 90, p. 163; 21st December, 1875, *ib.* vol. 101, p. 298).

Article 131 of the French Code of Procedure it is true allows the Judges to compensate the costs in whole or in part if the parties lose respectively upon different points. The jurisprudence considers that in virtue of this text the Courts are invested with an absolute power of appreciation for the purpose of dividing the costs between the parties who lose respectively in a case, and are not obliged to give reasons for this decision (Cass. 15th Dec., 1873, S. 1874-1-199; S. 23rd March, 1875—S. 1875-1-155; S. 1876-1-125; S. 1875-1-109; S. 1878-1-468; S. 1881-1-77; S. 1882-1-117; S. 1885-1-212).

Article 549 C.P. in my opinion authorizes a similar solution since the fact of losing respectively on different pretensions of law or fact is a special cause for which the Court can mitigate or compensate the costs or order otherwise. Our Courts have more than once sanctioned the principle and it is to be desired that they would put it in practice whenever occasion arises, for it is a rule of absolute justice as Garsonnet says (vol. 3, par. 1104-2, p. 497): *Bélanger* v. *Paxton*, 14 R.L. 528; *Lavery* v. *The Corporation of Bailiffs of the District of Montreal*, 16 R.L. N.S. 137; *Trebat* v. *Legris*, 9 L.N. 10; *Contant* v. *Demers*, 6 R. de J. 481; *Fontaine* v. *Mongeau*, 2 O.R., 12 S.C. 20.

We should not, however, compensate the costs: Firstly, because the plaintiff has lost as regards the object of his principal demand; secondly, because the modification which we are making in the *dispositif* was only specially asked for before this Court; thirdly, because we are not obliged in law to make such a modification in deciding on the merits of the action themselves; fourthly, because the failure to pronounce upon the payment of the sum of $156,750.00 in the *dispositif* of the judgment is not a ground for its reversal.

QUE.

Court of Review. 1912

KLOCK v. THE MOLSONS BANK (No. 1).

Bruneau, J.

The *dispositif* of the judgment of the Court of first instance will therefore, be modified by the unanimous opinion of this Court, but without costs according to the majority of the Court for the reasons given above.

GUERIN, J. (dissenting on the question of costs only), held that when the finding of partial payment and set-off (compensation) is embodied in the *dispositif* by an appellate Court, and the judgment of the Court below is modified to that extent, but confirmed as to the dismissal of the action, such a modification is not a sufficient ground for ordering the respondent to pay the costs.

Order accordingly.

CONSUMERS CORDAGE CO., Limited v. MOLSON.

QUE.

K. B. 1912

March 15.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Carroll, and Gervais, JJ., Mercier, J., ad hoc. March 15, 1912.

1. CORPORATIONS AND COMPANIES (§ IV B—52)—APPLICATION FOR SHARES TO A HOLDING SYNDICATE.

An application for shares and payment of a call thereon to a syndicate is not an application to the company whose shares this syndicate may hold and there is no contractual relation between the applicants and the company until, at any event, an allotment thereof is made.

2. EVIDENCE (§ IV I—434)—DISCHARGE OF MORTGAGE—PRESUMPTION FROM ACQUIESCENCE—DOCUMENTARY EVIDENCE.

Proof of acquiescence in the discharge of a mortgage signed by executors will not be inferred: there must be positive documentary evidence to that effect or at least a commencement of proof in writing or the admission of the interested party.

3. ESTOPPEL (§ III G—85)—NOTICE OF MIS-STATEMENT IN PROSPECTUS—DELAY IN PROTESTING—ACQUIESCENCE OR RATIFICATION.

The fact of a person seeing a prospectus wherein a company makes certain statements, which, if true, would affect such person's rights, and of not proceeding immediately to protest against such statements is no proof of acquiescence in such statements and of ratification of the acts or deeds therein described.

THIS was an appeal from a judgment of the Superior Court, rendered by the late Mr. Justice Curran on the 22nd February, 1909, which maintained in part, to the extent of $12,500, the action of the respondent Frederick W. Molson to set aside a discharge of a hypothec in his favour.

An appeal by the Consumers' Cordage Company and a cross-appeal by Molson were argued at the same time. By the former appeal, the company asked that the action be entirely dismissed, and by the appeal of the latter, it was asked that the action be maintained for the whole amount, to wit: $22,500.

The action was to set aside a deed of discharge for $135,000 executed in favour of the company on the 3rd January, 1903, by Alexander W. Morris and C. B. Morris, purporting to act in their quality of executors of the late John A. Converse.

QUE.

K. B.
1912

CONSUMERS CORDAGE CO., LTD. v. MOLSON.

Statement

Dame Helen Augusta Converse, the mother of respondent, F. W. Molson, had a life interest in this mortgage to the extent of $50,000, the balance being payable upon her death to the respondent Molson and his brother, H. M. Molson, in equal share. By an agreement between the parties in interest, the mortgage had been reduced from $50,000 to $45,000 and in consequence the share in this mortgage claimed by F. W. Molson was $22,500.

The rights of Dame Helen Augusta Converse had already been determined by a judgment of the Court of King's Bench rendered on the 14th February, 1899, confirmed by a judgment of the Supreme Court, which however limited the matters in issue to her individual claim: *Consumers' Cordage Co.* v. *Converse*, Que. 8 K.B. 511; *Consumers' Cordage Co.* v. *Converse*, 30 Can. S.C.R. 618.

It was argued that F. W. Molson and his brother, H. M. Molson, had a full and complete knowledge of the action of the executors—who were also directors of the company—in executing the discharge and had approved and ratified the same, and whatever might be the rights of their mother in the matter, they were bound by their acts and by this ratification. The trial Judge in part maintained this pretension by declaring that the discharge of the mortgage had been ratified to the extent of $20,000 and that consequently F. W. Molson was only entitled to one-half interest in the balance, or $12,500.

It was from this judgment that the present appeal was instituted, and the facts of the case sufficiently appear from the judgment of Mr. Justice Lavergne appearing below.

T. Chase Casgrain, K.C., for the Consumers' Company, submitted that even if the acts of the executors and the company appellant were tainted with fraud, the respondent Molson could not rely upon this fraud; that the irregular and fraudulent entries in the books of the company had no bearing upon and in no way influenced the consent given by Molson to the cancellation of the hypothec; that by agreeing that the Converse estate should subscribe for 500 shares of stock, 200 of which were to be applied for by himself and his brother, the respondent consented that the hypothec securing his claim should be replaced by such stock; that the respondent Molson had a full knowledge of the prospectus, which was issued, and applied for the shares according to the terms of this prospectus, and fully acquiesced in the declaration made to the public that the company had no mortgage indebtedness; that Molson having acted upon this prospectus and having caused others to act thereon, was estopped from now saying that the declarations contained therein were untrue; and finally, that all the circumstances of the case shewed that F. W. Molson was perfectly aware of all the acts and deeds of the executors and of the estate and was bound thereby.

QUE.
K. B.
1912
CONSUMERS CORDAGE CO., LTD. v. MOLSON.
Argument

Messrs. *A. W. Atwater*, K.C., and *J. W. Cook*, K.C., for the respondent and cross-appellant F. W. Molson, submitted that the pretended discharge of the mortgage was wholly illegal and was not acquiesced in by him in any way; the executors had no authority whatever to discharge the mortgage, this question being settled by the decision of this Court in the case of *Consumers' Cordage Co.* v. *Converse*, Que. 8 K.B. 511. As regards acquiescence in such discharge this could only be proved under the terms of article 1233 by a *commencement de preuve* in writing or the admission of the adverse party. Constant objections to the evidence were made throughout on this ground. The only writing on which the company could rely as coming from F. W. Molson was the application for 200 shares of stock, which was not signed by himself but by his brother H. M. Molson, and the receipt which he gave to A. W. and C. B. Morris for $1,000. These writings were insufficient to constitute a *commencement de preuve*. Neither the application nor the receipt were addressed to or had any connection with the company, which was not a party to the transaction. See *Laliberté* v. *Roy*, 11 Que. S.C. 18. Even were there a valid commencement of proof, the evidence was not sufficient to justify the conclusions that there was any acquiescence in the pretended discharge. Such an acquiescence or confirmation is not easily presumed and must be clearly proved, as was held in *Bouchard* v. *Blais*, 4 L.C.R. 371. The doctrine is laid down absolutely by the greatest authors: 9 Pothier, Traité des Droits, Bugnet edition, sections 196, 197, pp. 477 and 478, and 1 Taylor on Evidence, 10th edition, sections 809, 813, and 816.

Apart from the question of the legality of the proof as to acquiescence, it was submitted that the charges of fraud made by the respondent were amply substantiated and that he was entitled to ask that the mortgage be declared effective for the full amount of the share belonging to him, namely, $22,500.

March 15, 1912. LAVERGNE, J.:—Both parties in this case appeal from the judgment rendered by the Superior Court, Curran, J., on the 22nd February, 1909.

The testamentary executors of the late John A. Converse, Alexander W. Morris and Charles B. Morris, executed in favour Charles B. Morris, certain immoveable property for the sum of $135,000, with interest, and granted a *main-levée* of the hypothecs given to guarantee this claim.

On the 3rd January, 1903, Frederick W. Molson instituted an action against the company wherein he prayed that this discharge and *main-levée* be declared illegal and null and that certain immoveable property belonging to the company should, notwithstanding the said discharge, be declared hypothecated in his favour and in favour of his brother, Henry Markland Molson, to the extent of the sum of $45,000.

QUE.

K. B.
1912

CONSUMERS CORDAGE CO., LTD. v. MOLSON.

Lavergne, J.

The facts of the case are as follows:—

By deed of sale of the 20th March, 1886, the late John A. Converse sold to his grandsons, Alexander W. Morris and Charles B. Morris, certain immoveable property for the sum of $150,000, stipulating that at his death this price should be paid to his three children, that is to say, $50,000 to each one of them. To secure the payment thereof, as stipulated, the said immoveables were hypothecated for the sum of $150,000.

By his will of the 8th April, of the same year, the said John A. Converse confirmed the disposition of the said deed of sale except as to his daughter, Dame Helena Augusta Converse, to whom he bequeathed the interest only of the sum of $50,000, the capital to be paid to the sons of the said Dame Converse, namely, Frederick W. Molson and Henry M. Molson.

Later, as a result of an agreement which is admitted, this sum of $50,000 was reduced to that of $45,000.

John A. Converse died on the 4th of May, 1886, without revoking or modifying the said will.

On the 6th January, 1893, the said Alexander W. Morris and Charles B. Morris, who had accepted the charge of testamentary executors, and had taken possession of the estate of the said John A. Converse, consented to the deed of discharge and *main-levée* already mentioned in favour of the company for the said sum of $135,000 balance of price of the said immoveable property and this without having received the price of the sale.

The appellant and respondent, Frederick W. Molson, asserts that the said discharge is illegal and null and was granted without right by the said executors without the receipt by them of any money and as a result of a conspiracy with the Consumers' Cordage Company to defraud the true creditors of this amount.

The appellant company pleaded, in substance, that Alexander W. Morris and Charles B. Morris having accepted the executorship of the will of the late John A. Converse took possession and control of the estate and continued the cordage business of their grandfather under the name of "A. W. Morris and Bro."; that this firm failed; that later A. W. Morris, having obtained a discharge from his creditors, acquired the property which was re-sold to the Dominion Cordage Company for the price of $401,415.06, of which $215,000 were paid in cash and the balance of $186,413.06 were stipulated to be payable to different persons mentioned, among others, $45,000 to Dame Helena Augusta Converse, the mother of the appellant, and respondent Frederick W. Molson; that on the 6th January, 1892, the Dominion Cordage Company sold the property to the Consumers' Cordage Company, appellant, for the sum of $186,413.06, of which $45,000 was payable to the said Dame Helena

Augusta Converse; that in the month of November, 1892, the appellant company decided to pay the hypothec upon the said property and paid the sum of $146,413.06, balance then due, to Alexander W. Morris and Charles B. Morris, the executors of the Converse estate, who agreed that the said sum should stand to the credit upon the books of the Consumers' Cordage Company, and on the 6th January, the said A. W. Morris and C. B. Morris granted the discharge and *main-levée* already mentioned.

The plea of the company continues in effect as follows: The *main-levée* in question and the receipt of the executors for the said sum of money which remained on deposit in the hands of the said company were known, approved of and ratified by F. W. and H. M. Molson, who had been consulted upon the matter; in the month of January, 1893, the owners of all the capital stock of the company decided to offer the sum of one million dollars of the said capital stock in order to carry out an arrangement entered into on the 31st December, 1892, and, as a consequence on the 14th January, 1893, one million dollars of the said capital stock, consisting of 10,000 paid-up shares, were offered to the public for subscription. This offer was advertised in the newspapers and in a prospectus circular. This prospectus declared that the property of the company was free of all charges and hypothecs.

To carry out this sale Alexander M. Crombie, at that time manager of the Canadian Bank of Commerce, was appointed a trustee of the said 10,000 shares, applications for the shares to be addressed to the said Crombie. Mr. H. M. Molson, knowing all these facts, made application by which he subscribed for 200 shares in the capital stock offered to the public, upon which $5.00 per share was payable in cash, $15.00 at the time of the allotment or distribution of the said shares and the balance payable $20.00 per share at one, two, three and four months from the date of the allotment.

The cheque for one thousand dollars which accompanied the application made to Mr. Crombie was received by Messrs. Molson from the Messrs. Morris, the executors, who had taken this money from the amount carried to the credit of the Converse estate upon the books of the company. Then it was also known to the Messrs. Molson that A. W. and C. B. Morris had applied for 300 more shares, and had made the different payments upon these shares with the money of the said Converse estate.

That all the said shares had been allotted in favour of the Converse estate to the knowledge of the Messrs. Molson and that they had been paid for by the company upon the order of the executors and for the benefit of the said estate.

That 2,932 shares of the said capital stock were transferred

QUE.
K. B.
1912
CONSUMERS CORDAGE CO., LTD. v. MOLSON.
Lavergne, J.

to the Messrs. Molson and put into the hands of H. M. Molson as trustee about the 26th February, 1894, and that the said H. M. Molson as such trustee, with the consent of his brother and of the said A. W. and C. B. Morris, subsequently transferred to the Merchants Bank of Halifax the said shares as security for a loan made by the said bank to pay certain debts of the Converse estate. That these shares had subsequently been held by the said bank and used to pay the said debt of the Converse estate.

The plea alleges a knowledge and a complete acquiescence on the part of the said F. W. Molson in all the acts of the executors.

The judgment of the Superior Court, from which the appeal is taken, declares that the Messrs. Molson were acquainted with the prospectus; that they had subscribed for 200 shares of the capital stock of the company; that they had received from the executors of the Converse estate one thousand dollars as a payment on account of the said shares; that they relied upon the executors to see that the other payments were made, and that F. W. Molson had no longer any interest in the said hypothec for the amount of $20,000; that whatever might be the acts of his brother, H. M. Molson, as to the balance of the said hypothec, namely, $25,000, the said F. W. Molson was not responsible for these acts, and the judgment declared the discharge and *main-levée* null and void as to the said F. W. Molson for the sum of $12,500, and that the hypothec was, therefore, good and valid in favour of the said F. W. Molson for such amount.

Frederick W. Molson asserts that he never consented to the discharge of hypothec, which was given in favour of his mother and subsidiarily in his own and in favour of his brother, H. M. Molson, for the sum of $45,000.

He admits that at a meeting held at the residence of Mr. Fulton, treasurer of the company, on the 31st December, 1892, he was informed that it was proposed to sell shares of the said company to the par value of one million dollars and he was then urged, as was also his brother, to subscribe for a certain number of these shares; Fulton gave him to understand that he would be able to obtain these shares for two-thirds of their apparent value at par; the prosperous condition of the company was explained; also that shares could easily be disposed of at par and that there would be a large profit for himself. Nevertheless, nothing was done at that time.

A prospectus had been prepared shewing that the properties of the company were free and clear from all charges.

Frederick W. Molson says that he saw this prospectus, but that he did not examine it carefully. He never thought for a

moment that the hypothec of his mother, of himself, and of his brother, could be discharged without his formal consent.

This prospectus was not of his making, he was then in no way interested in the company. He believed that this pompous prospectus was an advertisement to attract subscribers to the stock, as is so frequently the practice.

On the 17th of January, 1893, H. M. Molson signed for himself, and for the said Frederick W. Molson an application for 200 shares out of the said ten thousand shares, of which the syndicate claimed to be proprietor.

In making this application according to the terms of the subscription, the sum of $1,000 was payable. The appellant company acting, through A. W. Morris, handed over to the said Messrs. Molson a cheque for $1,000, for which the Messrs. Molson gave a receipt. To whom then was this cheque payable? Without doubt to the owners of the shares, members of the said syndicate.

I am disposed, in any event, seeing the receipt of the said Messrs. Molson, to hold that the company had made a valid payment of the sum of one thousand dollars to the said Messrs. Molson.

Frederick W. Molson was later informed that the president of the company, Mr. Stairs, would not consent to sell the shares of the company at 66 per cent. of their par value. Mr. Molson then considered that his subscription was of no effect, and did not, therefore, trouble himself further about it. There was never any allotment of shares in his favour, there never was a call for any subscription payment, no demand of payment has ever been made upon him, and no certificate for the stock has ever been offered to him.

What has become of these 200 shares? The proof on the subject is not very clear. Nevertheless, this is what we have been able to ascertain with regard to it:—

A. W. Morris himself had subscribed for 300 of these shares. Later on, he appears as the holder of 400 to 500 shares "in trust."

The pretention of the company is that the money due to the Converse estate was used to pay for these shares of which not a single one has been charged to or allotted in favour of Frederick W. Molson.

The appellant company contends that the fact of having consented to the application for 200 shares of the company (a fact which, strictly speaking, should only bind the party signing the subscription, H. M. Molson, but which was ratified by Frederick W. Molson in signing jointly with his brother a receipt for one thousand dollars in favour of the company in order to pay 5 per cent. upon the subscription) was an acquies-

QUE.
K. B.
1912
CONSUMERS CORDAGE CO., LTD. v. MOLSON.
Lavergne, J.

cence in the discharge of the hypothec and in everything that Mr. Morris had been able to do in the name of the Converse estate.

What is certain and admitted is that Mr. A. W. Morris, with the aid of his brother, acting in their quality of executors had acquired a large number of shares in the appellant company, and used the money of the Converse estate to pay therefor, at least, A. W. Morris says so. They traded with and used them in different ways until they were lost. H. M. Molson was for sometime the holder as trustee of a great number of these shares, at the request of the Messrs. Morris.

Up to what point has H. M. Molson compromised his rights in the Converse estate? I do not think that we have to decide this, because H. M. Molson is not a party to this case. But F. W. Molson has never had any knowledge of anything but the receipt for $1,000, which he gave for the cheque of the company for that amount.

As I have already said, no demand has been made upon him for the payment of the shares, no certificate for the shares has ever been offered him, no allotment of the shares has ever been made in his favour.

Moreover, he has never heard the affair spoken of. He only learned that the president of the company, Mr. Stairs, would not consent to have these shares sold at 66 per cent. of their par value. He believed in good faith, that his subscription with his brother was treated as of no effect, and as never having been made. The proof, as I have already said, shews that A. W. Morris had taken all these shares in his own name as trustee. He claims that he was a trustee for the Converse estate.

The company does not pretend that Morris had the right of swallowing in this way all the Converse estate and particularly the shares of F. W. Molson. As a matter of fact, the powers of the executors did not confer upon them any such right. The rights of Lady Morris to $50,000 in usufruct, the capital being for her children, constituted a particular legacy, the distribution or disposition of which the executors had no right to change.

In deciding this point in favour of Lady Morris, mother of F. W. Morris, the Courts have set this question at rest.

But, says the company, if A. W. Morris had not this right, F. W. Molson has ratified the acts of A. W. Morris, and has acquiesced in his actions to the extent of his interest in the Converse estate; this ratification or acquiescence is valid and discharges the company.

F. W. Molson never gave any authority to A. W. Morris to deal with his property. He has never ratified either the acts of Morris or even the acts of H. M. Molson, of which he did not even know. All that he agreed to was the payment by the com-

pany of the sum of $1,000, a payment that he never accepted himself and of which he did not even know the destination, but for which he must be held responsible jointly with his brother, H. M. Molson, since he signed the receipt with his brother. Beyond this, there is nothing that can bind him. There is nothing which can be held as equivalent to a discharge.

A great part of the oral evidence made in this case was absolutely illegal and ought not to have been admitted.

The company says that it has a commencement of proof in writing in the receipt signed by F. W. Molson. For my part, I consider this receipt as proof of his consent to the payment of the sum of $1,000. This receipt can prove only a payment of $1,000. It is not a commencement of proof in writing for the balance owing to him by the estate of his grandfather.

He is entitled to one-half of the sum of $45,000. Out of this sum he has agreed that $1,000 should be used to make a payment upon the shares subscribed by his brother, but nothing more. Apart from the receipt in question the proof of the consent to the discharge and *main-levée* in question could be looked for only in his own evidence given by him in the witness box. I cannot find it in this evidence.

The subscription by H. M. Molson was not addressed to the company, but to Mr. Crombie as representing a syndicate who were the owners of the shares offered for sale to the public. Supposing that the subscription of the Molsons was valid (which I cannot admit for a moment since no allotment was made in their favour and since they had no authority to bind the Converse estate), at the worst, their creditor for these shares would be the syndicate who were the owners thereof, and not the company. They have never been recognized as holders and owners of shares in the capital stock of the company. If anyone could make any claim upon them it would be the syndicate. The company has no direct action against them. They are not shareholders in the company.

In order to prove a consent to a payment of $22,000 and to a discharge for this amount, there must be other elements of proof than have been adduced in this case.

The convincing authorities cited by F. W. Molson in his factum are absolutely *ad rem* and are more than sufficient to sustain his contentions.

I refer especially to the jurisprudence cited and to the authority of Pothier.

For these reasons I come to the conclusion that the payment of $1,000 alone can be considered as valid in so far as F. W. Molson is concerned. There remains a sum of $44,000, in which F. W. Molson is interested to the extent of one-half, to wit, $22,000. To the extent of this $22,000 the hypothec of F. W.

QUE.
K. B.
1912
CONSUMERS CORDAGE CO., LTD. v. MOLSONS.
Lavergne, J.

Molson ought to be maintained in his favour and the discharge and *main-levée* annulled for so much. I make no pronouncement upon the rights of H. M. Molson.

I am, therefore, of opinion that the appeal of the company ought to be dismissed and that the appeal of F. W. Molson ought to be maintained in the proportions mentioned, the whole with costs against the company.

Appeal of the company dismissed; appeal of F. W. Molson allowed with costs.

MAN.
C. A.
1912
Mar. 4.

HICKS v. LAIDLAW.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue and Cameron, JJ.A. March 4, 1912.

1. CONTRACTS (§ II C—140)—TIME OF THE ESSENCE—EFFECT OF EXTENSION.

Where 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 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.

[*Barclay* v. *Messenger*, 43 L.J.Ch. 449, followed.]

2. SPECIFIC PERFORMANCE (§ I A—14)—FAILURE AS TO TIME—EQUITABLE RELIEF.

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 surrounding circumstances which would make it inequitable to interfere with and to modify the legal right. (*Per* Perdue, J.A.).

[*Tilly* v. *Thomas*, L.R. 3 Ch. 61, specially referred to.]

AN appeal by the defendant and a cross-appeal by the plaintiff from the judgment of Robson, J., 19 W.L.R. 525.

The appeal was dismissed and on plaintiff's cross-appeal the judgment pronounced at trial was varied by adding a clause thereto.

A. W. Morley, for plaintiff.

A. Haggart, K.C., for defendant.

RICHARDS, J.A.:—The facts are fully set out in the judgment of the learned trial Judge. It seems to me that the contention, that the giving of the notice of 9th January, 1906, by the plaintiff to the defendant, did wholly away with the provision in the contract that time should be of the essence of the contract, is untenable. In *Parkin* v. *Thorold*, 16 Beav. 71, the Master of the Rolls did express such an opinion, but that view has been since held erroneous by Lord St. Leonards and by Jessel, M.R. The latter in *Barclay* v. *Messenger*, 43 L.J. Ch. 449, 30 L.T.N.S. 354,

held that such an extension of time only substitutes the extended time for that originally fixed, without in any way doing away with the provision that time is to be of the essence of the contract. Whether the attempt to make the first postponed payment, four months or so after the time as extended by the notice of 9th January expired, was too late to enable the defendant to then insist on specific performance of the contract by the plaintiff need not now be considered. The return of the money by the plaintiff to the defendant, with a statement that she considered the contract cancelled and would not carry it out, was notice to him that she considered it at an end. Nevertheless he then waited several years before making any claim, except by filing a caveat, and in fact made none until brought into Court by the plaintiffs bringing this action. Even the mere making or persisting in a claim would not in itself have made his position better.

I take the law to be as stated in *Parkin* v. *Thorold*, 16 Beav. 71, in that respect, where Lord Romilly says, at p. 73:—

> If one of two parties to a contract for the sale of land gives to the other notice that he will not perform the contract, and the person receiving the notice does not, within a 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.

The use of the word "abandonment" used by the noble and learned Lord in the above quotation, is perhaps too wide an expression. He only means by it an abandonment of the right to claim specific performance. The words following that word distinctly shew that that only is his meaning. The result is, I think, that the defendant should be held, as he has been, as I understand it, by the learned trial Judge, to have no further claim whatever upon, or rights in, the land; but we cannot now say that the contract should be rescinded. The defendant may have common law rights to sue for damages, which nothing but the lapse of time under the Statute of Limitations might interfere with. The plaintiff in this action has asked to have the caveat, which the defendant filed, taken off record. As between the plaintiff and defendant I can see no reason why that should not be ordered, but the power to deal with caveats is limited by the Real Property Act itself. Section 138 of that Act says:—

> In case of any caveat filed . . . the applicant or owner may at any time before the caveator has taken proceedings thereunder apply to the Court or a Judge or a Judge in Chambers . . . calling upon the caveator to shew cause why such caveat should not be discharged.

It will be seen that the right to apply is limited to the "applicant or owner." There was not a tittle of evidence given in the case to shew that the plaintiff was the owner of, or had any

MAN.
C. A.
1912
HICKS
v.
LAIDLAW.
Richards, J.A.

title to, this land, legal or equitable. She does, in one place, speak of having purchased it, but evidence of title cannot be given in that way. She, therefore, cannot be held to have shewn herself the owner. The word "applicant," as I understand it, in this section refers only to a party applying to bring the title to land under the Real Property Act. It might be possible for the plaintiff, if she has an equitable title, to get the holder of the certificate of title to apply to have the caveat removed; but I express no opinion as to the method of doing that, as it is not now in question.

I think both appeals should be dismissed. But I agree with the conclusion arrived at by my brother Perdue as to the clause to be added to the judgment of the trial Judge.

The defendant to pay the costs of his appeal. No costs of the plaintiff's appeal to either party.

PERDUE, J.A.:—The facts of this case are set out in the judgment appealed from. The agreement contained a clause providing that in case the purchaser should make default the vendor might on delivering or mailing a notice, calling upon the purchaser to make payment within a calendar month, and on the failure of the purchaser to make payment within that time, the contract should be void and all rights of the purchaser under the agreement should cease, and the purchaser should have no right to reclaim moneys theretofore paid under the agreement. It was clear from the evidence and was in fact conceded on the argument that the vendor had failed to comply with the terms of this clause and that consequently she was not in a position to avail herself of it. The contract, however, contains a further clause in these words:—"And it is further agreed that time is to be considered the essence of this agreement." The question therefore is, what is the effect of this last provision in regard to the rights of the purchaser?

Under sec. 39, sub-sec. (m), of the King's Bench Act:—

> Stipulations in contracts as to time or otherwise which would not before the passing of The Queen's Bench Act, 1895, have been deemed to be or to have become of the essence of such contracts in a Court of equity, shall receive in all Courts the same construction and effect as they would prior to the passing of The Queen's Bench Act, 1895, have received in equity.

The rights of the parties, therefore, and the remedies to be accorded to them in this case, will depend upon the principles declared by the Courts of equity. The nature of the equitable jurisdiction is thus described by Lord Cairns in *Tilley* v. *Thomas*, L.R. 3 Ch. 61, 67:—

> A Court of equity will relieve against and enforce specific performance notwithstanding a 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 (as Lord Justice Turner said

> in *Roberts* v. *Berry*, 3 DeG. M. & G. 284) there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Courts of equity held they were not concluded by the letter of an agreement to do some act within a given time, and where the party in default came before the Court with a sufficient excuse for non-compliance with the contract, and there was no unreasonable delay upon his part, relief might be granted to him. See Williams on V. & P., 2nd ed., 58, 59.

In the present case the defendant made default in paying the instalment which fell due on the 1st of December, 1905. The plaintiff appears to have written to him on several occasions demanding payment but without effect, and on the 9th January, 1906, she wrote him a letter, which was duly received by him, referring to the default and to the letters she had written him and then stating:—

> I now give notice that if payment is not forthcoming within thirty days after receipt of this, the agreement will be cancelled and all your rights, title and interest in lot null and void.

As previously stated, this letter must be held not to have been a compliance with the condition relating to the cancellation of the contract and the retaining of the purchase money, but it was good as a notice calling upon the defendant to make his payment in accordance with the terms of the agreement or that the agreement would be cancelled. It was in effect an extension of the time for payment of the overdue instalment, until after the lapse of thirty days from the receipt of the notice. The defendant failed to comply with this notice and did not for several months make any tender of the moneys that were overdue.

It was argued that the plaintiff by calling upon the defendant for payment and by extending the time by her letter of January 9th, 1906, had waived the condition as to time being of the essence of the contract, at all events, as regards the then overdue payment. It appears to me that the effect of the letter was that, notwithstanding the time that had passed, the plaintiff was still willing to give the defendant the further time to pay up, that the extension of time only waived the provision as to the essentiality of time during the extended period and that on the termination of that period it again revived. In *Barclay* v. *Messenger*, 43 L.J. Ch. 449, 456, Jessel, M.R., thus expresses the equitable rule to be applied:—

> If a man says a contract is to depend upon a payment of money by a certain day and the party entitled to receive the money says, "I will extend your time; I will give you a week or a month," why that should put the party in a better position than if it had been originally put in the contract, I cannot conceive. It appears to me

MAN.

C. A.
1912

HICKS
v.
LAIDLAW.

Perdue, J.A.

plain that a mere extension of time and nothing more is only a waiver to the extent of substituting the extended time for the original time and not a total destruction of the essential character of time."

I think the judgment of the trial Judge was right in holding that the defendant by his delay had waived all rights to specific performance, that is to say, if the defendant had asked for specific performance, in this case, which he has not done, the Court would have refused it. I think the trial Judge might have gone further and have declared that the defendant's right under the contract had been forfeited. If the defendant is no longer entitled to specific performance by his delay in the case, he would also be disentitled under the same circumstances to claim damages for non-performance. It may be that the purchase money he had already paid has not been forfeited, but that has been allowed to him by the trial Judge, the plaintiff's costs being set off against it *pro tanto*.

I think that, in order to put an end to any further litigation and in order to clear the plaintiff's title, there should be added to the judgment of the trial Judge a clause declaring that the defendant's rights under the contract, in so far as the land is concerned, have ceased and are at an end. The judgment of the trial Judge will be varied in accordance with the foregoing and the defendant's appeal will be dismissed with costs. There will be no costs of cross-appeal.

HOWELL, C.J.M., and CAMERON, J.A., concurred.

Appeal dismissed, with variation of judgment below.

Annotation

Time of essence of contract.

Annotation—Contract (§ IV F—371)—Time of essence—Equitable relief.

Although the general rule is that where a contract expressly stipulates that time is made of the essence thereof equity will enforce that rule, yet there may be circumstances under which a Court of equitable jurisdiction will relieve against such an express stipulation where justice may be more thoroughly done to all parties concerned.

In accordance with this rule, specific performance of a contract for the sale of land was granted where the purchaser failing to pay an instalment of the purchase-price when due made a tender thereof on the day after the date of the expiration of the notice of cancellation, though the contract specifically made time of the essence and further provided that unless payments of the purchase-price were punctually made the vendor might give the vendee thirty days' notice in writing demanding payment of the overdue instalment and declaring that if it was not paid at the expiration of the notice that the contract should be void and the vendor at liberty to sell and all money paid, forfeited to the vendor: *Great Western Lumber Co.* v. *Wilkins*, 1 Alta. R. 155. (For a criticism of this decision see *Steele* v. *McCarty*, 1 Sask. R. 317, at p. 330.)

Specific performance may be granted of a contract for the sale of land at the suit of a purchaser who failed to pay the purchase price when

Annotation (*continued*)—**Contract—Time of essence—Equitable relief.**

MAN.

Annotation

Time of essence of contract.

due, though time was made of the essence of the contract in that regard, where it appeared that the vendor who, to the knowledge of the purchaser, was merely a holder of an agreement for the purchase of the land from the owner, refused a request for inspection of such agreement and ignored a demand for a solicitor's abstract of title, both the request and demand being made by the purchaser before the first instalment of the purchase price was due: *Langan* v. *Newberry* (B.C.), 2 D.L.R. 298.

And specific performance was granted of a contract for the sale of land providing that time was to be of the essence and unless the payments were punctually made as stipulated the agreement was to be null and void and the vendor would have the liberty of re-selling the land, where the vendee was let into possession and had finally paid the first instalment which was 2/5 of the purchase price, but did not pay it when due and failed to pay the balance at the time stipulated and the vendor afterwards refused to accept it when tendered and declined to convey the property to the purchaser but gave no notice of cancellation and did not in any way intimate that he would cancel the agreement until he resold the property more than four years after the default: *Barlow* v. *Williams*, 16 Man. R. 184.

Where the agreement was that the defendant should advance money on the purchase of the land, and that the plaintiff should have the right to re-purchase the same by a certain day, upon repayment of the amount so advanced, and interest, together with what was paid by the defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract, it was held, that, although the Court, as a general rule, would hold a party to perform such a contract within the time limited, yet it was not ousted of its jurisdiction, but would admit him to shew a good and valid reason for its non-performance within such time, and in that case might order specific performance: *McSweeney* v. *Kay*, 15 Gr. 432.

And even when time is the essence of the agreement if the party in default has done what in him lay to perform the contract, the Court may in the exercise of its discretion grant specific performance: *Cudney* v. *Given*, 20 O.R. 500.

Where the contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer, and the offer contained, *inter alia*, the following provisions: "This offer to be accepted by September 25th, A.D. 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense," it was held, that time was of the essence as to all the terms of the contract; but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent upon her to do to put herself in a position to complete the sale; it was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted; and, having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer

MAN.

Annotation

Time of essence of contract.

Annotation (*continued*)—Contract (§ IV F—371)—Time of essence—Equitable relief.

to the plaintiff's claim for specific performance: *Foster* v. *Anderson*, 16 O.L.R. 565, affirmed; *Anderson* v. *Foster*, 42 Can. S.C.R. 251.

And in *Labelle* v. *O'Connor*, 15 O.L.R. 519, in which the Court refused relief against a stipulation making time of the essence, Judge Anglin declared it was true that a default under a contract of which time was the essence, did not, in the language of *McSweeney* v. *Kay*, 15 Grant 432, at p. 439, "oust the Court of its jurisdiction, or make it impossible for the Court to grant specific performance after the expiry of the time stipulated for. The Court will certainly as a general rule hold a party to such a contact bound to perform it within the time limited for its performance, but it will admit him to shew a good and valid reason for its non-performance at the time; as, for instance, that he did all that in him lay in order to its performance."

In England it would seem that the Court of Chancery, at one period at least, went to such an extreme in its disregard of time in contracts that Lord Thurlow, in *Gregson* v. *Riddle*, cited by Romilly, *arguendo*, in *Seaton* v. *Slade*, 7 Ves. 265, at p. 268, appears to have been of the opinion that time could not be made of the essence of a contract in equity even by the insertion of an express stipulation to that effect. But Lord Eldon said in *Seaton* v. *Slade*, *supra*, at p. 270, that, notwithstanding what was said in *Gregson* v. *Riddle*, he was much inclined to think that time might be made of the essence of a contract and the stipulation recognized in equity.

And in *Parker* v. *Thorold*, 16 Beav. 59, Lord Romilly said, at p. 64, that Lord Thurlow's dictum that time could not be made of the essence of a contract in equity had "long been exploded."

And in *Radcliffe* v. *Warrington*, 12 Ves. 326, in which specific performance of a contract with no express provision as to time was granted, though the party seeking the relief had not performed his part of the contract at the time stipulated, Lord Erskine denominated Lord Thurlow's statement as "a very strong proposition." See also Fry's Specific Performance, sec. 1076.

A company agreed with a land owner to purchase a piece of land for £4,000 of which £2,000 was to be paid at once and the balance on a future date named in the agreement with a provision that if the whole balance and interest was not paid off by that date, in which respect time was to be of the essence of the contract, the vendor might repossess the land without any obligation to repay any part of the purchase money and it was held that this stipulation was in the nature of a penalty from which the company, though in default as to the payment of the balance of the purchase money, was entitled to be relieved on payment thereof, with interest: *In re Dagenham (Thames) Dock Co., Ex parte Hulse*, L.R. 8 Ch. 1022, 43 L.J. Ch. 261.

Attention should be called to *Vernon* v. *Stephen*, 2 P. Wms. 66 (1722), which, though not strictly in point on the question here discussed, being an action for specific performance of a contract not containing an express stipulation as to time, is an illustration to what length the old Court of Chancery was prepared to go in relieving against a failure to perform

Annotation (*continued*)—Contract (§ IV F—371)—Time of essence—Equitable relief.

MAN.

Annotation

Time of essence of contract.

on time. It appears that while a former action for the same reliefs was pending the plaintiff had entered into several orders of Court whereby he was given further time to pay the residue of the purchase price, when if the money was not paid, the agreement was to be delivered up and cancelled and he was to lose what he had before paid. He again failed to pay on time and upon bringing a new bill his default was relieved upon payment of principal, interest, and costs. The Lord Chancellor said: "Here have been solemn agreements that ought not slightly to be got over; but however, if the defendant has his money, interest, and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff, to lose all the money which he has paid; lapse of time in payment may be recompensed with interest and costs; and as to these agreements, they were only intended as a security for payment of the money, which end is answered by the payment of principal, interest, and costs."

The proposition that equity may, when circumstances so demand, relieve against an express stipulation in the contract that time is of the essence, finds support in the following American cases: *Camp Manufacturing Co.* v. *Parker*, 34 C.C.A. 55, 91 Fed. 705; *Potter* v. *Tuttle*, 22 Conn. 513; *L'Engle* v. *Occrstreet* (Fla.), 55 South.R. 381; *Machold* v. *Farnan*, 14 Idaho 258; *Smith* v. *Brown*, 10 Ill. 309; *Morgan v. Herrick*, 21 Ill. 481; *Steel* v. *Biggs*, 22 Ill. 643; *Tempel* v. *Hughes*, 235 Ill. 424; *Voltz* v. *Gummett*, 49 Mich. 453; *Morgan* v. *Bergen*, 3 Neb. 209; *Benedict* v. *Lynch*, 1 Johns. Ch. (N.Y.) 370, 7 Am. Dec. 484; *Sowles* v. *Hall*, 62 Vt. 247; *Kiefer* v. *Carter Contracting and Hauling Co.*, 59 Wash. 108.

"Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited, will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give special relief": *Cheney* v. *Libby*, 134 U.S. 68.

"Time cannot be made essential in a contract, merely by so declaring, if it would be unconscionable to allow it. Parties may stipulate to make it so when the stipulation is reasonable; but . . . if the stipulation is not reasonable, Courts will not regard it": Judge Campbell in *Richmond* v. *Robinson*, 12 Mich. 193.

Of course, the stipulation that time is of the essence of the contract may be waived by either party and therefore when such is the case a Court of equity will not give efficacy to such provisions: *Harris* v. *Robinson*, 21 Can. S.C.R. 390 (affirming on this point *Robinson* v. *Harris*, 19 O.A.R. 134, which affirmed 21 O.R. 43), though the lower decisions were reversed on other grounds; *Devlin* v. *Radkey*, 22 O.L.R. 399; *Hetherington* v. *McCabe*, 1 O.W.N. 802, 16 O.W.R. 154; *King* v. *Wilson*, 6 Beav. 124; *Hudson* v. *Bartram*, 3 Mad. 440; *Ex parte Gardner*, 4 Y. and C. Ex. 503; *Webb* v. *Hughes*, L.R. 10 Eq. 281; *Upperton* v. *Nicholson*, L.R. 6 Ch. 436; *Hill* v. *Sturdivant*, 46 Me. 34; *Morris* v. *Hoyt*, 11 Mich. 9; *Brown* v. *Ulrick*, 48 Neb 409.

ONT.

H. C. J.
1912

Feb. 9.

DURYEA v. KAUFMAN.

Ontario High Court. Trial before Middleton, J. February 9, 1912.

1. PATENTS (§ IV—31)—AGREEMENT FOR LICENSE—CONSTRUCTION OF.

An agreement for a license to manufacture and sell a patented invention is equivalent to a license.

[*Walsh* v. *Lonsdale*, 21 Ch. D. 9, 52 L.J. Ch. 2, 46 L.T. 858, followed.]

2. DAMAGES (§ III J—203*a*)—TECHNICAL CONVERSION—RETURN OF GOODS—RELIEF AGAINST DAMAGES.

Notwithstanding that there may have been a technical conversion of the plaintiff's goods by the defendant, the Court has power to relieve the defendant from payment of damages for the conversion on terms whereby the goods are returned.

3. COSTS (§ I—13)—APPORTIONMENT WHERE SUCCESS DIVIDED—SAME SOLICITOR—SETTLEMENT BY TRIAL JUDGE.

Where an apportionment of costs becomes necessary because of divided success of two of the parties defendant represented by the same solicitor, the proportionate part of the costs of the joint defence to be awarded against the plaintiff in respect of the successful defence of one defendant should be settled by the trial Judge in preference to its being left to be disposed of by the taxing officer.

THIS action was brought against Kaufman and the Edwardsburg Starch Company in respect of a written agreement made between the parties in January, 1906, and subsequent oral agreements. The first agreement recited that the plaintiff had made valuable discoveries in respect of the business carried on by the defendant company, for which he had secured patents both in the United States and Canada. These the defendants were to be allowed to use, on certain conditions, fully set out in the agreement. The plaintiff alleged that he had performed all that he was bound to do under the agreement, and that the defendants had taken advantage of his discoveries, but refused to carry out the obligations consequent thereon; and he claimed damages for the breaches of the contract, an account of profits, an injunction against infringing the patents, royalties, and a declaration that the defendants were not entitled to make use of his inventions.

Judgment was given for the plaintiff.

Messrs. *N. W. Rowell*, K.C., and *Casey Wood*, for the plaintiff.

Messrs. *D. L. McCarthy*, K.C., and *Frank McCarthy*, for the defendants.

MIDDLETON, J. (after summarising the first agreement and describing the mode of manufacture of starch products):—On the 31st December, 1901, the plaintiff obtained his patent for the manufacture of "thin boiling or modified starch," by the "in suspension" process.

This term "modified" had not then been applied to starch. Duryea says that he was the first to use it, and no trace of its earlier use has been found. While the term is convenient and scientific, it cannot be said to have any real meaning as applied to starch before this patent.

"Modify," according to Murray, may mean "to make partial changes in, to change (an object) in respect of some of its qualities, to alter or vary without radical transformation"—and, no doubt, this is the sense in which the term is used.

There has been much discussion as to the exact meaning of the expressions "modified starch" and "thin boiling starch," the plaintiff contending that starch that is in any degree changed has become "modified," and that, if the change has resulted in reducing the viscosity to any extent below the viscosity of the crude green starch, this has made the starch a "thin boiling" starch. The defendants, on the other hand, contend that these terms are synonymous, and both indicate a starch of such fluidity as to be known to the laundry trade as "thin boiling," *i.e.*, having what has been called a degree of viscosity of 40 or less.

The true view can, I think, best be determined after a consideration of the patents in question.

The plaintiff originally claimed an injunction restraining the infringement of this patent by the defendants, and the defendants in answer set up a license or agreement to license, and, in the alternative, that the patent was invalid. The plaintiff denied that the agreement to license was binding, and alleged that any right to manufacture had been lost by the defendants' defaults. An order was made by the Master in Chambers permitting the plaintiff to amend by withdrawing his claim to an injunction based on the allegation of infringement, without imposing any terms as to admission of the invalidity of the patent; and the plaintiff then contented himself with a claim for a declaration that there is no license subsisting entitling the defendants to use the patented process. I think this order was improvidently made, and that the Master ought not to have permitted this claim, once made, to be withdrawn, save upon terms amounting to its abandonment—but, as it is, this claim can now be raised in a substantive action. On motion made at the trial, I was compelled to strike out the defendants' counterclaim asking a declaration of the invalidity of the patent, as this Court has no jurisdiction to declare a patent invalid save as an incident to a defence in an action for infringement. . . .

Leaving out of consideration for the present any complication arising from Kaufman's position, the situation is this.

Duryea established the necessary plant, machinery, etc., to manufacture starch according to his in suspension process, and

ONT.

H. C. J.
1912

DURYEA
v.
KAUFMAN.

Middleton, J.

demonstrated, to the satisfaction of the defendant company, its commercial value, and starch has been and still is manufactured under this process and sold as "Diamond D."

Under sec. I., clause 3, the company, desiring to use this process, so notified Duryea, and on the 1st October, 1908, reimbursed him the cost of his outlay by the payment of $1,000. This gave the company the right, at the expiration of the agreement, to an assignment of the Canadian starch patent or a license to manufacture under sec. VIII., clause 1, subject to payment of royalty. Two questions arise upon this clause, the discussion of which can best be postponed—the form of the grant or license, and the amount of the royalty to be paid.

The plaintiff denied the right of the company to the license, because he alleged that the company had failed "to apply fair and energetic trade methods in marketing" this Diamond D. starch. It was well established that fair and energetic trade methods were used; and upon the argument it was admitted that this contention absolutely failed.

On the 25th March, 1911, a notice was served, purporting to cancel any rights under the agreement, by reason of the failure to pay royalties.

As the action was commenced on the 18th November, 1909, for the purpose, inter alia, of having it declared that the company had no right to a license, it is obvious that this notice cannot be relied on, for two reasons: (*a*) because the plaintiff's rights must be ascertained and declared as of the date of the writ, and at that time no royalty was due; (*b*) because the plaintiff had denied and by his action was denying the right to a license, and this excused the company from making any tender of the royalty.

The agreement for a license, upon the principle established in *Walsh* v. *Lonsdale*, 21 Ch. D. 9, was equivalent to a license; and the company were, therefore, entitled to manufacture and sell the modified starch.

In the manufacture of this modified starch, knowledge and skill, not to be acquired from the patent itself, are necessary in order to enable the company to obtain the best results. The nature of this special knowledge and skill was not disclosed upon the hearing, but it was said that it related to certain secret testing methods, necessary to enable any predetermined degree of modification to be readily and accurately obtained.

This is the very thing which Duryea agreed to give to the company. The agreement provides that he "shall disclose . . . special processes . . . knowledge and skill for the benefit of the company." Duryea has not in any way carried out this obligation. Upon the hearing, or rather during the argument, his counsel said that he was ready to do so. If he, within a

time to be limited, makes the necessary disclosure to the company, so that the patents may be successfully operated, then the only question will be the damage already sustained by the company. These I assess at the sum of $750, plus the loss of any royalty on this output. If he fails to make the disclosure, then he must answer in damages, and a substantial sum will be awarded.

This clears the way for the consideration of the questions arising upon the agreement and patent in regard to glucose processes.

As the result of Duryea's investigations, he determined to substitute modified starch for crude green starch in the glucose process, and in his patent of the 25th June, 1907, for a new and useful "process of manufacturing glucose," he describes his invention as "submitting a modified starch to the action of an acid to convert it into glucose and subsequently neutralising the acid and refining the product."

It is quite clear that the only element of novelty, when this process is contrasted with the well-known mode of manufacture, is the use of a modified starch in the place of a crude green or mill starch.

There is no disclaimer of the neutralisation and refining as well-known processes, but I do not think this necessary; and, subject to what has to be said as to novelty and utility, this is a clear statement of what Mr. Duryea then intended to claim as his invention. The meaning of the term "a modified starch" will also have to be discussed.

This statement of invention is followed by a statement of the procedure in practice. Before considering this statement in detail, the claims should be referred to. They are : (1) "The process of manufacturing glucose, consisting in providing a purified thin boiling or modified starch, in a state of free flowing suspension in water, converting the mass by heating it with dilute acid under pressure neutralising the acid, and subsequently refining and concentrating the product." (2) "The process of manufacturing glucose, consisting in providing a thin boiling or modified starch, in a state of free flowing suspension in water, converting the mass by heating it with dilute acid under pressure neutralising the acid, and subsequently refining and concentrating the product so that, in the main, converting influences act concurrently and uniformly upon all the starch in any given conversion."

Each of these claims departs from the original statement of the invention.

Leaving out the statements as to conversion and subsequent treatment which are not novel, and the statement that the starch, when converted, was to be in a state of free flowing sus-

ONT.

H. C. J.
1912

DURYEA
v.
KAUFMAN.

Middleton, J.

pension in water, which is not novel, the first claim is reduced to the use of "a purified thin boiling or modified starch."

The second claim, treated in the same way, and leaving for subsequent consideration the words following "so that," is, for the use of "a thin boiling or modified starch."

I have come to the conclusion that in this patent the words "thin boiling" and "modified" are to be regarded as synonymous, and that in clause 1 the word "purified" must be regarded as qualifying "starch," and that this claim is for a starch which has been made thin boiling (or modified), and has then been purified.

I find nothing in the statement of the invention to justify any claim for a purified starch, as distinct from a modified starch.

I have come to the conclusion that the heat treatment is radically and essentially different from the modification intended to be the subject of Mr. Duryea's patent.

I think that the whole situation was not understood at the time of the patent. The defects in the glucose arose from the failure to eliminate impurities sufficiently before conversion. The conversion had two effects upon the proteins present: it made them less soluble, and it made them more difficult to remove by reason of the admixture with the glucose in solution. When Mr. Duryea found that he obtained a better glucose from modified starch he jumped at the conclusion that the modification and incidentally the more nearly simultaneous conversion brought about this result. In this he was, I think, in error, the improvement was caused by the purification, which was a mere incident of the modification and not by the modification itself. When Mr. Benson ran the starch through the plant without modification (save the small degree of modification incidental to the heat process and re-running), he, quite unwittingly, demonstrated that a better glucose could be manufactured in that way. This was better because by the heating and re-running those impurities were made soluble and were removed at this early stage by the process when their removal could more readily and cheaply take place.

The essential difference in the two processes is that, in the one, the purification is a mere accident and is incidental to the modification, in the other, modification to a very slight degree is a mere accident and incident of the purification. The purification is sought and the modification is not desired and is of such an exceedingly slight degree as to be quite immaterial.

I have thus come to the conclusion that there is no infringement, and I would so find even if I had come to the conclusion that the patent covered any degree of modification—because the processes are essentially different. The starch used

by the defendants is not, in any aspect of the case, a "purified thin boiling or modified starch"—it is essentially a "purified starch."

I must now ascertain the rights of the parties upon the agreement and its oral supplement.

Both parties agree that what was done with reference to the glucose annex was under the oral agreement. Section III. was not regarded as adequate.

I am not able to accept as entirely accurate the statement of either party. I think each seeks to read into the agreement his inferences and to carry back and import into his recollection his impression of what he would have stipulated for had the matter which is occasioning the difficulty been present to his mind when making the bargain. I do not mean that this is being done consciously. It is one of the weaknesses incident to all memory, and the process is one which is quite unconscious. Speaking generally, I think, both witnesses endeavoured to tell the truth, as they recollected the transaction, and my great regret is that they did not make a written memorandum of their bargain at the time. I fear that there may be some ground for thinking the parties were not *ad idem*, but as this would, under the circumstances, be a disastrous finding, I shall endeavour to spell out a bargain from the evidence.

There undoubtedly was a bargain that the new annex should be erected at the joint expense, under the supervision of Duryea.

I do not think there was any bargain made such as claimed by Duryea, that each was to have an equal interest in the building.

If the process was a success, then Benson (the president of the defendant company) was to refund Duryea his share of the cost. Failure was not contemplated, and there was no agreement as to what was to be then done.

The building was on Benson's land and I think that as he desires to retain it he should pay its fair value to Duryea for his share. This may not be in one aspect the right way to get at the result. It may be that the right way would be to attempt to sell the material in this building but this would involve a large loss, and Duryea cannot complain if Benson is charged with the value, and as Mr. Benson has in one sense converted it to his own use he cannot complain. No doubt there was much expense in the erection of this building which is of no value to Mr. Benson in view of his failure to use the process in question, and bearing this in mind.

I fix $3,500 as the price to be now charged to Mr. Benson, and it will be declared that he is the owner of the whole. I do not think it was intended that Duryea should have no interest in the material which entered into the building if the process was a failure. He would have a half interest in any salvage.

ONT.

H. C. J.
1912

DURYEA
v.
KAUFMAN.

Middleton, J.

I find that the process in question was not demonstrated to be and was not commercially advantageous over that in use by the company. The waste in the re-running of the modified starch was such as to prevent its commercial success.

The next matter to be considered is Duryea's right to a confidential assistant. I find that this formed no part of the oral agreement.

I think that Duryea believed that he would have the right to an assistant but this mental position arose not from any bargain made but rather from the impression that the provisions of the old agreement would be carried over into the new and that the oral agreement was really an extension of the old. In one sense it was, but in another sense it went far beyond the old. This large expenditure was something quite above and beyond anything contemplated under the old.

If in this I accept Benson's evidence in preference to Duryea's it must be borne in mind that his condition was such that his memory may well be supposed to be inaccurate. I much prefer to base my preference on this than to suggest that he is intentionally inaccurate in his evidence. In fact, I desire to state my conviction that he believes most thoroughly in his story. Mr. Benson, on the other hand, impressed me as a very candid and careful witness and I was satisfied that he had this point in his mind and did not and would not agree to an outside assistant even if this had been demanded by Duryea.

Much was made by Duryea of the reasonableness of his having an assistant; this is not the question, but on this branch of the case Kaufman and DeCureoler, both very competent chemists, men of greater experience and ability, in my judgment, than Duhaut, were at his service, and at this time when all was harmonious and success appeared to be within reach and the manufacture was upon this large scale was or appeared to be of such great moment to Duryea in his negotiations with the N.Y. Company, I cannot think that he would have made this a *sine qua non* or that it then appeared to have the same importance that it subsequently assumed when the parties became at arms' length. When I say "all was harmonious" I do not mean that differences had not existed in the past and that there was not even then mutual distrust, but each had made up his mind to the fact that in his own interest they should, notwithstanding this, work together.

From this it follows that the failure to have the demonstration was occasioned by Duryea—and he cannot now complain.

During the two days in which the defendants demonstrated they did use Duryea's process—they did infringe—(assuming

that the patent was valid), but they were justified in making the experiment by reason of Duryea's failure.

In any event, there was no damage resulting from the temporary use of the process; and, under the circumstances, there was not anything in what was then done which would in any way justify this action.

Coming then to maltose. The correspondence and evidence leave this matter in an unsatisfactory position.

Under the agreement the modified starch processes were to be first taken up; then the starch syrups were to be developed. There was much experimental work done. As already pointed out, the improved glucose and proposed maltose were in a sense alternative modes in which it was hoped to meet the situation occasioned by the pure food law. In the course of the experimentation the improvement of glucose loomed larger than the maltose and secured the greater attention.

Having regard to the nature of the agreement I am inclined to think that until a late stage the parties cannot complain. They were working on under this agreement by which each was making something and each was looking to the future for the reward. But in the end I think Duryea quite failed to give any satisfactory demonstration on a commercial scale of the supposed success of the result of his experiments.

The original agreement terminated on 31st December, 1908, and whatever may have been the intention of the parties this agreement contemplated completion of the investigation and the determination of the company to acquire Mr. Duryea's rights with respect to the syrup processes before that date. Both parties agree that this was dealt with in some way by the oral agreement.

Duryea states this oral agreement upon this point is an extension of the company's option under the original agreement for six months, during which additional samples were to be submitted and if the company then elected to manufacture they could do so paying a royalty of three cents per hundred pounds.

Mr. Benson's statement leaves the matter at very loose ends. He says the commercial exploitation of maltose was to be left over until after Mr. Duryea had renewed his contract with the Corn Products Association, as he then contemplated, and then it would be taken up with the result of the experiments at the Corn Products Company as a guide.

The Corn Products Company agreement never was made, and there never has been any adequate demonstration of the commercial value of maltose, and on either version of the oral agreement the company have not now any right in maltose. I cannot see my way clear to award any damages for Duryea's default, in

ONT.

H. C. J.
1912

DURYEA
v.
KAUFMAN.

Middleton, J.

view of all the circumstances, nor have I any power to order him to carry on any experiments or to make any demonstrations of his processes. From what appeared at the trial, so far as the demonstration had been made, Mr. Benson was not desirous of acquiring any rights in the maltose patent.

I think it should be declared that, in the events that have happened, the defendant company have not now any interest in the maltose patents or processes.

The question of the royalty payable may now conveniently be dealt with.

Under the agreement sec. 1, clause 1, the plant to be erected was to be capable of an annual output of 500,000 modified starch.

Under sec. VII. clause 1, the agreement ends 31st December, 1908. Under clause 3, Duryea has a salary of $2,000 per annum, and a royalty of five cents per hundred pounds on modified starch in excess of 500,000 per annum.

Under sec. VIII. on the expiry of the agreement a conveyance of the patents shall be made with the same covenants, conditions and rights reserved or mentioned in section 3, clause 6.

The company is to have the right to license to other manufacturers. Section 111, clause 6, deals with the rights with respect to starch syrups and does not touch the royalty on modified starch.

I cannot find any agreement to pay royalty on modified starch, save that found in sec. VII., clause 3, giving the right to manufacture 500,000 free from royalty. The reason may be, as suggested by Mr. Benson, that he had a market for 500,000 of modified starch prepared by the old method, and it was on the excess that he was to pay. It was expected that Diamond D. would drive the "drying in" starch from the market and greatly increase the demand. No starch has been manufactured in excess of this limit.

Then as to glucose. Section III., clause 6, provides that the royalty is to be paid on "all starch syrup products manufactured" under the patents. I cannot narrow this as Mr. Benson contends. This covers all manufactured products, and includes glucose that goes into table syrup, etc.

Then the form of the license. This is, I think, under sec. VIII., clause 1, to be "a grant and conveyance" or an assignment of the patents and not a mere license. No doubt, the parties can settle the document in the light of the above findings, and the provisions of the agreement. If not, there may be a reference or I may be spoken to.

I should add that the royalty upon modified starch is payable on the "annual sales," and so would not cover any modi-

fied starch, which may be used in the manufacture of glucose. The royalty would be payable on the glucose, in that case. The company, having the right to manufacture, would have the right to manufacture modified starch for glucose as well as for sale.

Kaufman was placed in a very unfortunate position. Duryea had bound himself to disclose to the company all his knowledge, skill, and secret processes. Kaufman was, as Duryea's assistant and employee, bound to respect his master's secrets. When Kaufman entered into Benson's employ, it was with Duryea's approval, and to some extent it was to his advantage. When the relations between Duryea and Kaufman became strained, and Duryea was contending that he was not bound to give to Benson the information he had contracted to give, he naturally became suspicious of his former employee.

I think Kaufman acted throughout with scrupulous honesty and did not in any way disclose any of Duryea's secret methods. He undoubtedly did use some of these methods in the manufacture of Diamond D. starch. If the use was in any way unauthorised, then there was no damage, because he was only doing what Benson was entitled to do, and in this way he cut down the damage Duryea would have had to pay.

The agreement between Duryea and Kaufman of the 1st June, 1906, provides that "the engagement is to be of a strictly confidential character." His employment is as a "personal confidential assistant."

Upon the renewal in May, 1907, it is provided that "this confidential restriction very particularly applies to all Charles B. Duryea's special technical manufacturing and testing processes, whether patented or not."

No doubt, one inducement to Kaufman in entering into the employment was the educational advantage he would receive by being trained by an expert chemist such as Mr. Duryea; and this provision cannot be so read as to prevent Kaufman from himself using the information he might acquire during his employment. He has in no way imparted this information; and, unless the manufacture of Diamond D. for Mr. Benson was a breach—and I do not think it was—he has not in any way used the methods either of manufacture or testing.

On ceasing to be employed by Mr. Benson and the company, Kaufman entered into a totally dissimilar employment, and has in no way sought to avail himself of the information acquired.

Yet what he did was in one sense a violation of his agreement.

I have had much difficulty in making up my mind as to the proper result so far as Kaufman is concerned; and, in the

ONT.
H. C. J.
1912
DURYEA
v.
KAUFMAN.
Middleton, J.

end, have come to the conclusion that I should award an injunction.

As to the laboratory equipment, save as to the maltose demonstration plant, I do not think there has been any conversion; and, if there has been a technical conversion, I think there is power to relieve from payment of damages, on the goods being returned.

The defendants agreed to consider again the taking over of certain articles, and will hand over the balance.

I think there was a conversion of the maltose plant; and I give the plaintiff the option of taking it now or charging the defendants with $150 as the damages for conversion of the cone filter, as Mr. Duryea has taken over the other articles.

Upon the evidence, I find, against the plaintiff, that there was no agreement such as he alleges to purchase the whole laboratory equipment.

When the figures are agreed upon, the balance can be carried into the general account.

There remains the question of costs. I do not think costs should be awarded against Kaufman. Between the defendant company and the plaintiff, the defendant company have succeeded upon the issues of greatest importance, and which have been most expensive to try. I do not think that I should impose upon the taxing officer the duty of apportioning costs. The matter is further complicated by reason of Kaufman and his co-defendants appearing by the same solicitor. I think I shall do what is right when I direct the plaintiff to pay to the defendant company half the total costs of the defence, exclusive of any costs which relate to Kaufman solely. An apportionment of costs in the taxing office is to be avoided, as far as possible; and, owing to the artificial rules as to apportionment, cannot be regarded as satisfactory.

Summary.

Duryea receives salary	$6,000.00
Retaining fee	1,000.00
	7,000.00
Has received	6,296.08
Balance	703.92
Allowance for buildings	3,500.00
Allowance on laboratory	1,322.61
Allowance cone filter	150.00
	$5,676.53
Less damages for failure to disclose secret	750.00
Net balance due the plaintiff on above items	$4,926.53

ONT.

H. C. J.
1912

DURYEA
v.
KAUFMAN.

If I have not carried all the amounts into the account, or if I have overlooked anything, counsel may speak to me before the record is indorsed.

Since writing the above, the disclosure has been made, and the terms agreed upon may be embodied in the judgment.

Judgment for plaintiff.

ONT.

C.A.
1912

Mar. 19.

DAVEY v. FOLEY-REIGER CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. March 19, 1912.

1. BOUNDARIES (§ II C—16)—ADJOINING OWNER—MILL PROPERTIES—COMMON TAIL-RACE—LAND BETWEEN TWO CHANNELS.

Where the water used for power in two adjoining mill properties belonging to different owners but once held by the same person was discharged into the same tail-race through a short channel from each mill, one of which ran on a slanting line past the other mill so as to cut off a triangular piece of land which would have been part of the land on which such other mill was situated had the admitted boundary between the two mills been extended in a straight line back of them, and the earliest conveyances of the land in parcels contained no description by metes or bounds and the water rights appurtenant to each parcel were always transferred therewith, and it appeared from the conduct and dealings of the owners of the two properties and their predecessors in title and from the acquiescence for years by the respective proprietors in everything that was done by his neighbour that the piece of land so cut off was considered and treated as equal and common ground in which each proprietor had equal privileges and equal rights, the respective owners are entitled in common to the use of such piece of land but only in such a way as not to infringe upon each other's rights.

[*Davey* v. *Foley-Reiger*, 2 O.W.N. 1284, varied on appeal.]

APPEAL by the plaintiff from the order of a Divisional Court, *Davey* v. *Foley-Reiger Co.*, 2 O.W.N. 1284, varying the judgment of BRITTON, J., at the trial, *Davey* v. *Foley-Reiger Co.*, 2 O.W.N. 1028, dismissing the action.

The judgment was varied without costs.

M. K. Cowan, K.C., for the plaintiff.

W. M. German, K.C., for the defendants.

MOSS, C.J.O.:—The dispute between the parties to this action, when narrowed down to the substantial merits, seems to lie within a comparatively small compass.

The raceway from the defendants' factory crosses from what is undoubtedly their property over a small triangular piece of land, and merges in an artificial watercourse situate on land which is undoubtedly the property of the Government of Canada. The waters flowing in this watercourse are the waters which emerge from the tail-races of the respective factories of the plaintiff and defendants, which are situate on adjoining

ONT.

C.A.

1912

DAVEY v. FOLEY-REIGER CO.

MOSS, C.J.O.

lands. Each of the parties claims title to the triangular piece. The learned trial Judge found in favour of the plaintiff's claim of title, but on the whole case dismissed the action. A Divisional Court held that the title was in the defendants, but subject to an easement entitling the plaintiff to discharge the water flowing from his factory to a certain specified extent. Upon the argument in this Court these contentions were renewed.

The determining factor appears to have been the exact line of the south-west boundary of the plaintiff's parcel of land. So far as the conveyances are concerned, they do not furnish as much light as could be desired. The descriptions are general, vague, and uncertain. This might be accounted for by the fact that all the earlier conveyances were among members of the family of George Keefer, who was the owner of both properties from 1826 until the time of his death, probably in the latter part of 1857 or the early part of 1858. He and those of the family to whom conveyances were made, as well as those of the family making such conveyances, were in all likelihood familiar with the position and limits of each parcel. At the date of George Keefer's death, there was on the parcel now owned by the defendants a flouring mill, which had been there from a very early date, certainly as early as 1831; and on the plaintiff's parcel a wooden building used as a cotton factory. When this was first built does not definitely appear, but probably as early as 1852. This was replaced by a stone building, probably between 1868 and 1870; but whether the walls of this building stood precisely on the same spot as the walls of the wooden building does not appear. Each used water from the Government head-race to the east, and each discharged by separate means into the tail-race over what was then the property of the Provincial Board of Works, and is now the property of the Government of Canada. The first conveyances after George Keefer's death which indicated limits separating these parcels were three deeds dated the 24th March, 1862, and made by John G. Keefer as grantor, the respective grantees being Catherine Eastman, John Keefer, and Thomas C. Keefer. They contain no description by metes and bounds, and the estate or interest granted by each deed is one undivided third of the lot and cotton mill thereon erected north side Mill street on the north of the Keefer mill on the east side of the Welland canal, together with one-third of the water and all other privileges thereunto attached, appertaining, or belonging. These grants were not made by owners of the Keefer mill parcel, and the descriptions could not vary the description by which George Keefer had devised the Keefer mill parcel to his three sons George, Peter, and John Keefer, viz., "all the large stone mill

and lot of land thereunto belonging, with all water privileges of the same as granted to me and my heirs forever by the Board of Works." It seems plain that the testator intended that the water privileges which were originally and primarily attached to this parcel, and involved the triangular piece, should continue undisturbed in so far as the water rights and all that was necessary to secure them as theretofore were concerned. And throughout the various descriptions and conveyances there are not to be found any that shew at all definitely or distinctly any intention on the part of the devisees of this parcel, or of those claiming under them, ever to relinquish or grant away these rights. Indeed, the conduct and dealings of the parties, the nature of the use made of the common tail-race, the acquiescence for years by the respective proprietors in everything that was done by his neighbour in regard to the discharge of water from their respective mills or factories over the small portion in question, all go to shew that it was considered and treated as common ground in which each proprietor had equal privileges and equal rights.

This involves, of course, a mutual obligation not to infringe upon each other's rights or to do anything which may unreasonably and materially interfere with the other's enjoyment of his rights.

I agree with the Divisional Court that the defendants have, in some of the respects indicated in the judgment of that Court, improperly interfered, and that they should pay the damages fixed, and be prohibited from continuing their obstruction in contravention of the plaintiff's rights. But I base my agreement to this extent upon the ground that the defendants and plaintiff have equal rights, and not upon any ground of superiority of title in either.

In my view, the judgment appealed from should be varied by striking out the declaration relating to the title to the raceway in question, and the rights of easement thereover, and substituting a declaration that the parties are entitled in common to the use of the triangular piece of land forming the raceway, with all necessary directions or variations from the judgment appealed from as may be consequent thereon; and that, with such variations, the appeal should be dismissed without costs.

Should any question arise as to the form of the certificate it may be settled in Chambers.

GARROW, J.A.:—The action was brought to obtain an injunction restraining the defendants from discharging water on or over and along the plaintiff's property, and for damages. The facts are stated in the judgment of Britton, J., and are sum-

ONT.

C. A.

1912

DAVEY v. FOLEY-REIGER CO.

GARROW, J.A.

marised by Middleton, J., who delivered the judgment of the Divisional Court, and need not be here repeated at any length.

The description in the early conveyances of the properties in question are far from being satisfactory. A parcel called a "mill" or "grist mill" appears upon the registered plan which was produced at the trial but not filed, and is identified as the "Keefer mill" now owned by the defendants. But the plaintiff's parcel the "cotton factory" lot is not even set out by name in that or any registered plan. The Keefer mill has, it is said, existed at least since the year 1827. The cotton factory mill was built after that and before the year 1862, but how long before does not appear. Both properties were originally owned by George Keefer, and the first conveyance of the plaintiff's parcel as a separate parcel is that from the heirs of George Keefer to John G. Keefer, dated October 21st, 1862, which thus necessarily forms the root of the plaintiff's title. In that conveyance the parcel is described as

> A lot of land upon which a cotton factory has been erected, with a water privilege, on the east side of the Welland canal on the north side of Mill street, north of the Keefer mill.

This description, although indefinite, was doubtless understood at the time by the Keefer family who had owned both properties, and in subsequent conveyances the descriptions became more definite, with the result that the boundary line between them was fixed as midway between the walls of the building then erected upon the two parcels. Britton, J., was of opinion that the wall which the defendants partially demolished in September, 1910, was built upon the plaintiff's side of this line. It may be so, but even if it is, it is not, in my opinion, a determining circumstance, for the reasons which I will presently give.

The "water privilege" cannot have had reference to the receipt of the water into the mill, for that was not under the control of the grantors, but of the Crown. It must, therefore, have referred to its discharge after use, a necessary part, of course, of a water privilege. And as the grant was of a lot having upon it at the time a mill or factory using the water as its motive power, it was probably intended that the mode of discharge then in use should pass. This was apparently the opinion of Middleton, J. But that learned Judge was under the impression that such mode of discharge consisted in the use of the flume spoken of in the evidence, and largely upon that conclusion his judgment apparently rests. That conclusion, however, seems to me with deference to be erroneous. Mr. Grenville, a witness called by the defendant, stated that he had known the properties since boyhood. He was born in the town

in the year 1852, and, had, when a young man, been employed in the Keefer mill. The flume, he said, was not erected until about the year 1870, or eight years after the plaintiff's title began. Before that the cotton factory mill had used an overshot wheel and discharged the water practically as at present, that is, as I understand it, into the present tail-race. This evidence is not contradicted, as it easily might have been if untrue. It presents a state of facts which in itself is quite reasonable, and in apparent harmony with the subsequent acts and conduct of the parties, a very material consideration where one is compelled, as here, to grope for a definition which the parties might have, but have not, made plain in their written documents of title.

When the plaintiff purchased, he proceeded to make and made very extensive changes in the cotton factory mill. He increased its power by putting in new and lower wheels. He abandoned the flume method of discharge and used instead the present tail-race which he straightened and somewhat improved, and in common with the Keefer mill has used ever since.

If he had then only for the first time begun to use this tail-race, one would naturally expect to hear of at least some protest by the owners of the Keefer mill, but nothing of the kind appears. Then the plaintiff himself admits that while he did not ask for or obtain any consent to his other changes and improvements, he did obtain the consent of Mr. Lawson, the then owner of the Keefer mill, to the erection in 1886 in connection with his changes and improvements, of the wall in question, which was built under the water in the body of the raceway, although he contends that such wall was within his own boundary-line, as was held by Britton, J.

One object in building the wall was for the protection of the rubble wall upon the Keefer mill property. It might even, upon the evidence, be inferred that that was its main object as Mr. Foley in his evidence says it was. But even the plaintiff admits that a part at least of the object was that which Mr. Foley states, namely, the protection of the rubble wall.

Under these circumstances, I have no difficulty at all in arriving at the conclusion that the plaintiff's water privilege was intended by the parties to be the right to use the tail-race in question in common with the Keefer mill property now owned by the defendants. The defendants, intending to do as the plaintiff had done in 1885, began last year to improve the Keefer mill property and to increase its capacity. And, in doing so, the little wall upon which the plaintiff sets such store was in the way and was in part removed. The plaintiff contends that he had acquired a title to its use under the Statute of Limitations. With that contention I cannot agree. Both parties were

ONT.

C. A. 1912

DAVEY v. FOLEY-REIGER CO.

GARROW, J.A.

in possession of the race-way, and Mr. Lawson's consent to the erection of the wall, under the circumstances, should be construed as a revocable license, and not as, in effect, the plaintiff contends, an undertaking that no future changes or improvements should be made in the Keefer mill. Both parties were, I think, perfectly at liberty to make any changes or enlargements which they desired in their respective mills, so long as they did not thereby involve a use of the tail-race which would be injurious to the other property. The defendants' recent changes involve a further enlargement and straightening of the raceway which it is said, and practically not disputed, can easily be made sufficient to carry away all the water from both mills. The mistake which the defendants made was in first interfering with the wall, which when the changes are completed would have been merely a useless obstruction.

Such enlargement they are now by the injunction under bonds to make at their own expense, and for their mistake they have been condemned by the Divisional Court to pay as damages $250, a result with which I do not feel called upon to interfere.

The judgment should, however, be amended so as to declare the parties to be entitled to the use in common of the raceway, instead of the present declaration as to title therein contained. And there should be no costs of the appeal.

MACLAREN, J.A., agreed with MOSS, C.J.O.

MEREDITH, J.A.:—Whether the rights of the parties, in question in this action, are vested upon their title deeds, or upon long user, the result is the same, when the facts are rightly understood; though they are plainer in the latter view; and that result is that neither party has a right to prevent the use, by the other, of the tail-race in question so long as such a user does not injuriously affect the user by the other; and it is sufficiently proved that by a proper enlargement of the capacity of the tail-race the increased capacity of the defendants' mill can be maintained without any obstruction to the flow from the planitiff's mill as it now is; and so any injunction against the defendants should not extend beyond the time when such an enlargement of the capacity of the tail-race shall have been made by the defendants.

The plaintiff's claim in respect of the small stone wall erected by him, in the tail-race, is not well founded, even upon his own testimony rightly interpreted. It was built, I have no doubt, for the same purposes only as that for which the loose stone wall which preceded it, was made by the then owner of the defendants' mill; that is the protection of the water wheels of that mill from "burning out." The plaintiff, in deepening the

tail-race, for his own purposes, disturbed the protection which the loose stone wall afforded, and, therefore, built the wall in question to restore it, which it did. Having been built in that way and for that purpose—altogether for the benefit of the defendants' mill and in substitution for its loose stone wall—there is no reason why the owners of that mill might not remove it, as they might have removed the loose stone wall.

The plaintiff's somewhat belated, and, to me, quite unsatisfactory, effort to make it appear that the substituted wall had some other purpose and effect, proves nothing more.

The defendants should be enjoined from using their increased water discharge, into the tail-race, until they have made sufficient provision for carrying it off, and shall carry it off, without obstructing, the capacity of and discharge from the plaintiff's mill now existing; and should pay the damages awarded to the plaintiff by the Divisional Court, the amount being reasonable. They should also, I think, have been ordered to pay the plaintiff the general costs of the action, including the appeal to the Divisional Court; but, as that was not done, it is but fair that no costs should be awarded against him here, though, in the substantial result, failing upon this appeal.

MAGEE, J.A. (dissenting):—The plaintiff's parcel of land adjoins the north side of that of the defendant company. Together they do not exceed an acre. Both lie between two strips of Government land, one on the west bordering the east side of the Welland canal and the other on the east containing the head-race which supplies the mills of both parties and is itself fed from the canal. The mills are worked by water obtained by rental or permission from the Government from the surplus canal waters. The tail-race from the defendants' mill runs somewhat north-westerly past the plaintiff's mill across what he claims as his land and then more northerly through the Government land and discharges into the canal at the level of lock 23. It cuts off to the west of it a very small triangular parcel not over fifteen square feet apparently at the south-west angle of the land claimed by the plaintiff. The plaintiff's mill also discharges its waters into the tail-race by a channel running westerly from the mill. A spillway runs westerly from the head-race to the tail-race, its northern edge being south of but near to the admitted boundary line there. That admitted boundary from the head-race to the tail-race is about 24 feet and 1 inch north of the defendants' mill. The plaintiff claims that that line continues as the boundary through to the Government canal land. Each party claims to own the soil of the tail-race north of that line and that the other has only an easement for discharging through it a limited quantity of water, the owner's

ONT.

C. A.

1912

DAVEY v. FOLEY-REIGER CO.

Magee, J.A.

own right being limited only by non-interference with such limited right of the other.

Both parcels form part of 100 acres owned in 1826 by George Keefer. In 1824 the Welland Canal Company was incorporated and subsequently the canal was taken over by the Board of Works of the then Province of Canada. By deed dated 13th November, 1845, made between George Keefer and the Board of Works reciting that he had permitted the canal company to occupy about 24 acres without having executed a conveyance and that he had consented to execute a deed of the same

> in consideration of the Board of Works allowing to him, his heirs and assigns forever the use of a sufficient quantity of water to work the flouring mill and all the machinery connected therewith at present in the possession and known as the property of the said George Keefer at the village of Thorold whenever there may be any surplus of water in the canal beyond what may be considered necessary for the purposes of the canal by the Board of works or their agent.

George Keefer conveyed to the Board 24 acres and 27 perches covering the canal and land on each side and also some additional lands. One of the easterly boundaries runs from a stake 20 feet from the south-west corner of George Keefer's stone mill northerly 350 feet to a point opposite the head of lock 24. Beyond the recital there is no grant by the Board of the right to water and no mention of disposal of it and there is no reservation by Keefer of any right to the tail-race across the lands granted by him. In his will, in 1855, he speaks of the water privileges granted him by the Board of Works. It would not be too much if it were necessary here to presume a grant both of the water and the right to discharge it through the Government lands.

The flouring mill there mentioned is now the defendants' mill or forms part of it. An old plan of 1827, registered in 1831, shews a grist mill at this point and indefinitely indicates an irregular water channel running northerly therefrom somewhat as does the present tail-race. It is not suggested that it ever was a natural watercourse.

As regards the subsequent title both parties with praiseworthy but unsatisfactory economy have put in only registrars' abstracts of registrations giving very meagre particulars. If one errs in any of the assumptions which have to be made as to their effect the original document or copies should be produced.

George Keefer evidently died between 13th July, 1855, the date of his will and 2nd July, 1858, when it was registered. The abstract shews a devise to his three sons, George, Peter and John, of

all the large stone mill and lot of land thereunto belonging with all the water privileges of the same as granted to me and my heirs forever by the Board of Works.

Another abstract mentions that George and John and Thomas C. Keefer were executors—no other parts of the will are set out and I assume that no further light would be given as to the exact extent of this devise. It is conceded, however, that the stone mill is now the defendants' mill or forms part of it—we are not informed what he did with the rest of his lands nor what other children or heirs he left.

For all that appears, however, the "mill and lot of land thereto belonging" may have included both parcels if the plaintiff's land was not then built upon. Indeed we find that on 22nd July, 1830, he had given a mortgage on one and a fifth acres upon which was erected a large stone mill and which evidently included both these parcels and some adjoining land, and the description commences at the south-east angle of "the said lot." There seems to have been a lease of the stone mill and premises on 30th April, 1856, but the abstract gives no further indication of the size of the lot or by whom the lease was made. If he really had in view a division one would expect to find some provision as to water privileges for each parcel. There is no evidence of any fence or other division mark nor of the existence of any building on the plaintiff's land before the testator's death. None is shewn on the old map of 1827 nor referred to in the deed of 1845, nor in the will of 1855, and the earliest mention of a building is by a witness for defendants, Thomas Grenville, who was born in 1852 and professes to remember being in the cotton factory thereon when he was six or seven years old. The earliest mention of the cotton factory in any document produced is in October, 1862.

If it could be shewn that the testator had in mind a separation of the two parcels with no contemplation of water power for the northern parcel then a very natural division would be to give with the flouring mill all that was used with it alone and if so the northern edge of the spillway if then existing and the north-east side of the tail-race would have been a very natural and complete northern boundary. The plaintiff says "there was always a spillway," but I am not sure that he is not referring to one at Lawson's dam across the tail-race. That boundary would give the soil of the tail-race as well as the mill to his three sons. As the rights of these parties, in my view, depend upon subsequent acts and documents and not upon the will it is really necessary to know what he intended. It may be that even before his death there was a line of division known in the family and according to which the devise was made and that

ONT.

C. A.

1912

DAVEY v. FOLEY-REIGER CO.

Magee, J.A.

line may have been just the one which was afterwards declared and which would not give those three devisees the tail-race.

In 1863, was registered a deed marked in the registrar's abstract Q.C. (quit claim) dated 21st October, 1862, from George, Peter, Jacob, Samuel, Janus, Augustus, Alexander and Thomas C. Keefer, Elizabeth Hamot Ann Kelso (with her husband), Catherine Eastman and Amelia McFarland to John G. Keefer covering *inter alia*

> a lot of land upon which a cotton factory has been erected with a water privilege on the east side of the Welland canal on the north side of Mill street north of the Keefer mill.

This cotton factory, a wooden building subsequently rebuilt of stone after a fire is now part of the plaintiff's mill and this is the first documentary reference to its existence. A part of its southern wall is yet standing.

I assume that as seems to have been admitted (p. 30) this deed by a grant or release conveyed to John G. Keefer the interest of the other parties to it in the land mentioned in it and that they, or some of them, alone, or with John G. Keefer were the parties entitled or who might be entitled under the will or as heirs of George Keefer, deceased, to any property here in question not devised to George, Peter and John Keefer. The fact of so many joining in that deed would indicate that those three were not the sole owners unless, indeed, the others were joined to remove doubt as to the extent of the devise to the three. What then was the lot thus conveyed? It is said to be on the north side of Mill street and north of the Keefer mill. According to the map and plans, that street does not extend west of the east side of the head-race nor as far north as the defendants' mill. Both Mill street and the Keefer mill are more than 20 feet south of the admitted boundary. We, therefore, must look elsewhere for a better description. But at this stage John G. Keefer owns the cotton factory lot and George and Peter and John Keefer who owned the Keefer mill lot, have joined in the conveyance to him, and a water privilege belongs to it which implies that there was some arrangement for obtaining water from the head-race and that water had to be discharged. At that time and up till about 1870 according to the evidence the water from the cotton factory went into the tail-race. Indeed a plan, undated, annexed to the water lease for that building (then used as a cement mill) from the Crown to John Battle dated 11th February, 1880, shews that the water took that course, but that plan must have been prepared before that date and I may note that the delineation of the land seems manifestly erroneous, explainable, perhaps, by Grenville's evidence

that both mills were run for a time by one man as a cement factory.

On 24th November, 1862, John G. Keefer, by three separate deeds conveyed to John Keefer, to Thomas C. Keefer, and to Catherine Eastman, one undivided third each in the cotton mill property. In each the description is "one undivided third of the lot and cotton mill thereon erected, north side Mill street on the north of the Keefer mill on the east side of the Welland canal together with one-third of the water and all other privileges thereunto attached appertaining or belonging."

On July 21st and July 28th, 1865, John Keefer and Catherine Eastman respectively conveyed each his or her one-third to Thomas C. Keefer who thus became sole owner. And here, for the first time, we have the boundaries definitely stated thus:—

> Undivided one-third of an hydraulic lot on which is erected the Thorold cotton factory on the east side of the Welland canal together with the undivided one-third of all houses, outhouses and waters thereon erected and all appurtenances to said premises belonging to which said cotton factory and premises are bounded on the east by the rear of the lots on Front street, on the west by the lands of the Welland Canal Company, on the north by the land commonly known as Christy's mill lot, and on the south by a line drawn from a point half way between the nearest part of the northern wall of Keefer mill and the southern wall of the said cotton factory through east and west to the eastern and western boundary of the said cotton factory and premises.

Here then, we find the line of the southern boundary declared to extend as the plaintiff claims through to the western boundary and John Keefer, one of the owners of the Keefer mill lot, is conveying the land north of that line and declaring that "the cotton factory and premises"—the hydraulic lot—are so bounded. At that time the south wall of the cotton factory of which part still remains was about 48 feet 2 inches north of the Keefer mill.

On 26th March, 1866, Thomas C. Keefer conveyed to Wm. W. Wait

> the Thorold cotton factory lot bounded on the north by the Christy mill lot, on the south by the Keefer mill lot, on the east by the mill-race, and on the west by the Board of Works line.

From Wait the property passed by the latter description through several intermediate successive owners until in 1883 the plaintiff became sole owner. He has been operating the pulp mill thereon ever since.

After John Keefer had so drawn the boundary line we find him with George and Peter Keefer conveying to James Lawson and Wm. O. Cowan by deed dated 21st September, 1868, "the property known as the Keefer mill lot" bounded on the west

ONT.
C. A.
1912
DAVEY
v.
FOLEY-
REIGER
CO.
Magee, J.A.

by the Board of Works line, on the south by the land of John Brown, on the east by the mill-race and "on the north by a straight line drawn from said race to the Board of Works line and running midway between the north wall of the mill and the south wall of the main body of the building, north of the said mill and used as a cotton factory together with all the water privileges and right of water for the use of the said mill and for running the machinery of the said mill acquired by George Keefer, deceased, from the Board of Works."

This is the only conveyance under which the defendants have any claim and clearly it only gives the land south of the boundary contended for by the plaintiff, and as there is no suggestion of any possession adverse to the plaintiff north of that line the defendants' claim to the ownership of the tail-race is effectually disposed of.

Lawson remained interested in the property and ran the factory till 1887, and subsequently it passed through various successive ownerships till in April, 1910, it was conveyed to Herman M. Reiger who is said to hold for the defendant company. The conveyance to him states the north boundary line as going to the Board of Works line just as in the deed of 1868. The water privileges and rights are referred to as being those acquired by a previous mortgagee, the Quebec Bank, but a reference to the registrar's abstract does not shew that they assumed to exceed those acquired by Lawson and Cowan. So that H. M. Reiger and the defendant company on the face of the conveyance had direct notice of their boundary and limited rights.

Although it is extremely unlikely that the cotton factory was originally built exactly the same number of feet and inches distant from an established boundary line as the grist mill was, and, therefore, it is more than probable that the line half way between the two buildings was an arbitrary one, afterwards established, nevertheless it is clear that before either of these two properties left the Keefer family that boundary between them was definitely settled and known. Thomas C. Keefer through whom the plaintiff claims had a conveyance in 1865, of one-third with that expressed boundary from John Keefer through whom the defendants subsequently claim. If the plaintiff had only that one-third it would suffice to give him a right of action against the defendants who have no share at all. But Thomas C. Keefer also had title by the deed of 1862 to "a lot upon which a cotton factory has been erected," north of the Keefer mill and of Mill street, from Peter and George Keefer, and when Peter and George and John subsequently convey to Lawson and Cowan "the property known as the Keefer mill lot," they expressly declare how that property so known is

bounded. That conveyance makes a solemn admission by all parties to it though not an estoppel against them for the plaintiff. It is, I think, perfectly clear, that the plaintiff's predecessor Wait acquired the title to all the land north of the straight line forming the boundary, and the defendants' predecessor acquired none of it, but at the most an easement in the tail-race.

It is not shewn that any one connected with the Keefer mill has ever since exercised any acts of ownership over the tail-race north of the boundary or expended any money or labour upon it. On the contrary the plaintiff during his 25 years of ownership has deepened, widened, straightened, and walled it, besides making considerable expenditure upon the head-race, which apparently would serve for the benefit of both properties.

I would therefore agree with the learned trial Judge that the land occupied by the tail-race north of the boundary line belongs to the plaintiff subject to whatever easement the defendants may be entitled to therein and consider that the appeal should be allowed in that respect.

Then as to the extent of the easement. It is unnecessary to consider what effect the conveyance by George, Peter, and John Keefer to John G. Keefer, had upon their right to send water over the land granted or released to him and thus derogate from their own conveyance. No doubt they intended to retain the right of discharging water to the full capacity of the existing mill. I do not see that it can be said they intended more. The will indeed only mentioned the water privilege as granted by the Board of Works—that was sufficient (in 1845) to work the mill and all the machinery. And when they conveyed to Lawson and Cowan, in 1868, they only specified "all the water privileges and right of water," for the use of the mill and machinery, "acquired by George Keefer, deceased, from the Board of Works." No doubt that might be intended as only a conveyance of the right to free water and to have no bearing upon the right to use and discharge whatever water they could acquire. But I am desiring to point out that there was no intimation in any of these documents of any intention to reserve more than the capacity at that time of the mill. And even if an implied reservation would be allowed to as great an extent as an implied grant it would go no further than such capacity. And neither they nor Lawson and Cowan nor those claiming under them would have any right to increase the burden. I see no ground whatever for implying tenancy in common or equal privileges in the tail-race. The utmost, I think, would be the right of reformation of the deeds of 1862 and 1865 to effectuate if necessary an implied reservation to the extent men-

ONT.

C. A.
1912

DAVEY
v.
FOLEY-
REIGER
CO.

Magee, J.A.

tioned or the circumstances would justify a presumption of a lost grant to them to the same extent.

Up till 1883, Lawson from 1868 used only about 70 horse power for four run of stones and the machinery. That appears to have been the capacity of the mill. In 1883, he changed it to a roller mill, and put in different wheels and used about 100 horse power. It does not follow that he used more water with the improved machinery. That seems to have been the only change, if it was one, as to quantity of water before Reiger or the defendants acquired the property in 1910, and began the manufacture of wood pulp. They applied to the Government for permission to take more water from the head-race. They and the canal authorities agreed to consider that George Keefer the testator had been entitled to water for a maximum of 100 horse power, and they obtained a lease from the Crown which so recites (dated 19th April, 1910), of sufficient for 300 additional, making 400 horse power in all. But they put in new wheels and machinery of a capacity of over 600 horse power and have since been using admittedly 400 horse power and discharging the increased quantity of water into the tail-race and to provide for this greater quantity they enlarged the openings for intake and discharge. The 400 horse power does not necessarily use four times as much water as Lawson did, for the defendants' wheels and machinery are more effective but the discharge is undoubtedly much greater and has raised the water in the tail-race. It is hardly denied that thereby the free flow from the plaintiff's mill and the free working of his wheels has been interfered with to some extent.

Apart from any right under the conveyances the defendants also say there has been sufficient user to enable them under the Statute of Limitations to an easement for using the tail-race on the plaintiff's land. Lawson ran the mill continuously from 1868 to 1887. Apparently it had previously been used from 1862 to 1868. From 1887 till November, 1888, it was operated by one Spinks. Then from November, 1888, till June, 1890, during the ownership of one Clark, it was idle and no water running from it. In April, 1892, it was sold to one Fraser, who in 1893 mortgaged to the Quebec Bank, by whom it was conveyed in July, 1900, to one Dawson, whose executors joined in the conveyance of April, 1910, to H. M. Reiger. Between 1893 and 1900 the mill was shut down for several years and no water passing through. Again it is said, but not clearly proved to have been closed for several years and up to April, 1910, during the ownership of Dawson, who seems to have held for the Imperial Artistic Wood Turning Company.

It is evident that in 1888, there had been more than 20 years' active enjoyment of the easement since either 1862 or

1866, and that would have been available as a defence by Spinks, if an action had then been brought against him. The intervals of non-user since 1888 have, in no sense, been interruptions by the plaintiff, but were owing no doubt to financial circumstances of the owners of the mill for the time being. Nor did they occur with any intention of extinguishment or abandonment of the easement. But the Limitations Act, 10 Edw. VII. ch. 34, sec. 36, requires that the full period of 20 years of actual enjoyment without interruption shall be the period next before the action which was begun in the autumn of 1910. It cannot be said that there has been enjoyment ever since 1890, for there were several years between 1893 and 1900, during which it is proved there was no enjoyment of the right. The defendants then cannot claim the benefit of the statute, though even if they could it would not increase the burden beyond the actual user which did not exceed 100 horse power. But they are still entitled to that extent under the old easement, which, as I think, it should be presumed, George, Peter, and John Keefer, by some agreement or grant were possessed of, and which has not been extinguished by mere non-user during the intervals referred to —but only modified by the dam and wall to be referred to.

With regard to the wall of the plaintiff, removed by the defendants, the facts appear to be these. Lawson, the owner of the defendants' mill, when putting in new wheels, about 1883, found it necessary to raise the water so as to cover them and prevent their burning out. He had put in some additional discharge tubes and constructed a curved wall to guide the water therefrom. That wall led from the mill to the east side of the tail-race at the boundary. To back up the water he constructed a rubble wall or dam on his own side at the boundary from the curved wall across the tail-race. The water then flowed over that rubble dam and fell into the tail-race on the plaintiff's side. Originally the water from the plaintiff's mill was discharged into the tail-race. When the plaintiff bought he found it not going into the tail-race which emptied into the canal level of lot 23, but carried across and above the tail-race by a wooden flume, which ran directly west and emptied into the canal level of lock 24, which is higher than lock 23. This flume dated from 1820 or perhaps a little earlier according to the defendants' witness Grenville. In making his improvements about 1886, the plaintiff decided to dispense with the flume and run the water again into the tail-race and to deepen the latter so as to give more head. As the water would run into the tail-race close to the boundary line, there would be danger of undermining the rubble dam, which Lawson had built and also the banks. So he built a stone wall on his own side of the boundary and across the tail-race and in front of it a sloping apron

ONT.
C. A.
1912
DAVEY
v.
FOLEY-
REIGER
CO.
Magee, J.A.

or slide to receive the force of the water and let it flow off more freely, and he also built walls along the sides of the tail-race. The wall across it was lower than Lawson's rubble wall over which the water flowed upon and over it without interruption. This condition remained until the defendants came. They wished to increase their head of water from 17 to 18 feet to about 23 feet, and they were going to use a different sort of wheel, and they needed to let off the water at a lower level, and so they decided to remove the rubble dam or make an opening in it and they appear also to have deepened their tail-race. That would still leave the plaintiff's wall as an obstruction across the tail-race, and without consulting him they removed it, or at least, the upper part of it. Edward Foley, one of the defendant company, says their mill as now constructed could not be run with the wall there, and they would have to raise the wheels if the wall be restored. Foley was at one time the plaintiff's foreman and had in fact taken part in building the wall, and therefore knew it was the plaintiff's. The defendants seem to have acted in that matter inconsiderately. It must, I think, be taken that Lawson and his successors in title deliberately abandoned their right to discharge the water at the lower level below the top of the wall and assented to the plaintiff's right to maintain the wall in that position upon his own property. It had been there for 24 years before its removal. The defendants had no right to remove it. It is not very clear what would be the cost of replacing it, but $50 would, perhaps, cover it.

Then as to the damages to the plaintiff's business already incurred. The water is higher in the tail-race by from 6 inches to 14 inches. That is, it varies as much as 8 inches above the 6 inches. Foley says it was usual for it to vary from 3 inches to 6 inches. Thus it would appear there is a permanent increase of 6 inches, and an increase of variation as well. The plaintiff attributes all the undoubted interference with the working of his mill, affecting not only quantity but quality of output, to this increase. But it is manifest from the evidence that there would be two causes of interference—one the lowering of water in the head-race and the other the raising of it in the tail-race. As already mentioned the defendants enlarged their intake opening and thus drew more water from the head-race. The effect of this is to lower the water at the intake of both mills. According to Mr. J. C. Gardner, C.E., whose evidence in this regard as modified on cross-examination is not disputed by any expert witness, this lowering of the water would account for the greater part of the plaintiff's loss of power. But the defendants are not liable for taking whatever the Government permit them to take out of the head-race as the plaintiff has no existing continuing lease or right to any specified quan-

tity. He is apparently only obtaining water at sufferance, having laid out a good deal of money upon the head-race as well as the tail-race. For only a fraction of the loss in his output can he hold the defendants responsible by their interference with the tail-race. The learned trial Judge was not satisfied that any damage had been proved therefrom. The Divisional Court considered that $250 would compensate him for the injury from September, 1910, to 9th December, 1911. Although holding the defendants to be the owner of the race they were assessing the full damage from increase of water. I cannot say their assessment should be disturbed for that period but as I think the operation of the injunction against the defendants should be stayed till 1st July, 1912, I would assess the whole damage from September, 1910, up to that time at $375, making with $50 for the wall $425 in all.

The defendants should be restrained from discharging into the tail-race more water than was sufficient for development of 100 horse power with the wheels previously in the mill—but the injunction to be stayed till 1st July next, to enable them to make any necessary alterations.

Counsel for the plaintiff, I understood, to be willing to allow even 150 horse power with improved machinery. If so, that may be so modified.

The plaintiff should have an opportunity of rebuilding the wall and apron or either within two months after the 1st July next, doing so with all proper dispatch, and the defendants should be restrained from discharging water through the tail-race during the re-construction so as to interfere therewith.

The plaintiff should be declared to be the owner of the tail-race subject to an easement in the defendants to discharge waters from the mill at the former height of the plaintiff's wall, not exceeding the quantity already mentioned.

The defendants should pay the damages and all costs, including those of this appeal.

It is to be hoped that in any event the parties with the aid, perhaps, of the canal authorities, who seem to have control of the situation, will be able to come to some sensible business arrangement, which will not retard enterprise.

Judgment varied.

QUE.

K. B.
1912

April 29.

CANADIAN LIGHT AND POWER CO. v. JULIEN.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. April 29, 1912.

HIGHWAYS (§ III—104)—CHANGING GRADE OF STREET—PUBLIC IMPROVEMENTS—DAMAGES TO ABUTTING OWNER.

In a complaint lodged before the Quebec Public Utilities Commission it is sufficient to allege an interference with the public right of travel or an obstruction to free access to a building in order to give such commission jurisdiction to proceed to the merits of the complaint, and an exception to such jurisdiction on the ground that the municipal corporation has alone jurisdiction to deal with the road complained of will be dismissed. (R.S.Q. 741 *et seq.*)

THIS was an appeal (taken by leave of one of the Judges of the Court of King's Bench under articles 763 *et seq.* R.S.Q.) from a judgment of the Quebec Public Utilities Commission dismissing the appellant's exception to its jurisdiction to hear the complaint of the respondent.

The appeal was dismissed.

The order as handed down by F. W. Hibbard, Esq., K.C., President of the Commission, read as follows:—

Montreal, January 9th, 1912. Present—F. W. Hibbard, Esq., K.C., President; Sir George Garneau and F. C. Laberge, Esq., Commissioners.

Rosario Julien (applicant) v. The Canadian Light and Power Company (respondent).—Order.—Whereas the complainant in effect complains that the respondent company, a public utility corporation, has constructed a bridge over its canal in the Parish of St. Timothee, and has graded the roads leading up to the said bridge and along the frontage of the complainant's property in such manner as to raise the level of the roadway four or five feet above the level of the entrance to the complainant's property, and he asks that the commission make order that the company do restore the level of such roadway.

Whereas the company contends that in the premises the commission is without jurisdiction to remedy the matter.

Whereas it appears from the plans and reports of record that the company in enlarging its canal decided to reconstruct the bridge traversing the same at the point in question, and obtain the approval of its plans for the bridge from the municipal council of the Parish of St. Timothee and a permit to macadamize the approaches to such bridge for a width of twenty feet and a distance of two hundred; fifty feet upon the northern approach, and a like width and a distance of thirty feet upon the southern approach, although this latter distance may be construed as greater from the approval of certain plans submitted to said Council, but that for the present this question is not material.

Whereas it appears from the plans produced that the company lengthened its bridge by about one hundred and twenty-five feet, and that entirely upon the south end in the direction of the complainant's property, and further raised the level of the approach to said bridge to a distance of about one hundred and seventy-five feet, and by a

QUE.

K.B.
1912

CANADIAN LIGHT AND POWER CO. v. JULIEN.

Statement

varying height, and further graded a road along the bank of said canal to a height sufficient to bring it up to the level of such approach.

Whereas the property of the complainant, which consists of a shop, dwelling and outbuildings, is situated at the corner of the two roads, and the effect of such grading is to raise the level of both roads from four to five feet above the level of his property, and leave a sort of trench, about eight feet wide and of varying depth, between two sides of his property and the said grading, making the shop, particularly, almost impossible of access by teams and especially difficult to all in winter.

Whereas article 741*a* R.S.Q. provides: "(*a*) The public utility shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building."

Whereas it is contended on behalf of the company that the matter of such blocking or otherwise does not fall within the jurisdiction of the commission, but is an absolute provision of law, the enforcement whereof must be left to the ordinary civil tribunals; further, that the work being that of and upon the property of the municipal council, and the said company having acted under permit from said council, it cannot be considered to have acted as a public utility corporation in grading as aforesaid, but to have acted as the agent or *préposé* of the municipal council; and also that the work having been done, the sole recourse of the complainant is an action in damages and over which the commission has no jurisdiction.

Whereas articles 740-745 inclusive are included within that section of the provisions of the law creating and dealing with the commission which refers to its jurisdiction.

Whereas it results from the whole effect and tenor of such section and article 741, particularly paragraphs 1 and (*g*), that the commission should have jurisdiction as to all matters and things whether left to its discretion or specifically ordered and enacted by the articles of such section (Real, 2nd ed., p. 267).

Whereas it does not appear from article 741*a* that any distinction is to be made as to when a public utility may and may not obstruct the entrance to any door or gateway or free access to any building, and that in any event the work done was in its nature incidental and necessary to the enlargement of the company's canal for its own purposes and benefit, without thereby assuming that the manner in which the same was done or the extent thereof were also necessary.

Whereas article 745 specifically provides that where the act complained of has been unlawfully done the commission has jurisdiction to make such order as it thinks proper under the circumstances.

Whereas the commission is not presently concerned as to whether the proper and useful remedy of the complainant would be redress in damages but that under the complaint as brought it has jurisdiction to make such order as it thinks proper under the circumstances when fully disclosed.

The said exception is dismissed.

Messrs. *J. E. Martin*, K.C., and *J. G. Laurendeau*, K.C., for appellant, urged, apart from the question of jurisdiction, that the obstruction, if any, had been done and completed before the complaint had been lodged and he cannot now ask for the

QUE.

K.B.

CANADIAN LIGHT AND POWER CO. v. JULIEN.

demolition of the work and the restoration of the road to its former condition. No injunction will lie for a past act: Joyce, on Injunctions, pars. 41, 41 (*a*), arts. 1318 (*a*), 1321 (*a*); High, on Injunctions, par. 23.

Arthur Plante, K.C., for respondent (*F. de S. A. Bastien*, K.C., with him) *contra*.

April 29, 1912. The judgment of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J.:—This case raises a question of jurisdiction relative to the Quebec Public Utilities Commission.

The respondent lodged a complaint against the appellant with this commission, alleging that appellant, whilst constructing a bridge on the Beauharnois Canal, at St. Timothy, raised to a considerable degree the level of the public highway leading to this bridge at a spot facing his store and that this raising of the level hinders public traffic and prevents free access to his store. He therefore prays the commission to order the appellant to put back the road to its former state.

This complaint is based on art. 741 of the Revised Statutes of Quebec of 1909, which says that a public utility, having a similar object to that pursued by the appellant, shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building.

The appellant has met this complaint by an exception stating that the complaint does not disclose any fact which could give the commission any jurisdiction.

The exception of the appellant has been dismissed by the commission.

The appellant contends that the roads complained of by the respondent were executed with the authorization and the consent of the municipal corporation of St. Timothy; that municipal corporations are not public utilities according to statute; and that the Public Utilties Commission has no jurisdiction as regards municipal roads which are placed under the exclusive control of the municipal councils of the corporations within the limits of which they are situated.

The question presented in this way does not arise in this case. The exception merely says that the complaint does not disclose any fact that can give any jurisdiction to the commission. Now, as I have already stated, art. 741 R.S.Q. declares that a public utility shall not interfere with the public right of travel or in any way obstruct the free access to any building.

These are the very facts complained of by the respondent. He alleges that the raising of the level of the highway in front of his store by appellant interferes with the right of travel and obstructs the free access to his store.

Article 742 enacts the commission shall have general supervision over all public utilities subject to the legislative authority

of this Province, and shall conduct all enquiries necessary for the obtaining of complete information as to the manner in which public utilities comply with the law.

Article 741 declares that over and above the conditions therein enumerated and which must be fulfilled by public utilities, amongst which is mentioned that which forbids interference with right of travel or obstructing access to a building—public utilities are subject to all other conditions which may be presented by the commission.

In face of these statutory enactments, it seems plain to me that the respondent's complaint contains all averments necessary to give the commission jurisdiction.

CROSS, J.:—In article 741 R.S.Q., a number of so-called "conditions" are set forth, and the enactment is that these "conditions shall be fulfilled, over and above those which may be prescribed by the commission."

The first of these "conditions" is that of sub-section (*a*) which is worded as follows:—

> (*a*) The public utility shall not interfere with the public right of travel, or in any way obstruct the entrance to any door or gateway or free access to any building.

If that is a "condition" which is declared and established by the law itself and is not dependent upon or created by decision of the commission, but is "over and above" what the commission may prescribe, it might be said that the Act itself puts the matter, which forms the subject of the respondent's complaint, outside of the jurisdiction of the commission.

And it might be added that this view is strengthened by the purport of section 2 of article 741, which treats of responsibility in damages as a subject clearly outside of the jurisdiction of the commission.

But when it is seen, upon looking at the other enactments which are grouped together under the heading of "Jurisdiction of the Commission" (in which articles 741 and 745 are included), that the enumeration of "conditions" declared in article 741 is followed in article 745 by the enactment that

> If the Attorney-General or any party interested makes complaint to the commission that any public utility, municipal corporation, company or person has unlawfully done or unlawfully failed to do, or is about unlawfully to do or unlawfully not to do something relating to a matter over which the commission has jurisdiction as aforesaid, and prays that the commission do make some order in the premises, the commission shall, after hearing such evidence as it may think fit to require, make such order as it thinks proper under the circumstances.

I consider that the effect of the combined operation of the articles grouped under the heading of "Jurisdiction of the Commission" is that the commission may make orders for the fulfilment of the "conditions" set out in article 741, and may "over

QUE.
K.B.
1912
CANADIAN LIGHT AND POWER CO. v. JULIEN.
Cross, J.

and above" them prescribe other conditions within the limits of the jurisdiction conferred upon them by other articles of the Act. This conclusion is strengthened by the consideration that in formulating one of the "conditions"; namely, the one set out in clause (*g*), express provision is made for action by the commission.

Having come to this conclusion, it appears to me that a short step further brings one to the decision that the appellant's objection to the jurisdiction is not well founded.

The ground of that objection is in substance that the work complained of was done on a public highway with the consent of the municipal corporation and within limits or purposes in which that corporation had jurisdiction to give a valid consent.

The entrance to a door or gateway, or the free access to a building may be obstructed as effectively by an embankment or other work set up on private property as by such work set up in a highway.

The jurisdiction of the commission is the same for one case as for the other.

Whether, in view of the consent of the municipal corporation, it should be held that the work was or was not a work "unlawfully done" within the meaning of article 745, may be an important question for the commission to consider upon the merits of the complaint, and possibly for the Superior Court to consider if the commission in deciding upon the merits were to make an order upon a matter with which the municipal corporation alone had jurisdiction to deal, but we are not to anticipate that the commission will overstep its jurisdiction. The question here is whether or not the legal relation of the municipal corporation to the work done in view of its having been done upon the highway has divested the commission of jurisdiction or not. As above indicated, I consider that the jurisdiction of the commission exists and that the objection to it has been rightly rejected.

I also consider that the appellants' objection, to the effect that the jurisdiction of the commission is non-existent because the work had been completed before complaint was made, is not well founded.

It has long been recognized that an injunction may be granted to suppress the continuance of a public or private nuisance. And it is not a valid objection to granting a mandatory injunction, to say that the injury was completed before the application for the writ: *Kelk* v. *Pearson* (1871), L.R. 6 Ch. App. 809, 813; *Calls* v. *Home and Colonial Stores (Ltd.)*, [1904] A.C. 179, at p. 194; *Jackson* v. *Normanby Brick Company* (1899), 68 L.J. Ch. 407.

It would follow that this argument, based upon the existence or non-existence of a legal right to an injunction, is not well founded.

QUE.
K.B.
1912
CANADIAN LIGHT AND POWER CO. v. JULIEN.
Cross, J.

But it is to be observed that a law Court, in deciding upon the grant or refusal of an injunction, is guided by rules of strict law and can do nothing by way of granting an alternative relief. This is not always so with the Utilities Commission. Thus, in all the cases which come under the application of section 745, where there is an application for the making of "some order in the premises," authority is given to the commission, not simply to decide upon or enforce existing legal rights as a law Court would have to do, but to "make such order as it thinks proper under the circumstances."

It can also be seen in section 740 that the commission has authority to "prescribe terms and conditions." In such a position of statutory legal authority, I consider it a mistake to argue that the exercise of the powers of the commission (at all events in those cases to which I have referred as coming under sections 740 (in part) and 745), is controlled by the rules of law respecting the grant or refusal of injunctions.

From the nature of the subjects upon which the commission has to act it must result that its judicial and its executive powers must merge into each other.

My conclusion is that the appeal should be dismissed.

Appeal dismissed.

Re STURMER and TOWN OF BEAVERTON.

ONT.
D. C.
1912
Jan. 26.
Feb. 17.

Ontario Divisional Court, Clute, Latchford, and Middleton, JJ. January 26, 1912; Court of Appeal, Moss, C.J.O., in Chambers, February 17, 1912.

1. COSTS (§ I—4*a*)—LIABILITY OF REAL LITIGANT BEHIND NOMINAL PLAINTIFF.

The real litigant who puts up a man of straw in whose name the litigation is carried on in order to avoid liability on the part of the real litigant for costs may, on dismissal of the claim, be cited by notice to appear and shew cause and may thereupon be ordered in a proper case to pay the costs of the opposite party even when the nominal litigant had a legal status similar to that of the real litigant to institute the proceedings.

[*Sturmer* v. *Beaverton*, 25 O.L.R. 190, affirmed on appeal; *The Queen* v. *Greene* (1843), 4 Q.B. 646, 12 L.J.N.S. Q.B. 239, applied.]

2. APPEAL (§ XI—721)—LEAVE TO APPEAL—WHERE NO NOVEL PRINCIPLE.

Leave to appeal is properly refused where the amount in question is below the statutory sum and the decision sought to be appealed from introduces no new rule of decision.

3. APPEAL (§ XI—721)—LEAVE TO APPEAL—JUDICIAL DISCRETION IN COURT BELOW.

Where the amount in question is less than the amount in respect of which an appeal can be taken without leave, an application for leave to appeal will not be granted merely to review the question of the proper exercise of a judicial discretion by the Court below.

APPEAL by Alexander Hamilton from the order of BOYD, C., 25 O.L.R. 190, 192, requiring the appellant to pay certain costs, amounting to $384, to the Corporation of the Town of Beaverton.

ONT.

D. C.
1912

RE STURMER AND TOWN OF BEAVERTON

Argument

G. Lynch-Staunton, K.C., for the appellant, Hamilton, argued that the case at bar was entirely different from the cases in ejectment which are cited in behalf of the respondent's contention, as the jurisdiction to award costs against a landlord in these cases has always been regarded as an exception to the general rule that the Court will not interfere to make a person who is not a party to the record pay the costs of the action, though he is the real party interested in the event of it: *Hayward* v. *Giffard* (1838), 4 M. & W. 194, a case which was followed in *Evans* v. *Rees* (1841), 2, Q.B. 334, 11 L.J.N.S.Q.B. 11. See also *Thrustout d. Jones* v. *Shenton* (1829), 10 B. & C. 110, 112, and *Berkeley* v. *Dimery*, *ib.* 113 (*n.*) The distinction between ejectment cases and others is also referred to in *Hutchinson* v. *Greenwood* (1854), 4 E. & B. 324, which is cited in the judgment from which this appeal is taken. The language of Warrington, J., in *In re Appleton French & Scrafton Limited*, [1905] 1 Ch. 749, at p. 755, shews that cases of that kind cannot be treated as precedents in a case like this, which is similar to the *Hayward* case: see *Hayward v. Gifford*, 51 R.R. 529, and cases there collected. It cannot be said that the plaintiff in this case was a "manufactured plaintiff," and there is no reason to believe that he would not have taken the proceedings in any case. The application of the respondents is quite different from one asking for security for costs, in respect of which the Court has most extensive powers.

W. E. Raney, K.C., for the respondents. The line of authority relied on by the appellant is derived exclusively from common law, yet the opinion of the majority of the Court in *Hutchinson* v. *Greenwood* 4 E.&B. 324, is against him, as also a line of equity cases: see *Corporation of Burford* v. *Lenthall* (1743), 2 Atk. 551; *Attorney-General* v. *Skinners Co.* (1837), C. P. Coop. (Prac.) 1, 7, cited by Boyd, C; *Anonymous* (1807), 14 Ves. 207; *Hearsey* v. *Pechell* (1839), 5 Bing. N.C. 466 (a common law case); *In re Partington* (1821), 6 Madd. 71; *Burke* v. *Lidwell* (1844), 1 Jo. & La. T. 703; *Mason* v. *Jeffrey* (1866), 2 Ch. Ch. 15, where *Burke* v. *Lidwell* is referred to; *Hathway* v. *Doig* (1881), 9 P.R. 91; *Andrews* v. *Barnes* (1888), 39 Ch.D. 133, *per* Fry, J., at p. 138, where he deals with the jurisdiction of courts of equity in relation to costs.

Lynch-Staunton, in reply, argued that the cases cited on behalf of the respondents were not applicable. Lord Campbell says, in his judgment in the *Hutchinson* case, that it is an exception to the general rule; so that case is really authority in our favour. He referred to *Fraser* v. *Malloch* (1896), 23 Rettie 619.

January 26, 1912. CLUTE, J.:—Appeal from the order of the Chancellor directing one Hamilton to pay certain costs amounting to $384, the balance of costs in testing local option by-law.

It clearly appeared and was not disputed that the proceedings taken in the name of Sturmer were at the instance of Hamilton

and one Overend. Sturmer being irresponsible, they put him forward in order to escape liability for costs; they became responsible to the solicitor who acted for Sturmer for his costs, and they furnished the money paid into Court as security for costs. The amount here ordered to be paid is the amount in excess of the security given.

The Chancellor held that the proceeding was an abuse of the process of the Court, and that there was inherent power in the Court to make the person who had set the Court in motion pay the costs of the unsuccessful application, and this though the person be not formally a party, but one who is the instigator and supporter of the movement. He further held that under the Judicature Act* there is now ample jurisdiction to deal with costs; full power is given to determine by whom and to what extent costs are to be paid: sec. 119.

Mr. Lynch-Staunton strongly urged that the rule here invoked was only applicable in cases of ejectment, because in those cases the tenant is put forward by the landlord as a party, and that the Court has no jurisdiction to bring any one not a party before the Court and order him to pay the costs, and that the Judicature Act has no application to the present case, and does not extend the rule to a case like the present.

He further pointed out that, in the present case, the applicant had a right to move, and that it was only in those cases where the applicant had no right that the rule applied.

The case chiefly relied upon by the appellant was *Hayward* v. *Giffard*, 4 M. & W. 194. The affidavits upon which the rule in the *Hayward* case was obtained, calling upon one Spencer to pay the defendants their costs, tended to shew that Spencer was the real plaintiff, and not Hayward, and also set forth an admission by the plaintiff's attorney "that the action was brought by and at the instance of the said George Spencer, and that the said Hayward was the nominal plaintiff only." Lord Abinger stated that, were they at liberty to consult equity and justice, they should probably make the rule absolute. He further pointed out that the authority of the Courts at Westminster is derived from the Queen's writ, directing them to take cognizance of the suits mentioned in the writs respectively, and thus bringing the parties before them. This being so, they had no power to order any particular individual to come before them at their pleasure. In the absence of contempt or other special cause, "we cannot make any order against an individual who is not party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit." He then points out the exceptional cases where the Courts have interfered in this way, referring to ejectment, which is a fictitious proceeding, and the Courts allow the action to be brought in the name of a nominal

*R.S.O. 1897, ch. 51.

ONT.

D. C.
1912

RE STURMER AND TOWN OF BEAVERTON

Clute, J.

plaintiff, and allow the landlord to come in and defend, but they take notice of the real parties litigant. "Those are the excepted cases, but the general rule is, that courts of justice have no power except over parties to the record."

This case was followed in *Evans* v. *Rees* (1841), 2 Q.B. 334 11 L.J.N.S.Q.B. 11, and cited in the judgment of the Judicial Committee in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186. Sir Montague Smith, who delivered the judgment of the Committee, referred (p. 212) to the Courts having ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they had continued to exercise it in the actions substituted for that of ejectment. "Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward* v. *Gifford*, 4 M. & W. 194." The case was also referred to in the judgment in the Scottish case *Fraser* v. *Malloch*, 23 Rettie 619.

In *Hutchinson* v. *Greenwood*, 4 E. & B. 324, it was held that in ejectment, as well since the Common Law Procedure Act, 1852, as before, the Court has jurisdiction to order by rule the parties really conducting the defence to pay the costs of the plaintiff, though those parties are strangers to the record, and claim no interest in the property. Lord Campbell in this case says, at p. 326: "I cannot see that the Common Law Procedure Act, 1852, affects the question at all. The principle is that the individuals who order an appearance to be entered in ejectment, in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs." Erle, J., dissenting, was of opinion that, the parties being strangers to the record, the Court had not this summary jurisdiction over them.

In *Evans* v. *Rees*, 11 L.J.N.S.Q.B. 11, Wightman, J., referring to *Hayward* v. *Giffard*, states that all the cases cited in which this power has been exercised were ejectments; and that form of action is an exception to the general rule.

A case more nearly resembling the present is that of *The Queen* v. *Greene* (1843), 4 Q.B. 646; *S.C.* (1842), 11 L.J.N.S.Q.B. 281. There it was held that where a rule *nisi* for a *quo warranto* information is discharged, and it appears that the party making affidavit as relator is indigent and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application. It makes no difference that such party was employed on the motion as an attorney. In this case *Hayward* v. *Giffard* was cited. It is true that the person ordered to pay the costs was a solicitor, but that was not the ground for the order for payment. Lord Denman, C.J. (4 Q.B. at p. 652), said: "The question is, whether a person who, on a motion for a *quo warranto*

information, acts as an attorney, is on that account to avoid payment of costs, when he has, in fact, been the relator, but has put forward another person in that capacity, who is unable to pay costs. I have no doubt that he is liable, where it appears that he is actually and virtually a relator."

In *Hearsey* v. *Pechell*, 5 Bing. N.C. 466, Tindal, C.J., said: "The real question is, whether this is the action of the plaintiff, or substantially the action of Mr. Wood. If it were an action which the plaintiff would not have brought but for the instigation and countenance of Wood, the case would fall within *Tenant* v. *Brown* (1826), 5 B. & C. 208, and another case in the Court of King's Bench, where a master was compelled to pay costs for his servant, whom he had put forward as a defendant instead of himself. But it is not clear to me that this is an action which the plaintiff would not have brought without instigation of Wood."

In (1843) 12 L.J.N.S. Q.B. 239, the case of *The Queen* v. *Greene* came before the Court, consisting of Denman, C.J., Patteson, J., Williams, J., and Wightman, J., on a subsequent application,* when Lord Denman said: "I am of opinion, upon the facts of this case, that a person in the situation of the attorney here, is not to avoid the payment of costs, when he is, in fact, the real relator, merely by putting forward another person, bearing that name, and who has complied with the general rule of Michaelmas term, 1839. Under such circumstances, the real party will be made to pay the costs."

I do not find that *The Queen* v. *Greene* has ever been overruled or questioned. It is, I think, an authority in an application of this kind to give costs against the party who is the real litigant, although his name does not appear as the applicant making the motion.

I agree with the Chancellor that, under the Judicature Act, there is now ample jurisdiction to deal with costs, full power being given to determine by whom and to what extent costs are to be paid: sec. 119; and in a case of this kind I am of opinion that, where the real party litigant puts forward another person in whose name proceedings are taken, the Court has jurisdiction to impose costs against the real litigant. The appeal should be dismissed with costs.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I think the judgment appealed from is clearly right. It is quite true that the jurisdiction of the Common Law Courts to award costs must, in general, be found in some statute; but it is equally a recognised exception to this general statement that the Common Law Courts always had power to award costs

*The application appears to have been subsequent to that reported in 11 L.J.N.S.Q.B. 281; but the same application as that reported in 4 Q.B. 646, from which report the learned Judge quotes above.

ONT.

D. C.
1912

RE STURMER AND TOWN OF BEAVERTON

Middleton, J.

against one unsuccessfully invoking the aid of its process, even when the Court had no jurisdiction to entertain the application: *Rex* v. *Bennett* (1902), 4 O.L.R. 205; *Re Cosmopolitan Life Association* (1893), 15 P.R. 185; *In re Bombay Civil Fund Act* (1888), 40 Ch.D. 288. And the Court always had power to award costs against the real applicant when the motion was made by him in the name of a man of straw for the purpose of avoiding liability. The Courts were never so blind as to be unable to see through the flimsy device nor so impotent as to be unable to act.

The Queen v. *Greene*, 4 Q.B. 646, has never been doubted. It determines: "Where a rule nisi for a *quo warranto* information is discharged, and it appears that the party making affidavit as relator is indigent and unable to pay costs, and was procured to make the application by another who is the real prosecutor, the Court will order the costs to be paid by the party so promoting the application." This is a decision of Denman, C.J., and Patteson, Williams, and Wightman, JJ. In answer to the rule *Regina* v. *Thomas* (1837), 7 A. & E. 608, *Hayward* v. *Giffard*, 4 M. & W. 194, and *Regina* v. *Dodson* (1839), 9 A. & E. 704, were relied upon—and, in addition, it was urged that Simpson, to whom the rule had been addressed, was attorney for the relator, and was acting in discharge of his duty. Lord Denman says: "The question is, whether a person who, on a motion for a *quo warranto* information, acts as an attorney, is on that account to avoid payment of costs, when he has, in fact, been the relator, but has put forward another person in that capacity, who is unable to pay costs. I have no doubt that he is liable, where it appears that he is actually and virtually a relator." This justifies the head-note, which proceeds: "It makes no difference that such party was employed on the motion as an attorney." In other words, the liability is not because he was attorney, but notwithstanding that he was attorney.

This case also shews that the liability may be enforced in a summary way.

Some question having arisen as to the material that should be read upon such an application, a rule of Court was promulgated in Easter term, 1843, dealing with this question: "In every case in which the Court shall grant a rule . . . to compel any person, not a party to an original rule, to pay the costs of such original rule," &c. Thus, in the year 1843, the Common Law Courts, not only by decision, but by formal rule, asserted the jurisdiction in question.

It is said with much force that the cases shew that the jurisdiction to award costs against a landlord who defended an ejectment action was always regarded as an exception to the general rule that the Court had no power save over parties to the record, and that this exception was based upon the peculiar practice in ejectment. Undoubtedly this is said in so many words in *Hayward* v. *Giffard*, 4 M. & W. 194, but I can only regard *The Queen*

v. *Greene*, 4 Q.B. 646, as a deliberate refusal to recognise this limitation to the general power of the Court.

In *Mobbs* v. *Vandenbrande* (1864), 33 L.J.Q.B. 177, a motion was made in an ejectment action to compel one Johnson, who had really brought the action in the name of Mobbs, to pay the defendant's costs. The motion was resisted upon the ground that the only exception to the general rule was in the case of defences in ejectment, and it was shewn that the Court had assumed jurisdiction over the landlord who defended in his tenant's name because he was a party to the consent rule necessary under the old practice. This made the landlord *quasi* a party and conferred jurisdiction over him. It was said that Johnson, not being a party to any such consent rule, could not be made liable. Cockburn, C.J., says: "I certainly agree with Mr. Prideaux, that the origin of the equitable jurisdiction as to costs, exercised by the Courts in the action of ejectment as distinguished from other actions, arose from the circumstance that persons, otherwise not parties on the record, were brought before the Court by being compelled to enter into the consent rule. And being thus within the jurisdiction of the Court, the Court could deal with them as to costs according to the equities of the case. But whether that be the origin of the jurisdiction or not, it has certainly been extended in practice beyond persons who have become parties to the consent rule. I think it a most useful and salutary jurisdiction, and one that we ought to exercise whenever the merits of the case require it. . . . It has been established by the dicta of learned Judges in one or two cases, that, irrespective of being parties to the consent rule, where it is found that there is a real defendant or plaintiff behind, the Court will compel such person to pay costs." *The Queen* v. *Greene*, 4 Q.B. 646 *supra*, was not cited, and the only cases considered seem to have been ejectment cases. Blackburn, J., after stating that the Court had jurisdiction by reason of the consent rule, adds: "But if the real parties had not entered into the consent rule, the Court had yet jurisdiction over them, on the ground, I suppose, that there had been an abuse of the process, or perhaps because the whole proceeding was the creation of the Court."

The fictitious character of the old action of ejectment was made obsolete by the Act of 1852, and in this case as well as in *Hutchinson* v. *Greenwood*, 24 L.J.Q.B. 2, 4 E. & B. 324, it was contended that the action, by the Common Law Procedure Act, having ceased to have the peculiar character of the fictitious action devised by Chief Justice Rolle, this peculiar remedy was at an end. Lord Campbell, C.J. (24 L.J.Q.B. at p. 4), after stating that he had always regarded ejectment as an exception, in the end bases his judgment upon the general and wider right: "I do not think that the practice is contrary to general principle, because those who come into Court in another name and abuse the process of the Court, justly render themselves liable to pay costs as suitors.

ONT.

D. C.
1912

RE STURMER AND TOWN OF BEAVERTON

Middleton, J.

. . . With sincere respect for my brother Erle, who still, I believe, entertains a different opinion, I cannot entertain any doubt as to our jurisdiction to grant the present rule; and as it is not disputed here that the parties against whom the rule is sought to be made absolute are the persons who really caused the appearance to be entered and have defended the action by their own attorney, and though not the nominal, are really the substantial defendants against whom the plaintiffs have recovered a verdict, I think they are liable to pay the costs." Wightman, J., places the case upon the same broad general grounds: "According to the old rule of practice, recognised . . . by the authority of several cases, and founded upon very good reasons, a party who chooses to defend an action in the name of another, and for whose benefit the defence is really carried on, and who may in effect be considered as the real though not the nominal defendant, may be called upon by the plaintiff to pay the costs of the action." Erle, J., bases his dissenting judgment upon the precise ground relied upon by the appellant, that to order payment of costs by one who is not a party to the record is contrary to principle. Singularly, *The Queen* v. *Greene* 4 Q.B. 646, is not referred to in any way.

There is a dictum of Tindal, C.J., in *Hearsey* v. *Pechell*, 8 L.J.N.S.C.P. 247,* much in point: "Where a party, for the purpose of trying a right, put forward his servant to exercise and act upon such assumed right, and consequently he, the servant, became the only defendant in an action of trespass, and the real principal stood by and gave assistance by means of his attorney; when, afterwards, the question of costs came to be decided, and the Court perceived that the party endeavoured to screen himself from the payment, by putting forward his servant as a nominal defendant, they compelled him to pay the costs." In one of the contemporary reports, the learned Chief Justice refers to this as "a case decided by the Queen's Bench."

The case of *Hayward* v. *Giffard* contains in the judgment of Lord Abinger (4 M. & W. at p. 196) an expression not without significance: "In the present case, if it could have been shewn that Spencer had committed any contempt of Court, or been guilty, in respect of this suit, of anything in the nature of barratry or maintenance, it would have been another matter; but we cannot make any order against an individual who is not a party to any suit before us, nor has been guilty of any contempt, but merely because he has an interest in the event of the suit."

In this case it is not said that Hamilton "merely has an interest in the suit." It is said and shewn that it is his suit and that he has been guilty of something in the nature of barratry and maintenance, because, desiring to try his own right, he has procured this man of straw to allow the litigation to be brought in his name.

*This is the case cited in the argument and by Clute, J., as reported in 5 Bing. N.C. 466.

This, as the cases shew, is an abuse of the process of the Court, and I think a contempt of a most serious character, because the Court, which is called into existence to administer justice, is being used as a tool and instrument by which an injury is inflicted, which, it is said, it can in no way redress.

In Chancery, there never was any such limitation suggested as to the power of the Court over costs. The books contain many references as to the mode in which payment of costs may be enforced against persons not parties to the suit (*e.g.*, *Sangar* v. *Gardiner* (1838), C.P. Coop. (Prac.) 262, *Attorney-General* v. *Skinners Co.*, *ib.* 1); but singularly do not contain, so far as I can ascertain, any case in which the foundation of that jurisdiction or the principles by which the discretion of the Court was governed, are discussed.

Courts of equity, it is said, have in all cases awarded costs "not from any authority but from conscience and *arbitrio boni viri:*" *Corporation of Burford* v. *Lenthall*, 2 Atk. 551. See also *Andrews* v. *Barnes*, 39 Ch.D. 133.

But, quite apart from any consideration of the law and practice before the Judicature Act as now amended, I think that that Act makes our jurisdiction clear. In addition to the power originally conferred, which made all costs "in the discretion of the Court," the Court now has "full power to determine by whom and to what extent such costs are to be paid." These words were added to get rid of the restricted meaning attached to the words of the earlier Act in *In re Mills' Estate* (1886), 34 Ch.D. 24, and the Court has, since then, declined to apply any narrow construction to the amending Act: *In re Fisher*, [1891] 1 Ch. 450; *In re Schmarr*, [1902] 1 Ch. 326; *Dartford Brewery Co.* v. *Moseley*, [1906] 1 K.B. 462. *In re Appleton French & Scrafton Limited*, [1905] 1 Ch. 749, is an instance in which the Court held that this statute enabled costs to be awarded to one not a party to the record.

The power conferred by this statute is one which must be exercised upon principle, and in accordance with those rules that govern the exercise of all judicial discretion, and in no harsh and arbitrary manner; but where, even in the old cases, it is said that justice and equity point to the propriety of an order in such cases as this, and the Court laments the absence of jurisdiction, there can be no reason, now that jurisdiction is conferred by the Act, why the Court should be slow to exercise it in proper cases.

One is inclined to wonder at the timidity of some of the earlier Judges and to admire the robust sense and courage of Lord St. Leonards, who in a somewhat similar case (*Burke* v. *Lidwell*, 1 Jo. & Lat. 703), after commenting upon the highly improper conduct of those who induced the pauper plaintiff "to allow his name to be made use of as the plaintiff in this suit, for the fraudulent purpose of avoiding the payment of costs," said (p. 708):

ONT.

D. C.
1912

RE STURMER AND TOWN OF BEAVERTON

Middleton, J.

"Can there be a fraud which this Court ought to visit more strongly than the conduct pursued in this case, in which, in order to avoid the payment of the costs of a doubtful litigation, to which the plaintiff might be made liable, the real plaintiff procures a pauper to become the nominal plaintiff . . .?" What was there sought was security for costs, and it was argued that there was no power in the Court of Chancery to make such an order and no precedent for it, though that remedy was well known at law. "Then comes the question, have I power to act in accordance with my opinion? . . . It would be a reflection upon the administration of justice if I had not such a power. I am clearly of opinion that I have that power, and I am prepared to exercise it, and to make a precedent if none exist." Can it be doubted that Lord St. Leonards would have made the order now asked?

Appeal dismissed with costs.

Alexander Hamilton then moved for leave to appeal to the Court of Appeal from the order of the Divisional Court.

February 1. The motion was heard by Moss, C.J.O., in Chambers.

F. Morison, for the applicant.
W. E. Raney, K.C., for the respondents.

February 17. Moss, C.J.O.:—The actual amount involved in the proposed appeal is $384, which is said to be the excess of the taxed costs of opposing the original application beyond $300 paid into Court as security.

The special grounds urged in support of a further appeal are, that Hamilton not having been a party to the original proceedings, the Court had no jurisdiction to compel him to pay any of the costs incurred in the matter, and that, neither by the practice as it existed before the Judicature Act, nor by virtue of the power as to costs conferred by that Act, have the Courts power or jurisdiction to make such an order, even admitting, as it is admitted here, that the proceedings were instigated by Hamilton and were prosecuted on his behalf and for his benefit.

These points were urged before and fully considered by the Courts below. It is not necessary to express or form an opinion at present as to the effect, if any, of the provisions of the Judicature Act and the Consolidated Rules in the matter of enlarging the powers and jurisdiction of the Court as regards directing payment of costs by persons not parties to the original proceeding, though it may well be that such is the case. The decision now sought to be appealed from does not appear to introduce a novel rule of practice —one hitherto unconsidered and now acted upon for the first time by the Courts. While apparent conflict between some of the early and the later decisions may be pointed at, it is plain that objections founded on technical reasons are no longer permitted to prevent

ONT.

C. A. 1912

RE STURMER AND TOWN OF BEAVERTON

Moss, C.J.O.

the Court from dealing, so far as costs are concerned, with one who has so intervened as to make himself the substantial though not the ostensible party.

The decision in question here does not appear to carry the rule beyond what appears to be well-established by decisions under somewhat similar circumstances.

No special reason appears for permitting the applicant to carry further a question of this kind, especially where the amount involved is so far under the statutory sum. It would not be proper to grant leave to appeal on the mere question whether, assuming it to possess jurisdiction, the Court properly exercised its discretion in the circumstances of this case, even if that point appeared more doubtful than at present it seems to me to be.

The motion must be refused with costs.

Leave to appeal refused.

QUE.

Court of Review. 1912

Apr. 19.

RABY (plaintiff) v. ROAD COMMISSIONERS a Barriére de Montreal (defendants); and said defendants (plaintiffs in warranty) v. TOWN OF ST. PAUL et al. (defendants in warranty) and THE CITY OF MONTREAL (defendant in warranty par reprise d'instance).

Quebec Court of Review, Tellier, DeLorimier, Dunlop, JJ. April 19, 1912.

1. HIGHWAYS (§ VI—265)—ROAD TRUSTEES—LIMITS OF LIABILITY.

Road commissioners in the Province of Quebec are entrusted with the management, making and repairing of roads; but this trust comprises the roadbed only and does not extend to the construction and maintenance of sidewalks which fall exclusively under the jurisdiction of the municipal corporations within which they are situate.

[*Lalonge* v. *St. Vincent de Paul*, 27 Que. S.C. 218, specially referred to.]

2. HIGHWAYS (§ IV A—155)—DEFECT IN SIDEWALKS—LIABILITY FOR INJURIES.

Where a person is injured by a fall as the result of a defective sidewalk bordering on a road managed by road commissioners in Quebec, no liability whatsoever attaches to such trustees and if action be taken against them the plaintiff will be nonsuited, as the duties of the road commissioners extend to the roadbed only, and the municipal corporation has control of the sidewalks.

APPEAL by the defendants and by the defendants in warranty from a judgment of the Superior Court, Weir, J., rendered on December 6th, 1910, whereby the plaintiff respondent's action in damages, the result of a fall on a sidewalk, was maintained to the amount of $2,204.05.

Both appeals were allowed.

H. Pelletier, K.C., for the trustees, appellants.

J. A. Bonin, K.C., for the defendants in warranty, appellants.

M. Raymond, for plaintiff, respondent.

QUE.
Court of Review.
1912
RABY v. ROAD COMMISSIONERS.
Dunlop, J.

DUNLOP, J.:—The plaintiff by his declaration alleges that, about the 5th of October, 1908, a sidewalk constructed on Cote St. Paul road, between the bridge over the little river St. Pierre and the bridge over the Lachine canal, was in a very bad condition, the said road being under the control of the defendants; that, on the said date, plaintiff was walking on the said sidewalk opposite the building of the Montreal Light, Heat, and Power Company, when his foot went into a hole in one of the planks of the sidewalk and he fell, losing consciousness; that, in falling, he inflicted upon himself very serious internal and external injuries, provoking hemorrhages, and as a consequence of said fall there developed in his right side an abscess, and he suffers and will suffer from a serious malady of the kidneys and from a very serious pulmonary affection, of which he will never be cured; that he is not yet able to work and probably never will be; that those injuries, besides lessening very considerably his capacity for work, will render him incapable, as long as he lives, from undertaking any work requiring physical vigour, and are of a nature to shorten his days; that the accident was due to the fault and negligence of the defendants, who allowed to exist, upon this part of the road under their control and neglected to keep in repair, the said sidewalk, which was then, and for a long time before had been, in a very bad condition; that plaintiff is 35 years of age and at the head of a family of which he is the sole means of support; that he is a labourer, being able only to provide for himself and family by means of manual labour, which requires robust health and physical force; that, as a consequence of this accident, he has suffered damages to the extent of $4,999.

The defendants, by their plea, allege that they have summoned as warrantors La Ville de St. Paul and La Ville Emard; that the said defendants in warranty have contested the action in warranty; that they deny the plaintiff's allegation that the said sidewalk is constructed on a part of the road under their control, and conclude for the dismissal of the action.

The defendants, by a dilatory exception served upon plaintiff's attorneys on the 8th of October, 1909, set forth that the plaintiff alleges that, by reason of the bad condition of the said sidewalk constructed on the part of the road of the defendants, comprised between the bridge over the little river St. Pierre and the bridge over the Lachine canal, he suffered serious injuries, and goes on to allege that, by a deed of convention, dated the 19th of January, 1901, passed between La Ville de St. Paul and the defendants, of which copy is produced, the defendants leased to La Ville de St. Paul that part of the road on which is located the sidewalk in question, for a period of 30 years, upon the condition by the said Ville de St. Paul to keep the

said road, during the whole term of the lease, in a good state of repair, in the room and stead of the defendants; and stated also that, by another deed of convention, dated the 25th of April, 1901, passed between the defendants and the municipality of the parish of Cote St. Paul, of which copy is produced, the defendants leased to the said municipality that part of their road previously leased to the said Ville de St. Paul and which is situated between the bridge over the little river St. Pierre and the bridge over the Lachine canal and providing that the rental payable by the said municipality of the parish of Cote St. Paul will acquit the liability of La Ville de St. Paul; adding, that the municipality of the parish of Cote St. Paul is now incorporated as a town under the name of Ville Emard; that the said dilatory exception further alleges that this part of the road, on which is constructed the sidewalk in question, was situated in the limits of Cote St. Paul and is also situated in the limits of La Ville Emard, and by the conclusion of said dilatory exception, the defendants pray that they be allowed to call as their warrantors the said Ville de St. Paul and the Ville Emard.

On the 11th October, 1909, this dilatory exception was granted.

The defendant duly summoned, by action in warranty, the said La Ville de St. Paul and the Ville Emard, alleging that the defendants never authorized nor permitted in any manner the construction of the said sidewalk; that, at the time of the accident, the road of the defendants was under the control and at the charge of the defendants in warranty; that, if the facts mentioned in the principal action are true, the accident complained of must have happened by the fault and negligence of the defendants in warranty, who must have neglected to keep the said sidewalk in good condition and tolerated the construction of the said sidewalk on the said road, and conclude that defendants in warranty be condemned to hold defendants harmless from any condemnation from the premises.

La Ville de St. Paul, by its plea to the action in warranty of defendants, alleges that the road leased in virtue of the deeds above-mentioned was never within its statutory limits; that it has fulfilled all its obligations concerning the said road, but denies having taken charge of the keeping up of that part of the road where the accident took place, the defendants having taken away from La Ville de St. Paul that part of the said road when they leased it to the corporation of the parish of Cote St. Paul; that, when the deed of agreement was passed between defendants and it on the 19th of January, 1901, the sidewalk in question was in existence and it was never constructed or repaired in accordance with instructions from its municipal

QUE.

Court of Review.

1912

RABY v. ROAD COMMISSIONERS.

Dunlop, J.

council or its employees, and that it was not bound to construct or repair the said sidewalk; that, according to the said agreement, the defendants were to continue to collect the toll rates of the said road; that, by deed of agreement subsequently passed between the defendants and the municipality of the parish of Cote St. Paul, now La Ville Emard, that part of the said road where the accident happened was leased to the said municipality, which undertook to pay the $100 rental to defendants, to the acquittance of La Ville de St. Paul, which arrangement was carried out by La Ville Emard up to this day; that, consequently, this latter corporation then assumed to execute all the obligations that the law imposed upon the lessee, virtually liberating La Ville de St. Paul from its obligation under the said deed of the 19th of January, 1901.

By its answer to the plea of La Ville de St. Paul, the defendants allege that the contract passed between the defendants and the corporation of the parish of Cote St. Paul on the 25th of April, 1901, does not annul the contract passed between the defendants and La Ville de St. Paul; that the defendant never discharged La Ville de St. Paul from any of the obligations assumed by the latter in the deed of the 19th of January, 1901.

La Ville Emard, by its plea to the action in warranty of the defendants, alleges that by a resolution of its council, passed on the 20th of September, 1909, it was resolved that, while not recognizing any obligation to maintain or repair the sidewalk in question, which was beyond its limits, yet, inasmuch as it was in the interest of La Ville Emard and of its citizens that these repairs be immediately made, the council authorized the superintendent of roads to make, without delay, the necessary repairs, subject to any recourse the corporation might have against the parties obliged to make such repairs mentioned in said resolution; that this is all La Ville Emard did for the maintenance of said sidewalk, and this was done under the conditions and for the reasons and under the reserve stated in said resolution, and asks for the dismissal of the action in warranty in so far as it is concerned.

Defendants, by their answer to the said plea of La Ville Emard, allege that, if such a resolution was passed, the facts therein mentioned are not exact, and ask for *acte* of the admission contained in the said resolution, that La Ville Emard made repairs to the said sidewalk.

By petition filed on the 23rd of June, 1910, the city of Montreal alleged that La Ville de St. Paul and La Ville Emard had been annexed to the city of Montreal and their rights and actions now belong to the city of Montreal, and asked that it be permitted to take up the instance in this case, which petition

QUE.

Court of Review. 1912

RABY v. ROAD COMMISSIONERS.

Dunlop, J.

was granted by judgment of this Court, rendered on the 12th of October last.

Finally, a motion of the defendants and plaintiffs in warranty, asking that the proof and hearing on the principal demand and on the action in warranty, against both the defendants in warranty, be heard at the same time, and that the proof made on the principal demand serve for the purpose of the action in warranty, was granted.

By the judgment the principal action and the action in warranty of the principal defendants against the town of St. Paul, now represented by the city of Montreal, the defendant *par reprise d'instance*, were maintained; and further, by said judgment, the said city of Montreal was adjudged and condemned to pay and satisfy to the principal defendants the amount of the judgment rendered against them in favour of plaintiff, to wit, the sum of $2,204.05, with interest and costs.

By said judgment, the city of Montreal was condemned to pay to defendants the amount of said judgment and all their costs in the principal action and in the action in warranty as directed against the town of St. Paul, and the action in warranty as directed against the town of Emard was dismissed, and the plea of the said town of Emard, now represented by the said city of Montreal, defendant in warranty *par reprise d'instance*, to wit, the sum of $2,204.05, with interest and costs against the said principal defendants.

The defendants, the plaintiffs in warranty and defendant in warranty *par reprise d'instance*, inscribed in review against this judgment, and both contend with great force that there is no proof that the sidewalk, on which the accident occurred, was constructed on part of the road under the control of the road trustees, or that, the plaintiff has established any obligation on the part of the road trustees to maintain and repair the sidewalk in question where the accident happened.

The road trustees are officials named by virtue of the Ordinance 3 Vict. ch. 31, passed in 1840. (Q.) . . . The Ordinance, after describing the roads of which the road adjoining the sidewalk in question is one, by section 14 ordained and enacted that the said roads shall, from and after the passing of this Ordinance, be and remain under the exclusive management, charge, and control of the said trustees, and the tolls thereof shall be applied solely to the necessary expense of the management, making and repairing of the said roads and to payment of the principal of the debentures hereinafter mentioned; and it is further declared that all the powers, authority, jurisdiction and control, over and in regard to said roads or any of them, heretofore vested in any Grand Voyer, overseer of roads, or road surveyor, or other

QUE.

Court of Review. 1912

RABY v. ROAD COMMISSIONERS.

Dunlop, J.

road officer, by a certain act passed in the thirty-sixth year of the reign of King George III., entitled, "An Act for making, repairing and altering the highways and bridges in this province, and for other purposes," or by any other Act or Ordinance or law whatsoever, shall cease and determine from and after the passing of this Ordinance.

The last mentioned statute fixed the width of the front roads at 30 feet and those of routes at 20 feet. No statute has conferred on them the right, or even the obligation, of constructing sidewalks. They have never constructed sidewalks, and there is no obligation on their part to maintain or control sidewalks. Municipal roads are under the control of the municipal corporations within whose limits they are situated.

The Ordinance, 3 Vict. ch. 31, declares that certain roads therein designated are the property of the Crown and enacts that these roads shall be under the control and administration of the trustees.

Under the Municipal Code, articles 485 and 547, municipal corporations are authorized to acquire public or macadamized roads to plant trees alongside of the roads of the trustees at the expense of the proprietors; 548-551, to regulate the speed of vehicles or horses and to forbid the use of certain vehicles on roads belonging to the road trustees; (544, 545, 546), and to construct and maintain sidewalks on said roads and to determine the mode of making and maintaining such sidewalks and sewers.

James Quinn, inspector of the road trustees for thirteen years, testified that the trustees have never constructed any sidewalks or given any instructions concerning sidewalks, and that the trustees never made or caused to be made or repaired the sidewalk in question.

R. V. Dun, secretary of the town of St. Paul up to the time of its annexation to the city of Montreal, in whose employ he now is, has known the place in question for about thirty years, and testifies that the part of the sidewalk in question had been constructed by subscriptions collected from the citizens of the town of St. Paul, and that the trustees never had anything to do with the sidewalk, and that the road of the trustees was only the part of the road macadamized; and says further that any repairs that might have been made, were made at the expense of the inhabitants of the town of St. Paul.

L. H. Senécal, secretary of the road trustees, testifies that the trustees had never authorized the construction of the sidewalk in question, nor any other, and that he has always considered that the trustees had nothing to do with the sidewalks.

Municipal corporations, under the Act respecting cities and towns, have the power or right to construct sidewalks on all

their streets without exception, and to keep in good order, not only sidewalks which they . . . construct, but also the sidewalks constructed by the adjoining proprietors, if they have left them open for the use of the public.

This is what is declared in article 4616 of the Revised Statutes, Quebec, 1888, and by article 5886 of the Revised Statutes of 1909. This was also decided in the case of *Lalonge and the Corporation of St. Vincent de Paul*, Que. 27 S.C., page 218.

In my opinion, there was no obligation on the part of the trustees, the principal defendants, to maintain the sidewalk on which the accident happened. Nor were they responsible for the sidewalk or for damages resulting from the accident in question.

The object of the Ordinance, 3 Viet, ch. 31, was to provide for the improvement of the roads in the neighbourhood of and leading to the city of Montreal, and for raising a fund for that purpose. There is no question as to the maintenance or construction of sidewalks in the said Ordinance. The trustees were authorized to levy tolls for vehicles and animals, but not to charge pedestrians with tolls.

As I said before, the road in question, in my opinion, was a municipal road. Inasmuch as the defendants have denied specifically that the sidewalk was on the road of the road trustees, and this was their principal defence, I do not think plaintiff can avail himself of the pretension that there is a judicial admission in the allegations of their dilatory motion, and on this point I would refer to the authorities cited in the factum of the principal defendant. The defendants never intended to admit that the sidewalk was on their road. This they have specially denied in their defence. According to common language, the word "*sur*" signifies "*le long de*," as will be seen by art. 544, M.C., which gives municipalities acting under it the right to oblige proprietors of lands situate on roads belonging to the trustees of turnpike roads, or municipal or other roads, or on public places in the whole municipality, or in a part only of the municipality to make and maintain on such roads or public places in front of their respective properties, sidewalks in wood, stone or other material fixed upon. It is often said that a house is built on a street—for instance, St. James street. That does not mean to say that the house is built on the street—on the land forming the street—but simply that it fronts on the street.

After a very careful consideration of this case, I am of opinion that the plaintiff has entirely failed to shew that the sidewalk in question, on which the accident occurred, was ever constructed or repaired or under the control and direction of

QUE.

Court of Review. 1912

RABY v. ROAD COMMISSIONERS.

Dunlop, J.

the principal defendants, or that it was situated on the road-bed, which was the only part of the road under the control of the said trustees, now represented by the city of Montreal. It has been proved, on the contrary, that the principal defendants never constructed, repaired, or had control and direction and jurisdiction over the sidewalk in question.

I am, therefore, of opinion that there was error in the judgment of the Superior Court maintaining plaintiff's action and condemning the defendants to pay and satisfy to the plaintiff the sum of $2,204.05, with interest from the date of the service of the action and costs, and that said judgment of the Superior Court should be reversed and plaintiff's action dismissed with costs.

Now, as respects the action in warranty taken by the principal defendants against the towns of St. Paul and Emard, defendants in warranty—inasmuch as the principal action has this day been dismissed with costs . . . on the ground that the sidewalk in question on which the accident occurred was not constructed and maintained, or under the control and direction of the principal defendants I am of opinion that, under these circumstances, the action in warranty as respects the town of St. Paul must be dismissed, inasmuch as the plaintiffs in warranty have totally failed to establish the essential allegations of their declaration in warranty. I am of opinion that the defendants in warranty, the town of St. Paul, now represented by the city of Montreal, defendant *par reprise d'instance*, has proved the material allegations of its plea to the action in warranty, and that said plea should be maintained and plaintiffs in warranty's action dismissed.

As respects the defendant in warranty, the town of Emard, I am of opinion that said action in warranty, as directed against the town of Emard, now represented by the city of Montreal, defendant in warranty *par reprise d'instance*, should be dismissed, and the plea of the said town of Emard maintained, the whole with costs against the said principal defendants, inasmuch as the principal action has been this day dismissed with costs for the reasons at length stated in the judgment on the principal demand hereinbefore recited as well as for the reasons stated in the judgment of the Superior Court dismissing said action, and that said judgment, in so far as respects the town of Emard, should be modified accordingly, and the judgment dismissing said action in warranty confirmed in all other respects, and judgment is given accordingly dismissing the principal action, with costs against the principal plaintiff, and dismissing the action in warranty of the principal defendants against the said city of Montreal, defendant in warranty *par reprise d'instance*, as representing the town of St. Paul, and

also dismissing with costs the action in warranty taken by the principal defendants against the town of Emard, also now represented by the city of Montreal, defendant *par reprise d'instance*, the whole with costs of the principal action against the plaintiff in both Courts, and with costs of the actions in warranty against the plaintiffs in warranty in both Courts.

Appeals allowed; main action and action in warranty dismissed.

Catherine GILLESPIE v. Frederick WELLS and Francis Harvey Quickfall.

Manitoba King's Bench. Trial before Prendergast, J. April 29, 1912.

1. VENDOR AND PURCHASER (§ I B—5)—PAYMENT OF PURCHASE MONEY—KNOWLEDGE OF EXISTING ENCUMBRANCE.

If a purchaser knows of an encumbrance, either before or after the execution of his conveyance, but before the payment of the whole purchase money, he will be liable to the extent of any purchase money which he subsequently, without the consent of the encumbrancer, pays to the vendor.

[*Rayne* v. *Baker*, 65 Eng. Rep. 905, followed; Dart on Vendors and Purchasers, 7th ed., vol. 2, pp. 386 and 387, approved.]

2. EVIDENCE (§ II L—353)—INSTALMENT PAID—RECEIPT FOR SAME—PREVIOUS INSTALMENTS DUE.

A receipt for "instalment due in November last with interest to date" is, unless the contrary be shewn, sufficient evidence that all previous instalments and interest have been duly paid.

3. SPECIFIC PERFORMANCE (§ I A—12)—PERSONS ENTITLED TO ENFORCE PERFORMANCE—TRIFLING DEFICIENCY.

A trifling deficiency in the amount tendered as the balance due under an agreement for the sale of land, will not necessarily disentitle the purchaser to specific performance of the agreement.

TRIAL of an action for specific performance of a contract to sell lands to the plaintiff.

Judgment was given for the plaintiff.

W. D. Card, for plaintiff.
A. G. Kemp, for defendant Wells.
A. S. Campbell, for defendant Quickfall.

PRENDERGAST, J.:—This is an action for specific performance of an agreement for the sale of land wherein the plaintiff was the purchaser and defendant Wells the vendor, and Quickfall is joined as a defendant for the purpose of having removed from the Registry Office files a mortgage made by his co-defendant Wells to himself subsequently to the making and registering of the said agreement for sale.

The agreement for sale is dated October 13th, 1903, and was registered on December 13th following. The consideration therein stated is $1,200, bearing interest at 6 per cent., and payable in periodical instalments extending till November 1st, 1909.

MAN.

K.B.
1912

GILLESPIE
v.
WELLS

Prendergast, J.

The mortgage from Wells to Quickfall is dated February 20th, 1908, and was registered May 4th following. It is made to secure $500 payable March 1st, 1911, with interest at 10 per cent. payable yearly.

On October 24th, 1908, Quickfall served the plaintiff with notice in writing of this mortgage.

The plaintiff alleges that, before action, she tendered $164.80 both to Wells' solicitor in Winnipeg (Mr. Affleck) and to him personally at Lockport in the State of New York, which was in each case rejected; and that the said amount covered the balance of all sums due under the agreement, together with costs of deed.

Wells denies in his defence that the tenders were ever made, that Mr. Affleck was an agent for the purpose of receiving money on his behalf, and that the alleged tender covered all sums still due under the agreement. The defence of Quickfall is to the effect that there was a balance of the purchase price under the agreement still unpaid by the plaintiff when she was served with notice in writing of the mortgage.

First, as to Quickfall. I find that on October 20th, 1908, when Quickfall served plaintiff with notice of the mortgage, there were two payments not yet due and consequently not made under the agreement for sale; that the same have all since become due and none of them have been paid to Quickfall.

The proposition is well established that "if the purchaser knows of an encumbrance, either before or after the execution of his conveyance but before payment of the whole of the purchase money, he will be liable to the extent of any purchase money which he subsequently, without the consent of the encumbrancer, pays to the vendor": Dart on Vendors and Purchasers, 7th ed., vol. 2, pp. 386-387.

In *Rayne* v. *Baker*, 65 Eng. Rep. p. 903, where the vendor, pending payment of the balance of the purchase price, withheld the title deeds and left them as security with a third party, the Vice-Chancellor said at p. 905:—

> Whatever equitable interest the vendor had, by his depositing the title deeds by way of equitable mortgage, would pass to that equitable mortgagee. The plaintiff here sues as equitable mortgagee to assert against the purchaser his right to the extent of the unpaid purchase money. The only questions are whether the purchaser can say that he had paid the whole purchase money, and, if he did, whether he paid it before action.

Whatever determination may be made of the issues with Wells, the action must then fail, at least as to the relief specifically prayed for against Quickfall.

As to Wells. On the correspondence and papers produced, amongst others exhibits 6 and 19, I am of opinion that Mr. Affleck was an agent to whom tender could be made for Wells, and that tender was made to him in proper manner; but the

offer made to Wells personally at Lockport I hold not to have been a tender.

I may say, however, that so far as Wells' dispositions may be gathered from the correspondence filed and the very many grounds he urges in his defence (such as moving buildings, default in taxes, etc.) that are absolutely without any foundation of fact on his own shewing when answering to interrogatories, his mind seems to have been made up to avoid and refuse tender. If that be so, and even if no tender at all had been made, the case might still come within the proposition laid down by the Vice-Chancellor in *Hunter* v. *Daniel*, 4 Hare 420 at p. 433.

The question is whether the amount of $164.80 tendered to Mr. Affleck was sufficient to cover the balance of the purchase price under the agreement, together with costs of deed from Wells to the plaintiff.

Unless the contrary be shewn, the receipt dated January 19th, 1909 (Ex. 7) from Wells' solicitors to plaintiff's solicitors, "For $190.75, being instalment due in November last with interest to date," must be taken as sufficient evidence that all previous instalments and interest on the agreement were duly paid. The only other instalment then remaining unpaid under the agreement is one for $150 due November 1st, 1909, with interest thereon at 6 per cent. On the date of the tender to Mr. Affleck, which was February 10th, 1910, there was then due on this instalment $162, or, with costs of deed, $167. Now only $164.80 was tendered. The tender was therefore short by $2.20.

The defendant Wells, however, claims $28.70 more for a balance of costs on cancellation proceedings instituted in 1908. The onus as to this part of the account is of course shifted on to Wells. I have nothing before me in this respect but two letters from Wells' solicitors (Exhibits 14 and 15), and Wells' answers to interrogatories; but these only shew that he claims that amount, and papers filed shew that the plaintiff was anxious to adjust item not proven.

It is essential when a purchaser asks for specific performance that he should have paid or tendered the full amount of the purchase. It is only after performing his part that he secures the standing which allows him to ask the Court to compel the vendor to perform his own.

The shortage of $2.20 in the tender is, however, so trifling that I do not think that this should stand in the way of granting the relief sought. *De minimis non curat prætor.* If there are cases where the rule may be overlooked or relaxed to this small extent, this seems to me to be one of them. The correspondence and not in any way that it is due him. I will then hold this last matters and made several attempts to do so without receiving any response from Wells; and, moreover, that pressed and urged by the latter, and misconceiving her position, she had paid him

MAN.

K.B.
1912

GILLESPIE
v.
WELLS

Prendergast, J.

$191.75 (see exhibit 7) to which he was not entitled in any way, and which she is bound now to pay over again to Quickfall or forfeit the property.

I will then grant the plaintiff the relief prayed for against Wells, at the same time protecting Quickfall's rights under the mortgage.

In order to finally determine all matters that I consider have been fully inquired into and that all parties have had the opportunity to fully meet, I will also, although the same is not specially prayed for, make a personal order for payment against Wells as to the money he has been paid in error by the plaintiff subsequent to the latter being served with notice of the mortgage, and also provide for the paying off of whatever may be due under the mortgage. I will provide for this under the plaintiff's prayer for further relief, and she will be allowed, should it be necessary, to amend her statement of claim accordingly.

There will be an order that upon the plaintiff paying into Court, to the credit of this cause, the sum of $162, together with $5 costs of deed, defendant Wells convey to her within one month all his right, title and interest to and in the said land as the same stood on October 31st, 1903.

And that on default by the said Wells to so convey his interest as aforesaid, there be an order vesting the same in the plaintiff subject to a lien under the mortgage for $320 (amount of two instalments of purchase price unpaid at the date of service of notice of the mortgage) with interest on same at 6 per cent. since November 1st, 1908.

Also, that after default by Wells as aforesaid, upon the plaintiff paying into Court to the credit of this cause the amount secured by lien under the mortgage as in the paragraph immediately preceding provided, less $167, which will then have been already paid in, but adding 6 per cent. on the latter amount to date, and also the costs of this action, defendant Quickfall discharge the mortgage within ten days, and the plaintiff may also sign judgment against Wells for $191.75 paid to him on June 19th, 1909, with legal interest since said date; and that in case of default by Quickfall to discharge the mortgage as aforesaid, the same be declared discharged and be removed from the files of the Registry office, with costs of proceedings on said default to the plaintiff.

The plaintiff to have in all event her costs of action against defendant Wells, and defendant Quickfall to have his costs against the plaintiff except in case of his default to discharge the mortgage as herein above provided.

Judgment for plaintiff.

BROWN v. ROBERTS.

British Columbia Supreme Court. Trial before Murphy, J. March 12, 1912.

B.C.

S.C., 1912

April 29.

1. TENDER (§ I—7)—LAND CONTRACT—VENDOR DECLARING SAME CANCELLED —WAIVER.

A declaration of the vendor upon inquiry by the vendee in a contract for the sale of land, as to the amount remaining unpaid thereon, that the agreement had been cancelled and terminated for non-payment, relieves the vendee of the necessity of making a valid tender of the amount due before commencing suit for specific performance of the contract, or a return of the money paid thereon.

2. EVIDENCE (§ II K I—311)—LAND CONTRACT—CANCELLATION BY VENDOR —ONUS OF PROVING CANCELLATION.

Where, after nearly half of the purchase price had been paid on a contract for the sale of land, the vendor sought to cancel the agreement, notwithstanding he had knowledge that the vendee was ready and willing to pay the balance due within three days of the time limited for payment in the notice of cancellation, in an action by the vendee for specific performance, the onus rests on the vendor to shew that such cancellation was in strict accord with the requirements of the contract of sale.

3. CONTRACTS (§ V C I—391)—RESCISSION FOR DEFAULT—REGULARITY OF NOTICE.

A notice is insufficient to cancel a contract for the sale of land which, contrary to the terms of the agreement, demands compound interest, and the payment of the balance due within thirty days from the date of the notice and not from the time of its service as required by the contract, where service was not effected until the thirty-day period had about expired.

4. PLEADINGS (§ II H—218)—LAND CONTRACT—CANCELLATION BY VENDOR— INSUFFICIENCY OF NOTICE OF CANCELLATION.

As the onus rests upon the defendant in an action for specific performance of a contract to sell lands, to shew that, in cancelling the agreement, the procedure agreed upon in the contract was followed, it is immaterial that objection to the sufficiency of the notice of cancellation was not taken by the plaintiff in the pleadings.

5. CONTRACTS (§ V C I—391)—SALE OF LAND—CANCELLATION BY VENDOR UPON DEFAULT.

A notice by a vendor of land while the purchaser was in default in respect of some of the payments stipulated for, that unless immediate payment is made "proceedings of foreclosure will follow" is not a sufficient notice of intended cancellation under a contract providing for a notice of intended cancellation and for forfeiture in thirty days thereafter.

6. TIME (§ I—9)—COMPUTATION—DATE OF WRITTEN DEMAND OR DATE OF SERVICE—"FROM THIS DATE."

A written demand for payment within thirty days "from this date" is to be construed as a demand for payment within that period computed from the date which the notice itself bears where the same is formally dated and not from the day of service of the demand.

ACTION for specific performance of an agreement for sale or in the alternative damages and return of moneys paid. Tried by Murphy, J., at Vancouver, on the 5th of March, 1912. The agreement, dated April 1st, 1910, was that the defendant agreed to sell to plaintiff a certain lot for $1,800, payable $800 cash, $332 October 1st, interest at 7 per cent. The plaintiff paid

B.C.
S. C.
1912
BROWN
v.
ROBERTS.

$800 in cash, but made default in payment of instalment due 1st October, 1910. Defendant and plaintiff had several interviews between approximately 1st November, 1910, and 24th February, 1911. On the 14th of December, 1910, defendant wrote plaintiff demanding payment by an ordinary letter, stating that he would take proceedings to foreclose if not paid. On the 21st of January, 1911, a notice of cancellation and forfeiture within 30 days, dated 23rd December, 1910, was served on the plaintiff. About the 24th or 25th of February, the plaintiff had a conversation with defendant. The trial Judge found as a fact that plaintiff told defendant he would pay up, and wanted a statement, but defendant stated he was too late, as the agreement had been foreclosed a day or two before. On the 22nd of March, 1911, the plaintiff attempted to tender the defendant the balance due; not finding him, the plaintiff's solicitors wrote the defendant, informing him that they were prepared to make the payment overdue, and in due course the payment falling due on April 1st. The defendant received the letter but did not accept the money, or signify his willingness to accept.

Judgment was given for the plaintiff.

F. L. Gwillim, for plaintiff.
M. A. Macdonald, for defendant.

MURPHY, J.:—In the particular circumstances of this case I think the plaintiff is entitled to succeed. As to the question of tender, I have already found as a fact that on the 24th or 25th of February, 1911, plaintiff made inquiry of defendant as to amount due, plaintiff being then in a position to make the overdue payment, but defendant put an end to all discussion by stating the cancellation had become effective and the agreement was at an end. This relieved the plaintiff from any necessity of making a valid tender before bringing action. The parties here set out in their agreement machinery for a short way out of it in case of default. In my opinion, where the facts are as here, no change having taken place in the position of the parties, a continuous intention on the part of the purchaser to fulfil his bargain, which intention was communicated to vendor, almost half the purchase money paid as a first instalment, and a readiness and ability on the part of the purchaser to pay the overdue instalment within two, or at the most three days after the 30 days given by the alleged cancellation notice had elapsed, communication of which state of facts to the vendor was prevented by the vendor's declaration that the agreement was at an end, it is incumbent on defendant to shew that the cancellation notice relied upon is in strict accord with what the agreement requires it should be. Here the notice of the 23rd of December, 1910, failed in at least two particulars—it demanded compound interest, and being served on the 21st of January, 1911, it called for

payment within 30 days, not from date of service, but from "this date," viz., the date it bore, 23rd December, 1910.

As to the notice of the 14th of December, 1910, I do not think defendant can rely upon it, as he went to trial and based his case on the notice of the 23rd of December, 1910. Even if he can, such notice likewise is not the notice required by the agreement, since it states if immediate payment is not made, "proceedings of foreclosure will follow."

As to the point that objection is not taken to the form of notice in the pleadings, the onus is on the defendant to shew that he properly followed the procedure agreed upon. There will be a declaration that the agreement is valid and subsisting and that the defendant is liable to perform and observe the terms, provided that the plaintiff within three days after taxation of costs pay to defendant the amounts and interest now due under the agreement after deducting therefrom the amount of taxed costs which are hereby awarded to plaintiff, taxation to take place within one week of entry of formal judgment.

Judgment for plaintiff.

DONOUGH v. MOORE.

Manitoba King's Bench. Trial before Robson, J. February 20, 1912.

1. CONTRACTS (§ IV E—365)—JOINT PROFIT AGREEMENT WITH REAL ESTATE AGENT—REFUSAL TO SELL—ELECTION TO TREAT AS A BREACH OR AS A CONTINUING CONTRACT.

Where a contract between the owner of land and a real estate agent provided that the land in question be sold at a profit to be divided equally between them, and the owner declines to entertain an offer made either by the real estate agent or any other person, the real estate agent is not obliged to treat such refusal as a breach of the contract, but may elect, either to consider the contract as still in existence and await the performance of the same or to treat it as a breach and in the absence of such election the contract still stands.

[*Johnstone* v. *Milling*, 16 Q.B.D. 460, and *McCowan* v. *McKay*, 13 Man. R. 590, specially referred to.]

2. BROKERS (§ II—B)—COMPENSATION—EQUAL DIVISION OF PROFITS ON A RE-SALE—TITLE OR INTEREST IN LAND.

Where a purchaser of land enters into a contract with a real estate agent, whereby the purchaser is to furnish the purchase money less the commission payable to the real estate agent, and the profits on a re-sale of the property are to be divided equally between them this does not create a partnership between the parties, and the real estate agent acquires no title or interest in the land in question.

AN action to remove a caveat from the land registry.

The caveat was set aside and judgment entered declaring the rights of parties.

Messrs. *W. H. Trueman*, and *W. Hollands*, for plaintiff.
A. E. Hoskin, K.C., for defendant.

MAN.

K. B.
1912

DONOUGH
v.
MOORE.

Robson, J.

ROBSON, J.:—The parties reside in Winnipeg. Plaintiff has carried on business as a merchant tailor, and defendant as a real estate broker.

About November, 1901, it was verbally agreed between plaintiff and defendant that defendant should select a parcel of land which might be bought reasonably and in such a way that there would be allowed off the purchase price by the vendor a sum for commission to defendant for effecting the sale; that plaintiff should furnish the purchase money less the sum so to be allowed; that the land should be sold when a profit could be realized and the profit divided equally between the parties. Pursuant to this arrangement the defendant brought to the attention of the plaintiff the land now in question, and in the result a formal agreement was entered into between the owner and the plaintiff whereby the former agreed to sell to the latter for $1,440.00. The down payment was $360, which was satisfied by payment of $288 by plaintiff to the owner and the set-off of $72 which may be called defendant's commission.

Plaintiff contends that defendant was to procure a purchaser at a profit within a year, that his so doing was essential to his sharing in the profit, that such was not done and that consequently the plaintiff had to make the future payments, as he in fact did. Plaintiff contended that defendant thus lost any rights he may have had. Defendant denies this alleged stipulation. This question became unimportant as it was made clear by the evidence of the witness Lundy that defendant had within the year produced an intending purchaser at an advanced price, and that plaintiff declined to deal with him. Plaintiff did not repudiate or deny the arrangement with defendant. He merely thought it unwise to sell at the price offered. According to defendant there were further offers procured by him, each one being an advance over the previous one. This is denied by plaintiff. Whether there was or was not any subsequent effort by defendant to find a purchaser is material only on the question whether he abandoned his bargain with plaintiff, I cannot find any such abandonment. Defendant did not treat the plaintiff's refusal to accept Lundy's offer or the refusal to accept any alleged subsequent offer as a breach of contract entitling him to damages, but permitted matters between him and plaintiff to stand regardless of any refusal. That defendant was not bound to treat plaintiff's conduct in any such instance as a breach is quite clear. He was at liberty to elect "either to treat the declaration as *brutum fulmen*, and holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which

he has entered. But such a declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such." See per Bowen, L.J., in *Johnstone* v. *Milling*, 16 Q.B.D. 460, at 473, cited with other authorities to the like effect by Killam, C.J., in *McCowan* v. *McKay*, 13 Man. R. 590. Had the defendant made an election in a binding manner (*McCowan* v. *McKay*, 13 Man. R. 590, at p. 596), to treat plaintiff's refusal as a breach, his cause of action might date from the breach and the period of limitation of an action of damages would become important, but there was no such election. In my view, therefore, the contract still stands and the only question is what is the position of the parties thereunder.

The defendant asserts that he has an estate or interest in the land in question, and the title being in the name of the plaintiff, he, defendant, filed a caveat. The plaintiff seeks the removal of that caveat. This would involve an adjudication that defendant has no such estate or interest. In my view the defendant has no estate or interest in the land, but has simply a right, when it is sold, to receive one half of the profits realized.

That the purchase price to the plaintiff was reduced by $72, was, together with the defendant's offer to find a suitable parcel of land, the consideration for the plaintiff's agreement to give the defendant one half of the profits on a sale. There was clearly no partnership. Had there been a loss, defendant would not have been liable to share it. Defendant had merely an unconditional right to share in the profit realized on a sale. This right would, if defendant should so elect on plaintiff's refusal to sell on reasonable request, give defendant an action of damages. That this is the present position of the parties, notwithstanding anything that has elapsed, seems unquestionable. In *Smith* v. *Watson*, 2 B. & C. 401, Bayley, J., said, at p. 407:—

> Now a right to share in the profits of a particular adventure, may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure.

See also *Meyer* v. *Sharp*, 5 Taunt. 74; *Stuart* v. *Mott*, 23 Can. S.C.R. 384, also shews the distinction between a right of sharing in proceeds and property in the subject-matter.

There will be judgment setting aside the caveat and declaring:—

1. That the defendant has no estate or interest in the lands in question, and

2. That the defendant, under the contract so found, has a right to receive one half of any profits which may be derived

MAN.
K. B.
1912

from any sale of the lands that may be effected either by the plaintiff himself or by the aid of the defendant. Otherwise the claim and counterclaim are dismissed.

I will hear counsel on the question of costs.

Caveat removed.

CHURCH et al. v. RACICOT.

QUE.
K. B.
1912
Apr. 29.

Quebec King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Cross, Carroll and Gervais, JJ. April 29, 1912.

1. LOGS AND LOGGING (§ I—9)—CONTRACTS—PRESUMPTION AS TO CULLER'S RETURN.

Under a contract for the cutting of logs in timber limits where it is stipulated that the culling and measuring will be done by a culler appointed by the party who undertakes the cutting, the calculations of such culler will be accepted by the Court and such clause given effect to although mere errors of calculation may be reformed.

2. LOGS AND LOGGING (§ I—9)—EFFECT OF ERROR IN SCALE—EVIDENCE—SCALING IN WATER.

A party alleging error of calculation by a culler or measurer does not need to pray for the cancellation of the contract; on the contrary, his prayer for a reformation is a demand for the complete execution of the contract. It will be necessary, however, to bring conclusive proof of error in such measurements, and measurements taken *ex parte* when the logs were in the water in the early spring and when many of them were hidden from view, cannot be accepted as against the measurements of the culler chosen by the parties under the contract.

THIS was an appeal from the judgment of the Court of Review, Archibald, Charbonneau and Mercier, JJ., rendered on April 8, 1911, and reversing the judgment of the Superior Court for the district of Ottawa, Champagne, J., rendered on September 2, 1910, and dismissing with costs the action of the plaintiff-respondent.

The appeal was allowed and the judgment of the trial Judge restored.

H. J. Elliott, K.C. (with him as counsel, *C. H. Stephens*, K.C.), for appellant:—The condition in the contract really provides that the measuring should be final and without appeal, for otherwise, if done by another party, such measuring would be in violation of the contract and not binding on the appellants: *Peters* v. *The Quebec Harbour Commissioners*, 19 Can. S.C.R. 685. If such measurements arrived at by the culler appointed under the contract are not final and conclusive then the clause has no meaning. The stipulation must have some purpose and the only purpose was that the result arrived at thereunder should be binding on both parties unless fraud or bad faith could be shewn to have existed in arriving at that result: *Sharpe* v. *San Paulo Ry. Co.*, L.R. 7 Ch. p. 605*n*; *Goodyear* v. *Weymouth Corporation*, 35 L.J. C.P. 12. The judgment appealed from is at best a com-

promise between the claims of the parties as it discards both measurements and adopts the mean average of all the measurements made. As to the question of fact it will be seen that the measurements made by the respondent are far less reliable than those of appellants and that a large portion of the logs was never even measured.

H. A. Fortier, for the respondent:—The clause in question does not impose the measurements on the parties as being final and without appeal. The legal principles enunciated by the trial Judge cannot apply to the present case and the authorities on which they are founded apply solely to arts. 1591 and 1592 C.N., which articles are not contained in our Code: Fuzier-Herman, Code Civil, art. 1592, No. 35, 4 Aubry & Rau, pp. 338-349; 4 Laurent, No. 77; 1 Guillouard, No. 108. As to the measurements made in this case, the conditions for measurement in the forest allow of a more expeditious but not of such a correct measurement as those obtaining when the logs are being driven in a lake or river.

April 29, 1912. The unanimous judgment of the Court was delivered by

CARROLL, J.:—This is an appeal from the judgment of the Court of Review quashing a judgment of the Superior Court by which the action of Racicot, the plaintiff, was dismissed. The Court of Review has condemned the defendants, Church *et al.*, to pay the sum of $1,429.13.

Racicot had undertaken to cut from fifty to sixty thousand logs in the timber limits of the defendants. The price had been fixed at the sum of $6.50 per thousand feet, board measure.

The main clause of the contract reads as follows:—

> Logs will be inspected, culled, measured and stamped monthly. The culling and measuring to be done by a Government culler appointed by said party of the second part, the party of the first part providing labour at his own cost to stamp, roll and expose logs for the inspection of the culler.
>
> The said party of the second part hereby agrees to receive the above stated quantities of spruce and other logs as above described and to pay therefor according to the Quebec Government method of computation at above mentioned prices, of which 50 per cent. shall be payable on the 20th day of the month following the inspection, measurement and stamping thereof, and the balance when this contract is fully completed and said logs are finally delivered into water and same certified to by the culler thereof.

A large quantity of timber was cut during the months of November, December, January, February and March, 1908-09. In the month of March, Racicot began to complain that the statements of measurements furnished by the culler, Leary, who had been chosen by the defendants for measuring operations, were not correct and did not do him justice, and on April 7 he notified

QUE.
K.B.
1912
CHURCH
v.
RACICOT.
Carroll, J.

the defendants by notarial protest calling on them to recommence the measurement of the timber conjointly with him. This the defendants neglected or refused to accept, and Racicot proceeded alone to have all the logs which were then in Lac Cinq Doigts measured by six cullers. This work was begun on April 17 and was only finished on April 26, and it was necessary to do the work quickly as the ice was on the eve of breaking up. For this reason the work had to be divided up into three parts—to each part two men being assigned—so that in view of this division of measurement operations the measurements were verified by only two cullers per log.

It should be remarked on this phase of the case—as to the number of cullers—that the measurements of the defendants were made in exactly the same way, Leary having measured the logs with the help of one Fee, the son of one of the defendants.

The latter measured 66,926 logs giving, according to their calculations, 2,213,821 feet, board measure, which at $6.50 per thousand amounted to $14,389.89. This amount has been paid to Racicot.

The cullers employed by Racicot counted only 56,431 logs. They were unable to measure the remaining 10,000 logs because, as they claim, they were under water.

According to them, these 56,431 logs measured 2,111,322 feet, board measure. They found an average of 35, 36 and 38 feet per log and the Court of Review, striking an average between the figure of 33 feet per log, as found by Leary, and the average found by Racicot's cullers, came to the conclusion that the latter was entitled to be paid for 2,392,604 feet—a difference to his credit in round figures of 170,000 feet.

In order to arrive at this figure it was inferred that the 10,000 logs which were not measured would give the same average as those which had.

The Superior Court dismissed the action for two reasons, one based on law and the other on fact.

In law:—

Considérant que la clause du contrat sus-citée, en vertu de laquelle le comptage et le mesurage du bois en question furent confiés au nommé Leary est légale et lie les parties, et que le mesurage fait par le dit mesureur ne peut être mis de coté, à moins qu'il ne soit entaché de dol ou de fraude.

Considérant que dans l'espèce, le demandeur ne peut invoquer l'erreur, cause de nullité des contrats dont il est question à l'article 992 du Code Civil, puisque son effet est de mettre les parties dans le même état qu'elles étaient avant la passation du contrat, et que le demandeur par son action, invoque le contrat mais n'en demande pas l'annulation.

On fact:—

Considérant, au surplus, que le demandeur n'a pas suffisamment prouvé son allégation que le mesurage de Leary ait été fait erronément.

QUE.
K. B.
1912
CHURCH
v.
RACICOT.
Carroll, J.

We agree with the Court of Review that the reasons of law are not well founded.

The clause in the contract which allows the defendants to appoint the culler or measurer is not final and conclusive (clause *compromissoire*) on the parties and Racicot may allege and prove an error of calculation. The first Court declares that Racicot cannot plead error, because he relies on the contract to establish his claim to payment. What he really relies on is the error in calculation made by the measure of the other party, and not an error in the contract itself. He does not pray for the cancellation of the contract, on the contrary, as stated by Mr. Justice Charbonneau in Review, he asks for the full and complete execution thereof.

On the question of fact, however, I am of opinion that the first Court is right. Not only has the plaintiff not proven sufficiently the error alleged to have been made by Leary, but he has not made any proof at all on this point.

Evidently the Court of Review, which finds the proof contradictory on this point, has allowed itself to be influenced by Racicot's offer to proceed to a measurement jointly with the defendants and by the refusal of the latter to accede to this proposition. But we should not forget that the defendants, interpreting the clause of the contract relative to the culler and being of the belief that Leary's measurements were final and without appeal, relied on what they considered their strict rights.

It is true also that Racicot offered to measure the logs at the outlet of the lake but this offer, in my opinion, could not be carried into practical effect because the high waters last a couple of weeks, and the witness Draper states that such an operation would have lasted one or two years. Even admitting this statement to be exaggerated, common sense convinces us that this operation could not be carried on during the high water period. Racicot therefore proceeded to an *ex parte* measurement.

As I have already stated, although six cullers were engaged in this work, they divided it up among themselves, and as found by the learned trial Judge we have to deal with the work of one measurer only. So that each party is on the same footing as regards the number of measurers and counsel for the parties have stated that no suspicion of bad faith existed in this case, as each party fulfilled his duty to the best of his knowledge. However, in my opinion, Leary was in a far better position to make his calculations. His measurements were taken each month as the timber was cut into logs and piled up, and they were placed so that they could be measured with accuracy, the piling up having been made specially for this purpose.

The other cullers had to proceed hurriedly with their work at the end of April as the ice was about to break up. The logs were in the lake and had not been put there so as to allow of another

QUE.
K. B.
1912
CHURCH
v.
RACICOT.
Carroll, J.

measurement. It is proven that the measurements were made partly in the water, and that there was one foot of water at least over the ice at many places. How could they, in such a juncture, measure at least the bottom row of the logs? For it is admitted that measurements are impossible unless a log emerge sufficiently from the water to allow its diameter to be ascertained.

And as the merchantable timber only is to be taken into account how could these useless portions be discovered in the slush and water?

The evidence shews that these measurements could not be satisfactory, and, even if we had no positive proof thereof, common sense would warn us that such measurements are unreliable.

But there is more than this. The clause in the contract allowing the defendants to choose the culler must not be illusory. We should place more reliance in Leary's operations seeing he was acting by consent of the parties. *Primâ facie* his evidence must have more weight than that of the others. Otherwise this clause would be meaningless.

I conclude, therefore, that the plaintiff has failed in his action, that the judgment of the Court of Review should be quashed and that of the Superior Court restored.

Appeal allowed with costs.

CAN.
Ry. Com.
1912
March 2.

DAWSON BOARD OF TRADE et al. v. WHITE PASS AND YUKON RAILWAY CO. et al.

Board of Railway Commissioners. March 2, 1912.

1. COMMERCE (§ II C—32)—REGULATING RAILWAY RATES—FREIGHT AND PASSENGER CHARGES—BOARD OF RAILWAY COMMISSIONERS.

As a railway company is entitled to earn a fair and reasonable return upon the money invested in it, the Board of Railway Commissioners will not reduce the freight and passenger tolls where the results would be an annual deficit to a company, whose net earnings under existing tolls, permitted a dividend of but one per cent. upon its outstanding stock.

2. COMMERCE (§ II C—32)—BOARD OF RAILWAY COMMISSIONERS—REGULATING RATES.

The fact that, in the past, the stockholders of a railway company have received back in stock and cash dividends all of their original investment will not justify a reduction by the Board of Railway Commissioners of the freight and passenger tolls which would, with its present earnings, result in a deficit.

3. COMMERCE (§ II C—32)—REGULATING RATE—WHAT BOARD OF RAILWAY COMMISSIONERS MAY CONSIDER.

Improper inflation of the stock of a railway company, which is all held by the original builders of the road, may be taken into consideration by the Board of Railway Commissioners in determining whether a reduction of its freight and passenger tolls would permit fair and reasonable earnings upon the money actually invested.

4. EVIDENCE (§ VII G—625)—BOARD OF RAILWAY COMMISSIONERS—REDUCING RATES—OPINION AS TO INCREASED BUSINESS.

In determining whether the freight and passenger tolls of a railway company should be reduced, the Board of Railway Commissioners will not act upon the supposition that a reduction in rates would, by attracting additional traffic, result in an increase of earnings where it is impossible to discover any source from which such additional traffic could be obtained.

APPEAL by the White Pass and Yukon Railway Co. from order of the Board of Railway Commissioners, dated January 18, 1911, application to re-open the whole matter having been granted them on July 18, 1911.

The appeal was allowed.

F. T. Congdon, K.C., for applicants.

T. P. Galt, K.C., for Col. Conrad.

F. H. Chrysler, K.C., for respondents.

THE CHIEF COMMISSIONER (HON. J. P. MABEE):—A reference to the report of this case in 9 Can. Ry. Cas., at page 190 [*Dawson Board of Trade* v. *White Pass and Yukon R. Co.*, 9 Can. Ry. Cas. 190], will shew that down to that date the only question disposed of was that of the jurisdiction of the Board. Later on, the case was heard at Vancouver when additional evidence was adduced, and for the reasons appearing in 11 Can. Ry. Cas., at page 402 *et seq.*, the Board thought that the class and passenger rates upon the rail division should be reduced by 33⅓ per cent., and directed the respondent companies to substitute for their existing class and passenger tariffs new joint tariffs of freight and passenger tolls based on a reduction of at least one-third, in each case; these new tariffs were to be effective not later than April 1st, 1911. It will be observed that this adjudication covered only the tolls upon through traffic on the rail division between Skaguay and White Horse, and upon local traffic between points upon the portion of the road that was in Canada. Tolls from Puget Sound points and Skaguay by water routes, of course, were not subject to the control of this Board, and it was also held that there was no control over the rates charged by the navigation company between White Horse and Dawson, and between intermediate points. The respondents being dissatisfied with this order availed themselves of the provision contained in section 56 of the Railway Act, and, on February 25th, 1911, petitioned His Excellency the Governor-General-in-Council for a rescission of that order. Some delay occurred in getting the petition on for argument before Council, and it becoming apparent that the matter could not be disposed of in time for the respondents to make the tariffs required by the order effective on April 1st, an order was made on March 23rd extending the effective date of these new tariffs. This course was necessary because it did not appear that the petition against the order operated as a stay of proceedings, and if the

CAN.

Ry. Com. 1912

DAWSON BOARD OF TRADE v. WHITE PASS AND YUKON RY. CO.

Comr. Mabee.

respondents complied with the order and filed the new tariffs, shippers would probably make contracts based upon the reductions provided for; then, in the event of the prayer of the petition being granted, and the order being rescinded, more confusion, and probably more inconvenience and loss would be caused than by postponing the effective date of the order.

In the petition by way of appeal from the order, the respondents introduced figures and set up facts that had not been presented to the Board at the hearings which preceded the judgment complained of. The case had been dragging along for five years and evidence given from time to time. The results of the companies' operations for the year 1910 had not been placed before us, nor had we been furnished with full information shewing the reduction of earnings, and diminishing traffic, as compared with former years.

Without going into particulars, the result of the petition was a report of the Committee of the Privy Council, dated June 16th, 1911, which, after reciting the proceedings declared that:—

> The Committee are of opinion that the petitions of the said companies to rescind the order of the said Board, dated 18th January, 1911, should not be proceeded with before this Committee until the companies shall have applied to the said Board to re-open the matter of the application on which the said order was made, and to hear any further evidence which either party to the said proceedings may desire to adduce, or any considerations which either of such parties may desire to urge with a view to any variation or modification of the said order, which it may seem to the said Board ought to be made, with liberty to the said companies to apply at the same time to the said Board to fix a new date at which any substituted tariff or tariffs of of the said companies should become effective, if after hearing such further evidence and argument, the said Board shall be of opinion that any tariff or tariffs should be substituted by the said companies for those mentioned in the said order of January 18th, 1911.
>
> The Committee advised that, in the meantime, further hearing of the parties before this Committee in the said matter do stand awaiting the further action of the said Board in the premises.

On June 28th, the respondents gave notice of motion for leave to re-open the matter and adduce additional evidence with further statistics relating to revenue and cost of operation, and upon the application were filed affidavits verifying the figures and statistics appearing in the petition to the Governor-in-Council, and which prior to that date had not been furnished to us.

This motion came on for hearing on July 18th, and an order was made granting leave to re-open the matter, with liberty to all parties to supplement the evidence as they might be advised; and the companies were in the meantime relieved from filing the tariffs covered by the order of January 18th, in appeal, and now under review.

Since the reopening of the matter, evidence has been heard at White Horse and twice at Ottawa; Mr. Commissioner McLean and myself have gone over the rail division from Skaguay to White Horse, and have had an opportunity of seeing the conditions under which the companies operate; and the Chief Engineer has furnished to us a careful and elaborate physical valuation of the road, and in the result much useful and material information is before us that we had not the advantage of when the former adjudication was made.

Perhaps at this point it may not be out of place to refer to the opposition that was offered by these respondents to the original application of the Board of Trade of Dawson.

At the outset, the jurisdiction of the Board was contested at every step, and some years' delay, during which the companies were making large profits, was successfully accomplished by these tactics. The books of the companies were kept at Skaguay, and excuses were made for not bringing them within the jurisdiction of the Board. They were placed at the disposal of the Board's Chief Traffic Officer at Skaguay for inspection, but in the light of subsequent developments, most material features of the companies' operations and system of bookkeeping were suppressed, and have only subsequently come to light, I understand, through disclosures made by discharged officials of the company.

Reference to these matters do not materially assist in determining what is proper now to be done, but these developments shew reasons why the then management of these companies regarded an investigation into their finances with a jealous eye; and little wonder that, while the management had secret accounts in the books shewing the payment of hundreds of thousands of dollars by way of *refunds*, as they were called, although in truth they were *rebates* in most part, no more assistance would be given to the Board in its inquiry than was absolutely necessary. However, the management is changed, and since the spring of 1911, when Mr. Dickeson became the general manager of these companies, the Board has no reason to suppose that the law has been violated, but, on the contrary, has every reason to suppose that he has endeavoured to operate the rail division in accordance with the requirements of the law.

In the respondents' petition, by way of appeal, the following figures for the year 1910 were for the first time introduced into the case:—

Total freight and passenger earnings	$738,457.77
Mail, express, telegraph, etc.	14,422.07
Total	$752,879.84

CAN.

Ry. Com. 1912

DAWSON BOARD OF TRADE v. WHITE PASS AND YUKON RY. CO.

Comr. Mabee.

Deduct one-third as provided by the order	246,152.59
Total railway earnings	$506,727.25
Less working expenses	438,377.13
Surplus	$ 68,350.12
Interest on bonds	$195,911.02
Surplus for payment	68,350.12
Deficit	$127,560.90

In the result, these figures shew that if the rates fixed by the order of the Board had been in effect during the year 1910, the companies would have defaulted to the extent of $127,560.90 in the payment of the interest upon their bonds, to say nothing of the stockholders obtaining no dividend whatever.

In dealing with the application that was made to the Board when the case was re-opened, it was stated that:—

> The Board never intended to deprive these carriers of the opportunity of earning, first, not only enough to pay the interest upon their bonds, but, secondly, to pay a fair return upon the actual capital that went into the road, and that is now outstanding in the form of stock. No controlling commission has got, it seems to us, the right or the jurisdiction to make an order that would have the effect of destroying the earning power of the capital that honestly went into the facility, and it is hardly necessary for me to reiterate that this Board never intended to make such an order; and if it is ultimately shewn that the order we made has that effect, I take the responsibility of saying that it will be very promptly rescinded.

At one of the subsequent hearings, it was discovered that some error had been made in compiling the above figures, but it was apparent that the reduction required would have left a large deficit.

At the hearing on December 6th, Mr. Dickeson gave us the figures, so far as possible, for the year 1911. The companies had earned $149,700.90 less than during 1910, although the rates were the same, the deficiency being caused by a general dropping off in business, upwards of 7,000 tons less freight having moved. A large reduction has been made by him in operating expenses. He stated that he had been compelled to go—

> away beyond what is ordinarily called good judgment, in the operation of railroads, in reducing our forces and cutting down expenses beyond what we can reasonably expect to continue.

Since the hearing on December 6th, the adjourned annual meeting of the companies has been held, and all that the shareholders got after the season's operations was a dividend of one per cent. When giving his evidence on December 6th, Mr. Dickeson was asked if he expected to be able to pay a dividend of two per cent., and he answered:—

I do not. We have provided for our operating expenses, and bond interest, and we are in very grave doubts as to whether or not we can declare a dividend of one per cent. That is entirely uncertain; something to be decided between now and the end of the year.

Many more matters could be recited that has been placed before the Board upon the rehearing to shew that the order of January 18th could not be put into effect; but sufficient has been said to make it clear that the reduction in rates then directed would be an outrage upon the stockholders in these railways. In the earlier years, when the Yukon was not only prosperous but booming, these railways were profitable, and then was the time for rate reduction. Had the management been as economical then as now, with the large earnings in those days, no doubt substantial reductions could have been made without hardships upon the stockholders; but this matter can be dealt with only upon conditions as they exist to-day. It was urged that the stockholders, in stock and cash dividends, had been repaid all the moneys originally invested. There is nothing, however, in this argument, even if such were the fact; profitable rates in the past are no argument for present day reduction without regard to all existing conditions; and even if stockholders in railways have, during a period of years, been repaid in dividends the sum total of the original investment, this forms no reason why they should not continue to receive a fair return upon the capital invested. Another feature, not to be lost sight of in this case, is the fact that all the money that ever went into this road was private capital; the companies never received any Government aid either by land grant or subsidy.

It will not be thought that this matter is being considered solely from the standpoint of the stockholders in these railways. It is not. The Board is alive to the burdens of the freight rates upon this route upon the people of the Yukon, and the record is full of high-handed and unreasonable treatment of the public by those in charge of the operation of these companies. It would gladly interfere, and require very substantial reductions, were that course at all reasonable or possible. It is clear that these companies are bordering upon receivership, and it is not in the interest of either the public, or those whose moneys are invested in these enterprises, that any action of the Board should force them into that position. It is of great importance that not only the people of the Yukon, but for that matter that the people everywhere, should be protected from extortionate or unreasonable transportation charges; but to my mind it is of equal importance that the capital invested in transportation companies should be permitted to earn fair and reasonable dividends. Railway construction in Canada depends entirely upon outside capital; thousand of millions must be borrowed within the next generation or two. We have in Canada less than 30,000 miles of

CAN.

Ry. Com. 1912

DAWSON BOARD OF TRADE v. WHITE PASS AND YUKON RY. CO.

Comr. Mabee.

railway as against more than 235,000 miles in the United States. Within fifty years Canada will require a greater railway mileage than now exists in the United States; the money for the construction of this must for many years at least, largely come from abroad, and how long would these investments continue if it were known that their earning power might, at any moment, be terminated by the intervention of this Board? While our duty to interfere and reduce rates in all proper cases is plain, surely it is equally clear that we should not require a reduction where the effect would be to prevent the investment earning a fair return.

In dealing with this feature of the case, the Board will be understood as referring to the actual money that was honestly invested. Here, as we understand it, the stock is held entirely by the original builders of these railways, and has not passed into the hands of the general public; so if it were apparent that the stock had been improperly inflated, there would be no difficulty in protecting the stockholders to the extent of the actual investment. It may not be necessary, but it is as well to deal briefly with the physical valuation that the Board's Chief Engineer, Mr. Mountain, made of these railways. The following table shews the careful valuation made by him:—

THE VALUE OF THE WHITE PASS & YUKON RAILWAY.

Right-of-way	1701 acres at	$ 10.00	$ 17,010.00
Clearing and grubbing	145 "	125.00	18,125.00
Clearing	719 "	50.00	35,950.00
Grubbing	2409 "	10.00	24,090.00
Solid rock	608900 cu. yds.	2.25	1,370,025.00
Loose rock	448870 "	1.00	448,870.00
Earth and other material	425662 "	.50	212,831.00
Cemented gravel	78000 "	.75	58,500.00
Overhaul	171000 "	.01	1,710.00
Track and ballast	121.72 miles	9000.00	1,095,480.00
Bridges, trestles, culverts and retaining walls			583,796.00
Widening bank			65,000.00
Switches			6,685.00
Telegraph	121.72 miles	200.00	24,344.00
Snow fence			12,243.00
Betterments			4,000.00
Brackett wagon road			95,000.00
Miscellaneous			20,000.00
Sidings	6 miles	9000.00	54,000.00
Extra right-of-way at Skaguay			20,000.00
Engineering and superintendence			125,000.00
			$4,292,659.00
Buildings on line			205,200.00
Terminals			445,300.00
Rolling stock			450,000.00
			$5,393,159.00

Franchise, financing, interest, legal expenses, and other contingencies, 10 per cent.	539,315.00
	$5,932,474.00
Cost per mile	$48,738.00

These shew a cost of $48,738 per mile. The statement furnished by the companies put the original cost at $62,000 per mile. This included a profit of 15 per cent. to the construction company, $90,000 for the Dyea Trail, $85,000 for the White Horse Tramway Company, and some other smaller items which Mr. Mountain does not think should form part of the capital account. Another item that went to swell the cost of construction was the expense and loss by reason of the continued disorganization of the construction gangs by their stampeding to placer mines that were being discovered. Mr. Mountain thinks the road could be duplicated for $50,000 per mile, but does not desire to go on record as saying that original construction did not cost $62,000 per mile. It does not, however, become necessary to decide which should be the proper sum, in view of the lean earnings; it is altogether likely that the stockholders would, in the meantime, be glad to obtain an earning of, say 4 per cent. upon Mr. Mountain's valuation, were that possible. Taking the average dividends paid from the beginning of operation, the shareholders have not realized more than about 6 per cent. upon their investments; from now on, unless the traffic increases greatly, even at present rates, the earnings must be of a nominal character only.

It may not be improper to advert to some of the conditions under which this road is operated. In the first place, there are only about four or five months of the year that there is any freight moving. From November to May there is a large annual loss in operation. Mr. Dickeson said that only during July, August, and September could a surplus above cost of operation be earned. In November last there was a loss of $36,000. Speaking on December 6th, Mr. Dickeson said:—

> Last year's figures shew, worked out by days, that we ran the train fifteen days without a single passenger or a single pound of freight. We had three engines back of a snow-plow plowing snow forty miles with three crews and a rotary crew of nine men, and about sixty men to keep the right-of-way clear for the purpose of handling a mail sack locally between Skaguay and White Horse, with weather all the way from 20 to 40 below zero.

Mr. Mountain says that the maximum grade for miles is 3.9 with 16 degree curvature, making, with compensation, a grade of about 5 per cent. The cost of labour (including train hands and section-men) is double that of any other road in Canada (he probably did not intend including the Klondike Mines railway in this statement). The cost of operation is about 12

CAN.

Ry. Com. 1912

DAWSON BOARD OF TRADE v. WHITE PASS AND YUKON RY. CO.

Comr. Mabee.

cents per ton mile, while to a railway hauling from 1,000 to 12,000 tons per train mile, the cost is about one cent per ton mile.

These matters are referred to for the purpose of shewing the difficulties in the Board's way in dealing with these complaints, quite apart from the fact that, with the diminishing traffic, and the high rates, the margin between the gross receipts and expenses is so extremely narrow. There are other difficulties, of a no less serious character, in the way of affording redress to the people of Dawson, even if we were, under the circumstances, able to let the order of January 18th stand as to the rail division. In the first place, not being able to control the rates on the river division, and the boats on the river being owned by a separate company, although under the control of the same company that controls the rail division, there is nothing to prevent the management, upon through traffic, adding to the dates upon the river division any reductions we might order upon the rail division; in other words, upon a ton of merchandise moving from Skaguay to Dawson, the rate upon which might be reduced by us from Skaguay to White Horse, by, say, $10 might be added by the navigation company to the rate from White Horse to Dawson. I do not say that the navigation company would do this, but if it did, I know of nothing to prevent it. It was said that if freight could be got to White Horse, competition upon the river would prevent increase of rates by the navigation company. How this might be, I do not know. It has not been very successful in the past.

Another serious difficulty, entirely beyond the power of the Board to deal with, is this: The steamship companies operating from Puget Sound points to Skaguay charge $4.50 per ton more upon freight for furtherance to rail and river points, than the local to Skaguay. Why this is so, I do not know. It is a combination that the Board cannot control, and must be left to the people themselves to deal with as best they may. The wharfage charges, the bunker tolls upon ore at Skaguay are all entirely beyond the Board's jurisdiction.

From what has been said, it is apparent that the order of January 18th, 1911, cannot stand, and must be rescinded; but, notwithstanding this Mr. Dickeson, the President and General Manager of the companies, has undertaken with the Board to voluntarily make some substantial reductions in certain rates both upon the rail and river divisions. The following is the understanding arrived at:—

Mining Machinery.—Ten per cent. reduction on both rail and river.

Powder and Dynamite.—Ten per cent. reduction on both rail and river.

Ore from McRae Spur.—Retail and wholesale, $2 per ton.

Bunker Charges.—Reduced from 50 cents to 25 cents per ton.

River Berth Rate.—Reduced from $2.50 to $1.

Row Boats.—Thirty-five per cent. reduction.

Coal. Tantalus Mines to Dawson.—Reduced from $6 per ton weighed to $4.50 per measured ton.

In addition to the foregoing, Mr Dickeson intends making the attempt of shipping coal from Tantalus to Skaguay, and other rail points, and undertakes that reasonable rates will be applied.

The passenger rates on the rail division are recognized as being unreasonably high, even under existing conditions, and Mr. Dickeson has undertaken that reductions will be made either in a regular mileage cut, or in reduced fares upon certain days; he must have a reasonable opportunity to develop this arrangement.

It will be seen from the foregoing that reductions are made that in no event could the Board order, and are directed upon the lines of assisting mining development.

The Board has been strongly impressed with the argument that if it enforced the order of January 18th, 1911, or even made it more drastic, it would work to the advantage of the companies in attracting additional traffic to this route; that it would assist in developing the country, and form an inducement to prospectors and miners to explore and make investments. How this might be is a matter of opinion. If the earning capacity of these roads was cut in two, and the traffic did not increase, the result would be that the Board would have wrecked the capital invested, forced the companies into receiverships, and probably done the country and the people irreparable harm, to say nothing of the perhaps greater question of shaking the faith of the investing public in Canadian securities. It might be that the reductions demanded would cause increased traffic, although, at the moment, I am at a loss to see where it would come from. White Horse and Dawson are no more stagnant than Skaguay, and its degeneration is not to be laid at the door of the White Pass companies; at any rate, it is much easier to advance arguments of this kind than to take the responsibility of putting these claims in the form of a concrete order. I am not prepared, upon all the information the Board has, to assume the responsibility and risk attendant upon such a course.

I am of opinion that a great deal of the dissatisfaction that has existed in the Yukon over the rates and other matters connected with the White Pass route could have been largely eliminated had there been a more intelligent and less domineering management. I am also of the opinion that these interests, under the direction of Mr. Dickeson, will stand in better favour among the people there than they have in the past; at any rate, the better course is to give him an opportunity to develop certain

CAN.

Ry. Com. 1912

DAWSON BOARD OF TRADE v. WHITE PASS AND YUKON RY. CO.

plans he has formed for the improvement and advancement of the country.

The changes in the rates above referred to are not to be regarded as finally disposing of these complaints. They are to be put into effect with the view of seeing what the result may be. The Board will retain the matter until the completion of the fiscal year of the companies; they will be asked to furnish detailed information of the year's operation, and further intervention will depend upon the result of such statements.

COMMISSIONER MCLEAN concurred.

Appeal allowed.

ONT.

H. C. J. 1912

Apr. 3.

REX v. PEMBER.

(Decision No. 1.)

Ontario High Court, Middleton, J., in Chambers. April 3, 1912.

1. MUNICIPAL CORPORATIONS (§ II C 3—111*a*)—BY-LAW REGULATING "TRANSIENT TRADERS"—TAKING ORDERS.

A person is not a "transient trader" requiring a municipal license as such under the Ontario Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 583,* where, although not permanently resident within the municipality nor assessed therein, he takes orders for hair goods and toilet articles to be supplied directly to the public and not to the retail trade only, if the samples from which orders are solicited are not sold by him and the orders are taken and the business transacted at one place only (*ex gr.* an hotel) and the orders so taken are addressed to a firm located in another municipality subject to acceptance or rejection by the firm after being transmitted to its place of business.

[*Rex* v. *St. Pierre* (1902), 4 O.L.R. 76, followed.]

MOTION to quash a magistrate's conviction of the defendant under a transient traders' by-law of a municipality.

The conviction was quashed with costs against the informant.

J. Jennings, for the defendant.

A. J. Wilkes, K.C., for the informant.

MIDDLETON, J.:—The firm of Pember & Co. carry on business in Toronto, dealing in hair goods and toilet articles. The accused, Frank R. Pember, is not a member of the firm, but travels for it. His custom, which he followed on this occasion,

*Section 583 of the Consolidated Municipal Act, 3 Edw. VII. (Ont.), ch. 19, provides as follows:—

583. By-laws may be passed by the councils of the municipalities or Boards of Commissioners of Police and for the purposes in this section respectively mentioned, that is to say:—By the councils of townships, towns and villages, and of cities having less than 100,000 inhabitants and by the Board of Commissioners of Police in cities having 100,000 inhabitants or more. . . .

30. For licensing, regulating and governing transient traders and other persons who occupy premises in the city, town, village, or town-

is to rent a room at an hotel at the place he visits, after previously advertising his advent, and there to display samples of the wares in question to those attracted by his advertisement. He does not sell the articles exhibited; he takes orders, which are transmitted to the firm in Toronto, and are there accepted or rejected by the firm. The question is, is this an infringement of the by-law of the town, which has been passed in the terms of the Municipal Act and its amendments? This narrows itself to a question whether what is done constitutes the accused a transient trader, within the meaning of the statute.

I think the matter is concluded by the case of *Rex* v. *St. Pierre*, 4 O.L.R. 76. There it was held not to be an offence for a person temporarily at an hotel to take orders there for clothing to be made in a place outside the municipality, from material corresponding with the samples exhibited. Since that decision, the Legislature has amended the statute with respect

ship, for temporary periods, and whose names have not been duly entered on the assessment roll of the municipality in respect of income or personal property for the then current year; and who may offer goods or merchandise of any description for sale by auction, or in any other manner conducted by themselves or by a licensed auctioneer or otherwise.

(*a*) No such by-law shall affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed of within the county in which the insolvent carried on business therewith at the time of the issue of an attachment or of the execution of an assignment.

31. For requiring all transient traders who occupy premises in the municipality, and are not entered upon the assessment roll or who may be entered for the first time upon the assessment roll of such municipality, in respect of income or personal property, and who may offer goods or merchandise of any description for sale by auction, or in any other manner conducted by themselves or by a licensed auctioneer, or by their agent or otherwise, to pay a license fee before commencing to trade.

(*a*) No such by-law shall affect, apply to, or restrict the sale of the stock of an insolvent estate which is being sold or disposed within the local municipality in which the insolvent carried on business therewith, at the time of the issue of an attachment or of the execution of an assignment.

(*b*) The words "transient traders" wherever they occur in clauses 30 and 31 of this section, shall extend to and include any person commencing in the municipality the business in the said clauses mentioned, who has not resided continuously in such municipality for a period of at least three months next preceding the time of the commencement by him of such business therein.

By the councils of townships, cities, towns and villages:—

32. For fixing the sums to be paid for licenses required under by-laws passed under the preceding clause 30.

33. For fixing the sums to be paid for licenses under by-laws passed under the preceding clause 31, not exceeding in cities and towns $250 and in other municipalities $100 for each license; and for providing that the sum so paid for a license shall be credited to the trader paying the same upon and on account of taxes for the unexpired portion of the then current year, as well as any subsequent taxes, should such trader remain in the municipality a sufficient time for taxes to become due and payable by him, and in any other event to be taken and used by the municipality as a portion of the license fund of such municipality;

Provided, nevertheless, that the license fee imposed by any by-law of any village situate within any territorial district may be a sum not exceeding $200.

ONT.

H. C. J. 1912

REX v. PEMBER.

Middleton, J.

to hawkers, by adding to the interpretation clause defining that word, so that it now applies to those "who carry and expose samples or patterns of any such goods to be afterwards delivered, within the county, to any person not being a wholesale or retail dealer in such goods, wares, or merchandise."

Although the section of the statute relating to transient traders has been under consideration by the Legislature and has been amended, no corresponding amendment has been introduced, and I cannot find anything in the amendments which have been made which will make the reasoning in the case cited less applicable.

Mr. Wilkes argued very forcibly that what was done by the accused was within the mischief apparently aimed at by the statute, and was just as unfair to those residing within the municipality and bearing the burdens of local taxation as any kind of trading. Unfortunately this argument must be addressed to the Legislature itself, as I cannot assume that it has not been adequately considered by the learned Judges who decided the *St. Pierre Case, Rex* v. *St. Pierre*, 4 O.L.R. 76, after argument by eminent counsel.

The conviction should, therefore, be quashed, with costs to be paid by the informant. The usual order for protection, so far as the magistrate is concerned, will be granted, and the $100 paid into Court as security should be refunded.

Conviction quashed.

QUE.

Court of Review.

1912

May 17.

LAPIERRE es qual. v. **MAGNAN** and **VIENS** (defendant in warranty and intervenant) and **LAPIERRE** es qual. (contestant) and **VIENS** v. **LAPIERRE.**

Quebec Court of Review, Sir Melbourne Tait, C.J., Tellier and Beaudin, JJ. May 17, 1912.

1. ASSIGNMENT (§ III—28)—TRANSFER OF AN AGREEMENT OF SALE—RIGHTS OF TRANSFEREE.

The transferee of rights under a promise of sale can have no greater rights under such promise of sale as against the original owner than the transferor.

2. COVENANTS AND CONDITIONS (§ III D—52)—LIABILITY OF GRANTEE FOR OBSERVANCE OF EVERY CONDITION AS WELL AS COVENANT TO PAY PURCHASE PRICE.

Where a transferee of rights under a promise of sale acquired these rights under a promise of sale and the transfer stipulates that the transferee shall fulfil all the charges, clauses and conditions imposed on the transferor, the transferee will not be entitled to obtain a deed of sale before he has fulfilled every condition mentioned, even though he have paid the entire purchase price; nor can he compel the vendor to sign him a complete deed of sale unless such deed contains every clause and obligation mentioned in the promise of sale.

3. COVENANTS AND CONDITIONS (§ III D—52)—RIGHT OF GRANTEE TO HAVE DEED—FAILURE TO OBSERVE BUILDING RESTRICTIONS.

If a transferee of rights under a promise of sale of lands has built a portion of a house on territory which was to be left free from build-

ing, such transferee is not entitled to a deed formally transferring the ownership of the immoveable, and the original vendor is entitled to have that portion of the building encroaching on the prohibited territory demolished, and this by direct action against the transferee if he so choose.

[*Delorme* v. *Cusson*, 28 Can. S.C.R. 66, distinguished.]

4. BOUNDARIES (§ II A—9b)—DUTY OF VENDOR TO DISCLOSE LOCATION OF BOUNDARIES.

The vendor is not obliged to shew the vendee where the line is, it is for the buyer to ascertain this.

5. ESTOPPEL (§ III J 3—130)—EFFECT OF SEEKING CANCELLATION OF AGREEMENT ON RIGHT TO CLAIM DEMOLITION OF A WORK, IN CONTRAVENTION OF CONTRACT.

The vendor who sues for the cancellation of a promise of sale of lands is not thereby estopped from praying for the demolition of work done in contravention to such promise of sale.

APPEALS from the judgments of the Superior Court, Bruneau, J., rendered on June 27th, 1911, maintaining the action of Lapierre, the respondent, in demolition of a portion of a building, and dismissing the action of Viens, the appellant, to compel the respondent to sign him a deed of sale.

The appeals were dismissed.

C. A. Guertin, for intervenant, appellant, and plaintiff, appellant.

A. Brossard, K.C., for plaintiff, respondent, and defendant, respondent.

BEAUDIN, J. (for the majority of the Court):—The plaintiff in his quality of testamentary executor to the estate of the late Joseph Brunet sues the defendant in demolition of a bay-window built in the façade of a house within twelve feet of Cartier street, within a delay of fifteen days; and prays that in case the defendant should fail to do so within such delay the plaintiff be authorized to have such demolition done at the defendant's expense.

The plaintiff alleges a promise of sale of September 3rd, 1903, passed before Bourdeau, N.P., whereby the late Mr. Brunet promised to sell to the defendant sub-division number 58 of official lot 1225, St. Mary's Ward, and also another piece of ground formed of sub-division lot No. 330 of lot 153, Cote Visitation, and of sub-division No. 9 of official lot 1225, St. Mary's Ward, at the rate of 16 cents per foot, making a total price of $592, whereof $25 was paid cash, $25 to be paid in October, 1903; $50 in December, 1903; and the balance of $492 in ten years, with interest at five per cent., payable semi-annually.

In this promise of sale we find the following clause:—

"L'acquéreur aura son contrat de vente dès qu'il aura payé la moitié du prix de vente ou construit une maison coûtant, $1,000; laquelle maison devra être construite à 12 pieds de l'avenue, avec façade en pierre, à deux étages; et à defaut par l'acquéreur de remplir les conditions ci-dessus et de payer

QUE.

Court of Review. 1912

LAPIERRE v. MAGNAN AND VIENS.

Beaudin, J.

des intérêts aux époques susfixées, Mr. Brunet pourra demander en justice la résolution des présentes, sans mise en demeure."

The plaintiff alleges that the defendant did not comply with the terms of the said promise of sale, seeing he built a house at less than twelve feet from the line of the street, to wit, at a distance of nine feet only, and he adds he has the right of asking that this part of the house be demolished.

The defendant appeared and instituted proceedings in warranty against Antoine Viens, alleging that by deed of February 7th, 1910, Brouillette, N.P., he had transferred and assigned to said defendant in warranty all his rights in the immoveables covered by the promise of sale of September 3rd, 1903, and that the said defendant-in-warranty had bound and obliged himself to fulfil all the agreements, clauses and obligations contained in the deed from Brunet to the defendant.

The defendant-in-warranty intervened, declared he took up the defence of the principal defendant and, pleading to the merits of the main action, declared that about the middle of February and the beginning of March, 1910, the principal plaintiff had become aware of the fact that he, the intervenant, had acquired this property, that on March 31st, 1910, he had addressed himself to Mr. Bourdeau, the notary of the estate, and to the principal plaintiff, had shewed them an authentic copy of the sale made to him by the defendant, and declared his desire of paying the balance due under the said promise of sale of September 3rd, 1903, and requested them to sign a deed of sale of the said property; that Mr. Bourdeau and the principal plaintiff then told him, the intervenant, that the Brunet estate could not shew that these immoveables were free from mortgages, as there existed some in favour of the Bank of Hochelaga for amounts far exceeding the balance of price due thereon, but that such balance should be paid to the Bank of Hochelaga, which would then grant a release and discharge, and that he, the intervenant, agreed to do this; that, nevertheless, the principal plaintiff refused to sign the deed of sale prepared by the notary of the Brunet estate; that the intervenant then addressed himself to Mr. Paquin, notary, who entered into *pourparlers* with the plaintiff respecting the rights of the parties under the said promise of sale, and that the plaintiff informed Mr. Paquin he would consult with the legal advisers of the Brunet estate before deciding finally upon what he should do and would inform the said Mr. Paquin thereof; that on April 1st, 2nd, 4th and 5th, the said notary communicated with the plaintiff in order to get an answer, but was told that they were still waiting for the opinion of counsel; that on April 2nd, 1910, in conformity with a notice sent to the plaintiff and in order not to pay interest any longer, the intervenant paid to the Bank of Hochelaga the sum of $561.30, being the balance in capital and interest due under the

said promise of sale; that the bank had accepted this payment and bound and obliged itself to give a release and discharge, which it did on April 4th, 1910. The intervenant adds that on April 6th, 1910, as he had obtained no reply from the plaintiff, he caused to be served on him a copy of the deed of sale made to him by the defendant, a copy of the discharge signed by the Bank of Hochelaga, and a formal requisition to consent unto the intervenant a deed of sale of the said immoveables as per draft deed annexed, but that the plaintiff persisted in his refusal to sign such a deed; that as between the principal plaintiff and the intervenant and the neighbours of the latter there is no legal and reciprocal obligation to build twelve feet away from the street line; that the principal plaintiff knew the site and the mode of building chosen by the intervenant at the beginning of March, 1910; that the plaintiff made no complaint and acquiesced tacitly thereto; that at the beginning of March, 1910, the principal plaintiff himself indicated to the intervenant the location of the said lots for building purposes; that, as a matter of fact, the neighbouring buildings extend over the twelve-foot line more especially as regards the verandahs and other commodities, and that the buildings at the two nearest corners are built flush with the street line, so as to block the view completely, and that the principal plaintiff had long known of this and had accepted this state of things; that the principal plaintiff has no interest to ask for the demolition of what might extend over the twelve-foot line and cannot suffer any prejudice therefrom; that he no longer has any right or interest in the said immoveables and that his only obligation is to consent and sign a deed of sale and a clear title in favour of the intervenant; and the intervenant prayed for the dismissal of the action of the principal plaintiff.

The principal plaintiff demurred to certain allegations of this plea, which demurrer was continued to the merits, and on the facts he answered generally.

Antoine Viens also took a direct action on his own behalf "*en passation de titre*" against the principal plaintiff, wherein he urges anew the grounds invoked in his intervention, and concludes that the plaintiff *es qual.* be condemned to pass him a deed to this property, failing which that the judgment avail as a title. And the said Lapierre, *es qual.*, also repeats against this action the grounds invoked by him in the first suit, and by his conclusions he prays for the cancellation of the promise of sale of September 3rd, 1903.

Thereupon the intervenant, Viens, asked leave to add as a ground of intervention the fact that the plaintiff Lapierre, in the case of *Viens* v. *Lapierre*, had prayed for the cancellation of the sale, and basing himself on articles 1541 and 1542 C.C., contended that such demand of cancellation extinguished the action taken by Lapierre against Magnan.

QUE.

Court of Review. 1912

LAPIERRE v. MAGNAN AND VIENS.

Beaudin, J.

The main action was taken on April 2nd, 1910, served on April 5th, and the promise of sale from Magnan to Viens was served on April 6th, and registered on April 9th, after service of the writ.

The trial Judge dismissed the demurrer of the principal plaintiff, maintained the action of the principal plaintiff in the case of *Lapierre* v. *Magnan*, and dismissed it in the case of *Viens* v. *Lapierre*, and also dismissed that part of the conclusions of the latter wherein he prayed for the cancellation of the promise of sale of September 3rd, 1903.

As will be seen from the foregoing statements of the parties, several important questions are raised, and I think they can be reduced to four main questions, to wit:—

1. Did the principal plaintiff consent to the building by the intervenant less than twelve feet from the street line?

2. Is the afore-mentioned clause of the promise of sale of September 3rd, 1903, applicable as against the intervenant, and was its effect to create a real servitude, or merely a personal obligation, and if the latter, is the plaintiff entitled to have the said building demolished?

3. Does the deed tendered by Viens in his action against Lapierre comply with the agreement and conventions entered into by the parties?

4. Did the plaintiff *es qual.* lose the recourse prayed for in the main action by the fact that, in answer to Viens' action, he prayed for the cancellation of the promise of sale of September 3rd, 1903?

First question.

The evidence of record shews that about the middle of March Viens telephoned to Lapierre to enquire where Magnan's property was situated; Lapierre replied that it was the third or fourth lot from the corner. A few days later certain persons who had bought lots from Lapierre, adjoining the property on which Viens was building, complained to their vendor that Viens was encroaching on the twelve feet. When the parties met at Mr. Bourdeau's, the notary, Lapierre asked Viens if he was the one who had built within the twelve feet; Viens answered in the affirmative, and Lapierre then told him he could not give him a deed of sale unless he, Viens, consented to pull down whatever encroached on the twelve feet. There is no evidence, as alleged in the intervention, to shew that Lapierre indicated the place of the line.

It seems to me that there is no similarity between this case and that of *Delorme* v. *Cusson*, 28 Can. S.C.R. 66, cited by the intervenant. In the *Delorme* case the parties had met on the spot and in order to avoid the expense of a regular "*bornage*," they had come to an agreement as to drawing the division line between their contiguous lots. Then, when Cusson had begun to

build Delorme discovered that the line drawn by the parties was incorrect and that Cusson was encroaching on his territory. So Delorme took an action in demolition; this suit went through all the Courts and finally to the Supreme Court, which held that there had been common error, that Delorme could not insist on demolition but was only entitled to the value of his ground taken by Cusson's building. The same principle was later recognized by the Court of Appeals in *Lidstone* v. *Simpson*, 16 Que. K.B. 557.

In the present case Viens did not request to be shewn the line, nor was the plaintiff obliged to indicate the line as Viens had obliged himself, in the deed of transfer between Magnan and himself, to respect all the conditions and stipulations contained in the promise of sale of September 3rd, 1903. He was not on Lapierre's property, but on his own, and he was obliged to build twelve feet away from the street, and it was for him to ascertain where the line was. And as a matter of fact, he found it all right as far as the building itself is concerned, it is only the bay-window which encroaches. This first ground, therefore, fails.

Second question.

The intervenant first of all contends that the second part of the aforesaid clause in the said promise of sale no longer applies after the purchaser has paid half of the purchase price or more, nor after he has built a $1,000 house, and says he: "Not only have I paid the entire purchase price but I have also built a house worth more than a thousand dollars and the clause, therefore, no longer applies."

The plaintiff, on the other hand, contends that this second clause applies even after the whole purchase price has been paid and after a $1,000 building has been put up.

I think the plaintiff is right. It seems to me that the clause was inserted in order to facilitate the sale of the neighbouring properties of which the estate was owner at the time this promise of sale was made, and some of which still belong to it. The intervenant adds, however, that if his first argument is unsound this clause in any event did not create a real servitude but merely a personal obligation and cannot be opposed to him by the plaintiff.

I do not think it necessary to decide whether this clause created a servitude. This question raises great difficulties although the plaintiff could cite in support of his contentions a decision of the Court of Appeals in the case of *Hamilton* v. *Wall*, 24 L.C.J. 49.

But for the purposes of this case I shall take it for granted that the obligation is purely personal. Magnan, the defendant, had not obtained a deed of sale when he transferred his rights to the intervenant; the latter declares he acquires the rights which Magnan might have, *i.e.*, to obtain a title if he fulfilled

QUE.

Court of Review. 1912

LAPIERRE v. MAGNAN AND VIENS.

Beaudin, J.

the obligations assumed by Magnan. But the deed of transfer goes even further, it contains this clause:—

"Ainsi que le tout se trouve présentement pour par le cessionnaire en jouir et disposer comme bon lui semblera, et à la charge par lui de remplir toutes les conditions clauses et obligations mentionnées et stipulées dans une promesse de vente consentie au cédant par Joseph Brunet devant G. A. Bourdeau, notaire, le 3 septembre 1903."

I interpret this clause as meaning that Viens is substituted to Magnan towards the plaintiff *es qual.* and that the latter may demand the execution of the obligation in the same manner as if he were dealing with Magnan personally as, in fact, he did deal with him in taking out his action and Viens then intervened in the principal action and declared he took up the defence (*fait et cause*) of Magnan. Can Lapierre now ask the execution of the obligation itself? It seems to me that an affirmative answer is imperative and that the plaintiff's demand is well founded under C.C. 1065 and 1066, and that he is entitled to pray for the execution of the obligation.

For art. 1065, C.C., declares that the creditor may demand the specific performance of the obligation and that he be authorized to execute it at the debtor's expense; and art. 1066, C.C., that he may also, without prejudice to his claim for damages, require that anything which has been done in breach of the obligation shall be undone if the nature of the case will permit, and the Court may order this to be effected by its officers, or authorize the injured party to do it at the expense of the other.

Beauchamp's Code under art. 1066, paragraph 3 of the French doctrine, and Demolombe, vol. 24, No. 498, and referred to 16 Laurent, No. 199; 4 Aubry and Rau, par. 299, note 14; Marcade, art. 1143 and 1144; 6 Toullier, No. 218; 10 Duranton, No. 466; 1 Beaudry-Lacantinerie, Des Obligations, 2nd ed., Nos. 431, 432 and 436.

Referring to Mr. Beauchamp's Code, under art. 1066, C.C., at par. 3 of the French doctrine, I find the following:—

> Lorsqu'il s'agit de l'inexécution d'une obligation et que le créancier demande l'autorisation de la faire exécuter par un autre, dans les cas où cette exécution est possible, les tribunaux peuvent-ils se borner, s'ils l'estiment convenable à accorder des dommages-intérêts contre le débiteur? La question est controversée et les auteurs sont partagés en trois opinions: Premièrement, les tribunaux ont le droit de refuser ou d'accorder l'autorisation d'exécuter l'obligation; deuxièment, il faut distinguer entre l'obligation de faire ou de ne pas faire. Dans ce dernier cas les tribunaux ne peuvent refuser l'autorisation de détruire ce qui a été illégalement fait; mais lorsqu'il s'agit d'une obligation de faire, les juges peuvent se borner à allouer au créancier des dommages-intérêts et lui refuser l'autorisation de faire exécuter lui-même les travaux requis; troisièmement l'opinion dominante, fondée sur la

règle que les conventions sont la loi des parties, enseigne que toutes les fois que la chose est possible et que le créancier le demande, les tribunaux doivent accorder au créancier l'autorisation d'exécuter l'obligation, qu'elle soit de faire ou de ne pas faire, sans que le débiteur puisse s'y soustraire à prix d'argent."

Demolombe, vol. 24, No. 498:—

Il résulte du texte de nos deux articles 1143 et 1144 qu'il est nécessaire que le créancier soit préalablement autorisé par la justice afin de pouvoir défaire ce que le débiteur a fait en contravention à son obligation, ou afin de pouvoir faire ce qu'il refuse de faire pour l'exécuter. Tel est, en effet, toujours, le mode régulier de procéder. La nécessité en est même indispensable toutes les fois qu'il s'agit de pénétrer dans le fonds du débiteur, ou plus généralement, de s'en prendre, comme dit M. Larombière, à sa chose.

Les développements que nous venons de fournier s'appliquent à celles des obligations de faire ou de ne pas faire dont l'exécution effective ne peut pas être obtenue forcèment contre le débiteur qui s'y refuse; mais il est certaines obligations de faire ou de ne pas faire, et même un très grand nombre, dont on peut au contrairie obtenir l'exécution effective malgré le refus du débiteur sans recourir contre lui à des voies de contrainte personnelle. Ainsi, vous vous êtes obligé envers moi à ne pas exhausser votre maison, ou à ne pas planter des arbres dans votre cour, et vous avez néanmoins exhaussé votre maison d'un étage, ou vous avez planté des arbes. Que je ne puisse pas vous contraindre à détruire de vos propres mains, ni à faire détruire vous-même par d'autres ce que vous avez fait en contravention à votre obligation, cela est d'évidence; mais où est l'obstacle à ce que je sois autorisé par la justice à le faire détruire moi-même à vos frais? Il n'y en a aucun. Et voilà, précisément le droit que m'accorde l'article 1143 (art. 1066 of our code) lorsqu'il s'agit d'une obligation de ne pas faire à laquelle le débiteur a contrevenu, dans le cas où le résultat de cette contravention est susceptible d'être détruit et où les choses peuvent être remises au même état qu'auparavant.

"Objectera-t-on que pourtant, si le débiteur résiste, et s'il refuse, par exemple, l'entrée de son fonds aux ouvriers, il faudra employer une voie de contrainte directe contre sa personne? Certainement oui. Il faudra bien que force reste à la loi et à la justice. Mais c'est là un principe de droit commun, qui n'a rien de particulier aux obligations de faire ou de ne pas faire, un principe essentiel et d'ordre public, qu'aucune résistance individuelle ne saurait tenir en échec. Le débiteur serait donc, en effet, contraint par la force publique de laisser détruire sur son propre fonds les ouvrages et les arbres qu'il y a élevés en contravention à son obligation. Mais il y sera contraint, non pas comme débiteur en cette qualité, mais comme y serait contrainte toute personne qui apporterait une résistance illégale à l'exécution des ordres de la justice; comme un parent, par exemple, ou un ami, qui, épousant trop chaudement sa cause, voudrait lui-même s'opposer violemment à la destruction des ouvrages ou des plantations que le créancier a été autorisé a détruire."

QUE.

Court of Review. 1912

LAPIERRE v. MAGNAN AND VIENS.

Beaudin, J.

I, therefore, come to the conclusion that the plaintiff has the right to demand the execution of the obligation contained in this promise of sale.

Third question.

But, says the intervenant, "I have paid the purchase price; I have built a house worth much more than a thousand dollars, and I was ready on March 31st to sign a deed conforming to the promise of sale."

Unfortunately for the intervenant he did not persevere in the disposition in which he seems to have been on March 31st. After he had been unable to come to an understanding with Lapierre he called on his own notary and had a protest or "*mise en demeure*" prepared on April 5th, 1910, wherein he declared he had had a deed of sale prepared, which deed is filed of record in the case, and which he wished Lapierre to sign; and it is the deed which is filed in the case of *Viens* v. *Lapierre*.

Now in this draft deed, the intervenant did not reproduce the condition mentioned in the promise of sale, as to the prohibition to build within twelve feet of the street line. Even if Lapierre did wrong in refusing to sign the deed prepared at Notary Bourdeau's on March 31, he certainly was, to my mind, in the right when he refused to sign the deed tendered to him; and this, therefore, means that the action taken against him to compel him to sign such deed fails.

Fourth question.

Finally, the intervenant in the case of *Lapierre* v. *Magnan*, by his procedure of "*puis d'arrein*," contends that as the defendant Lapierre—in the *Viens* case—demanded the cancellation of the promise of sale, he thereby abandoned his claim to the execution of the promise of sale; and the intervenant relies on arts. 1541 and 1542, C.C.

C.C. 1541: "The seller is held to have abandoned his right to recover the price when he has brought an action for the dissolution of the sale by reason of the non-payment of it."

C.C. 1542: "A demand of the price by action or other legal proceeding does not deprive the seller of his right to obtain the dissolution of the sale by reason of non-payment."

I find several answers to this objection of the intervenant. First of all, the plaintiff's action is not for recovery of price; it is rather to compel the defendant and the intervenant to comply with the terms of the promise of sale. This action is one in demolition, to undo what the intervenant has built within the twelve feet. Secondly, the intervenant did not comply with this demand; he contested it. And, thirdly, the demand in cancellation was dismissed. And, moreover, according to all the authors, the intervenant could have made the demand lapse by complying thereto: see 25 Demolombe, Nos. 530, 531, 532 and 533; 2 Guillouard, De la Vente, No. 605.

QUE.

Court of Review 1912

For these reasons I would confirm the judgment of the first Court.

TELLIER, J., dissented.

Appeals dismissed with costs and order to demolish sustained.

DUNN v. ALEXANDER.

B.C.

C. A. 1912

Apr. 2.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

CONTRACTS (§ VI A—411)—FRAUD OF VENDOR—RESCISSION OF CONTRACT —RECOVERY OF DEPOSIT BY PURCHASER.

Where a land company was engaged in selling lots from land to which had been given a name similar to that of a townsite owned by a railway company and issued circulars carefully and designedly prepared to create the impression, without explicitly so stating, that they were selling lots from the railway company's townsite, a person is entitled to recover the deposit paid by him on a contract to buy one of the lots under a belief induced by the circulars that he was buying a lot in the railway company's townsite.

AN appeal by the plaintiff from the judgment of Grant, Co. C.J., dismissing an action brought to recover the deposit made on entering into a land contract.

The appeal was allowed.

E. M. Macdonald, for appellant.

A. Alexander, for respondent.

MACDONALD, C.J.A.:—In the view I take of this case it is unnecessary to consider whether or not the defendant had a good merchantable title to the lot in question. To my mind it is quite evident that the plaintiff was misled into paying his money, which he seeks in this action to recover back, by the representations made to him in circulars by defendant's agents, the Canadian Northern Securities Company, Ltd. It is not necessary to rely on the letter heads of this company of letters written to the plaintiff after the purchase, though these, together with the circulars, shew the versatility of this company in the arts of deception. The two circulars (Ex. 6 and 7) are unique even in real estate transactions. Apart altogether from the similarity in name of this company and the Canadian Northern Railway Company, the contents of the circulars are well calculated to lead any ordinary person to the conclusion to which, as he swears, the plaintiff was led, that is to say, that the lots offered for sale were in the townsite which was owned by Mackenzie & Mann, the president and vice-president respectively of the Canadian Northern Railway Company. Ex. 7 consists largely of extracts from Vancouver daily newspapers, and interviews with or statements made by Mr. Mann, now Sir Donald Mann, and the land

B.C.
C. A.
1912
DUNN
v.
ALEXANDER.
Macdonald, C.J.A.

commissioners of the Canadian Northern Railway Company, and referring either directly or by implication to the Mackenzie & Mann townsite, or to the Canadian Northern Railway proposals and works. For instance, an extract from one of these articles, dated 6th August, 1910, describes "new plans of the Canadian Northern Railway in reference to Port Mann, its townsite opposite New Westminster, are being formulated and will soon be carried out." And again in March, 1911, quoting from an interview with one McMillan, who speaks of statements made to him by Colonel Davidson and Mr. McRae, joint land commissioners of the railway company, and saying, "The public sale of lots, however, will likely not take place until late in the summer, or early next fall owing to the magnitude of the task of clearing and grading the townsite. From what I learn in London, I think the future sale will easily eclipse the phenomenal record made at the auction of Prince Rupert lots." In another article Mr. McRae is quoted as saying, "All the flat lands in proximity to the water front, embracing hundreds of acres, has been reserved for railway terminals." And again, "All the water frontage within the limits (Port Mann) has been reserved for docks, etc." Under the heading in large letters "Port Mann's Future," an interview with Mr. Mann appears, in which he is quoted as saying, "Our idea in buying land on the south side of the Fraser opposite New Westminster is based on several considerations," etc.

Defendants said agents offered lots for sale in "Port Mann subdivision of sec. 9, range 1, west." They say, "Inside property is always as good as money. This subdivision is the first offered for sale within the townsite." The italics are mine. They also say, "Now note this, the remainder of the townsite lots will be put on the market and sold by auction about July next."

But why pursue the matter further. Deceit is stamped all over these circulars, and they are so skilfully prepared as to make it impossible to put one's finger on any actual mis-statement, but the whole appears to have been designed and certainly is well calculated to mislead the public into the belief that it was lots in the townsite of Mackenzie & Mann, known as Port Mann, that were being offered for sale, and throughout these circulars there is no statement, no hint even, that what the defendant was offering was something different.

Now, unless with full knowledge of the true situation the plaintiff has waived his rights, and elected to confirm the sale, which on the evidence I find he has not, then he is entitled to relief which he claims.

There is another matter which would entitle the plaintiff to the same relief. The agreement made by correspondence contains no restrictions upon the plaintiff's rights to have title shewn and made in the usual way by the vendor. The formal

agreement which defendant sent to the plaintiff for signature, but which was never delivered, contains such restrictions, and the plaintiff was threatened with the law if he did not sign and return it to the defendant. While the plaintiff's letter of the 10th May does not fully raise this objection to the formal agreement, still I think he has not waived it, and defendant's insistence on this variation of the agreement is in itself fatal to his right to retain the purchase money.

I would allow the appeal, and direct that judgment be entered for the plaintiff for the return of the money paid.

IRVING, J.A.:—This is an action to recover the deposit made on entering into a contract for the purchase of land. It is a common law action, and has nothing to do with any of the equitable rules or doctrines in relation to specific performance.

On 16th April, 1911, the plaintiff having seen an advertisement in some newspaper that the Canadian Northern Securities Company were selling lots at Port Mann, wrote to that company asking for a map. Having received a map and one of the Canadian Northern Securities Company's forms, he applied on 24th April for a lot, and agreed to pay therefor (without saying how much in all) "$237.50 cash, and the balance in half-yearly instalments extending over two years," and fearful lest he should not secure the good thing that was going, he telegraphed the money to the company. Price not being stated, I doubt if there was any binding offer. However, assuming that it was an offer, the company received the money, and the agent wrote (27th April) that the company had reserved the lot for him. I doubt if this was an acceptance of the plaintiff's offer. The contract thus made was an open contract for the sale by the company of the lot in fee simple, free from encumbrances. The nature and incidents of such a deposit are discussed in *Howe* v. *Smith*, 27 Ch.D. 89.

The contract—if contract there was—contemplated that the company would deliver to the purchaser a proper abstract of title to the property, and afford the purchaser an opportunity to examine the deeds, and then if the title was accepted, and on payment of the purchase money, to convey the property free from encumbrances by a proper deed, with the usual covenants, and to put the purchaser in possession, that would, in view of the stipulation, be in two years' time. Mr. Macdonell says that his client had a right to repudiate the contract with the company as soon as he discovered that the company were not the vendors. Granted that is so, if the objection was made at once, but the plaintiff could not take that stand. I believe that the common law is this, if the vendor fails to shew a good title on the face of his abstract at the time of its delivery, he thereby commits such a breach of the contract as discharges the purchaser from the duty of performing his part of the agreement.

B.C.
C. A.
1912
DUNN
v.
ALEXANDER.
Irving, J.A.

The vendor's obligation is a condition precedent to the purchaser's. In this case there was no abstract delivered nor demanded. The company, having obtained the plaintiff's name and description, sent to him a new agreement—practically a new proposal, *Larkin* v. *Gardiner* (1895), 27 O.R. 125, by which one Alexander, the defendant, agreed to sell to him the same lot for $950, payable $237.50 cash, and balance in four instalments with interest at 7 per cent., the plaintiff to be entitled to take possession at once, and stipulating that the vendor should not be bound to furnish any abstract or to afford to the purchaser the usual facilities for examining into the title. In short, the agreement Alexander to Dunn was wholly different to the contract (if contract there was) made between the company and Dunn. Immediately after the receipt by the defendant of this proposed agreement, it was open to him to repudiate the proposed contract at once, on many grounds, *e.g.*, that he had not contracted with Alexander but the company; that he had made a bargain under which he was entitled to have an abstract delivered to him, at the vendor's expense, and produce also, at his own expense, all proper evidence of all deeds, etc., mentioned therein.

But instead of doing this, he wrote the letter of 10th May, 1911 (p. 104), complaining of the provision that he was to pay the cost of the conveyance Alexander to himself, something that the purchaser usually does pay. On the 15th May the company wrote that he had misread the agreement, and asked him to execute the document and return it to him. On the 6th June the plaintiff wrote to the company that he would call on them next week with the agreement.

All this correspondence shews that he recognized that the company were merely the agents of Alexander.

"Next week" he called on a solicitor in Vancouver, who searched the title and found that Alexander was not the owner in fee, but held an agreement for sale from one Barby. This fact that Alexander was not the owner in fee was seized upon, and put forward as a ground for not proceeding further with the contract, although the time for making a good title had not arrived, and later on the plaintiff advanced a further reason, viz., that the company had, by using as part of their name the words "Canadian Northern," and exhibiting on their stationery a railway engine, misled the plaintiff into believing they were connected with—to follow the language of the statement of claim—had direct association and fiscal relationship with the Canadian Northern Railway Company, and that it was only on account of this association with this great railway company the plaintiff was induced to buy the lot in question. This last ground can be disposed of in a few words. In my opinion it is not a *bonâ fide* defence, and was trumped up in July long after

B.C.
C. A.
1912
DUNN
v.
ALEXANDER.
Irving, J.A.

the plaintiff knew that Alexander was his vendor. I agree with the learned trial Judge that as there was no evidence that the plaintiff had been misled, there was nothing in the name of the company, nor in the embellishment on the company's stationery to lead anyone to believe that the land being offered for sale was the railway company's land.

I also agree with the learned County Court Judge that Alexander's title has been shewn to be such that he can at the proper time give the plaintiff a good title in fee simple; but the time for so doing has not yet arrived.

The difficulty that I find in supporting the judgment appealed from is that the defendant admits that he has refused to complete with the plaintiff, save and except on the terms of the written agreement of the 24th April. As I have already pointed out, that document does not contain the terms which by implication are read into the receipt, and as it was to secure the performance of the sale under the open contract or receipt, the deposit was made, the plaintiff must succeed.

GALLIHER, J.A.:—In my view it is only necessary to deal with one feature of this case. A perusal of the literature sent to the plaintiff before he purchased would, I venture to say, lead ninety-nine men out of a hundred in reading it casually, to infer that they were being asked to purchase lands in the railway company's townsite.

In fact, on a careful analysis of the circulars, one is impelled to the belief that they were carefully and designedly prepared to create that impression without in explicit terms saying so. Such being my views, and the plaintiff swearing that he was so misled, there can be only one result.

The appeal should be allowed with costs and judgment entered for the plaintiff with costs.

Appeal allowed.

FERGUSON v. SWEDISH CANADIAN LUMBER COMPANY, Limited.

N.B.
S. C.
1912
Feb. 23.

Supreme Court of New Brunswick, Barker, C.J., Landry, McLeod and Barry, JJ. February 23, 1912.

1. APPEAL (§ V A—238)—CONCLUSION OF COURT—ACTION UNDEFENDED.

An objection that the cause of action set up in a statement of claim was not supported by the evidence will not be considered on an appeal of a cause that was not defended on the trial, as such objection, had it been made on the trial, might have been met by an amendment of the statement of claim so as to conform to the evidence.

2. JUDGMENT (§ II B—72)—UNDEFENDED ACTION—DEFAULT JUDGMENT—MISTAKE OF COUNSEL.

Relief from a judgment obtained in an undefended action will not be granted merely on the ground that judgment was taken contrary to some loose understanding between counsel for the several parties that the trial of the action should be postponed to a later day.

N.B.

S. C.

1912

FERGUSON v. SWEDISH CANADIAN LUMBER COMPANY.

3. NEW TRIAL (§ III B—18)—JUDGMENT IN UNDEFENDED ACTIONS—MISTAKE OF DEFENDANT IN NOT ATTENDING.

Ordinarily a new trial will not be granted upon a judgment pronounced in an action not defended at the hearing merely on the ground of an inadvertent mistake or misunderstanding, through which the defendant did not attend and was not represented by counsel thereat.

4. NEW TRIAL (§ III B—18)—JUDGMENT IN UNDEFENDED ACTION—MERITS OF DEFENCE—MISTAKE—TERMS.

A new trial will be granted, in the interests of justice, where the merits of a defence are shewn, and it appears that the action was undefended because of someone's mistake, misapprehension, or perhaps neglect, upon the payment of the costs of such undefended trial, and the costs of opposing the motion for the new trial, and on giving satisfactory security for the amount of any judgment that may be recovered against the defendant on a new trial.

[*Dickenson* v. *Fisher*, 3 Times L.R. 459; and *Holden* v. *Holden*, 102 L.T. 398, followed.]

APPEAL by defendant in an action for goods sold and delivered, and for work done, for money paid and interest. The case was tried before White, J., without a jury at the Northumberland Circuit on January 17th, 1912, when a verdict was entered for the plaintiff for $5,958.62, the defendant not appearing at the trial. On January 24th an order was made by White, J., on application of the defendant staying proceedings until the next sitting of this Court and enlarging the time to make application to set aside the verdict under O. 36, R. 33.

February 15, 1912. *M. G. Teed*, K.C., for the defendant, moved to set aside the verdict and for a new trial.

L. A. Currey, K.C., for the plaintiff argued *contra*.

M. G. Teed, K.C., in reply.

The facts and the grounds of appeal are set out in the judgment of the Court delivered by Barry, J.

February 23, 1912. The judgment of the Court (BARKER, C.J., LANDRY, MCLEOD and BARRY, JJ.) was delivered by

BARRY, J.:—A motion to set aside the verdict and judgment in this case, and that a new trial be granted, is made to us upon a number of grounds, only three of which I think it necessary to mention. These are: (1) The action was tried in the absence of the defendant and his counsel, contrary to agreement with defendant's solicitor and counsel; (2) Through mistake or inadvertence or misunderstanding the trial proceeded without the defendant or his solicitor or counsel being present; and (3) The cause of action alleged in the statement of claim is for goods sold and delivered to, work and labour done for and money paid for the defendant by the plaintiff at defendant's request, and for interest; and there was no evidence that any goods were sold and delivered to the defendant or at his request, or any money paid for the defendant or at its request, or any work or labour done for the defendant or at its request.

The third ground is, shortly, that the cause of action set out in the statement of claim is not supported by the evidence given at the trial. This is a matter that could have been corrected at the trial had the objection been raised there. The statement of claim could have been then amended to conform to the evidence, and can be amended by the Court even now, if such an amendment be deemed necessary; the defendant should not be permitted to raise and take advantage of an objection here, which if taken at the proper time could have been easily overcome without doing an injustice to anyone.

In regard to the first and second grounds, which may be disposed of together, the case was tried as an undefended one before Mr. Justice White without a jury, at the last Northumberland Circuit, and a verdict entered for the plaintiff for $5,958.62. It is claimed by counsel for the defendant that this was done in violation of an agreement between Mr. Powell and Mr. Currey, counsel for the defendant and the plaintiff respectively, or if not that, then through mistake, inadvertence, or misunderstanding.

The application is supported by affidavits of A. A. Davidson, K.C., Hedley Oquist, Joseph Ander, H. A. Powell, K.C., and W. H. Harrison, and against it, affidavits of the plaintiff, his counsel, Mr. Currey, K.C., and D. Mullin, K.C., were read. The case was first noticed for and brought down to trial at the Northumberland Circuit of May, 1911, when, upon the application of the defendant, it was postponed until the following December Circuit upon the usual terms, on account of the absence of a necessary and material witness. The case was accordingly noticed for trial at the next Circuit, December 5, and Mr. Powell in his affidavit says that he made all necessary preparations for the trial of the cause at that time, but that by arrangement between him and Mr. Currey, it was agreed that it should be postponed to a later date. Mr. Currey denies that there was any such arrangement as claimed by Mr. Powell. I do not think that it would serve any useful purpose to here enter upon a detailed examination of the allegations and counter-allegations contained in the several affidavits. Suffice it to say that upon a careful reading of the affidavits it does not seem to me to be at all clear that, after the adjournment of the Circuit by the presiding Judge to January 16 last—an adjournment, as is admitted, that was duly notified to the counsel of both parties by the clerk of the Circuits—and notwithstanding the talk that had taken place between the counsel before the opening of the Circuit in regard to the postponement of the trial, there was any obligation or duty upon Mr. Currey to agree or consent to a postponement beyond the date fixed by the presiding Judge. Mr. Powell says, however, that he left St. John for Washington on January 6 to attend a meeting of the International Joint Commission constituted

N.B.

S. C.
1912

FERGUSON
v.
SWEDISH
CANADIAN
LUMBER
COMPANY.

Barry, J.

under a treaty between Great Britain and the United States, of which he is a member, trusting in an arrangement with Mr. Currey, which Mr. Currey denies, that the cause would not be brought on on January 16 nor at any other time previous to the next Northumberland Circuit, unless by arrangement. The cause was tried and the verdict rendered on January 17 in the absence of Mr. Powell, who did not return to St. John until the next day, the eighteenth. One thing that appears quite clear and outstanding is, that the several postponements and delays that have occurred in connection with the trial of the cause have all been made at the instance of or occasioned by the defendant.

It has been more than once determined by this Court that if attorneys choose to practice upon loose understandings, they can of course do so if they like, but they cannot expect aid from the Court, if difficulties arise in carrying them out: *Moore* v. *May*, 19 N.B.R. 506. It is much better that they should carry on their business according to the established rules of practice, rather than by understandings, which generally lead to disputes: *Knox* v. *Gregory*, 21 N.B.R. 196.

We have, however, notwithstanding these adverse cases, unanimously come to the conclusion that under the peculiar circumstances of this case, and taking into account the several affidavits in which the merits of the defence have been sworn to, and the fact that through someone's mistake or misapprehension, or it may be through someone's neglect, the case was tried as an undefended one, there ought in the interests of justice to be a new trial. That the Court has power to order a new trial where something has been done inadvertently or by mistake, or where there has been a slip in the proceedings, see *Germ Milling Co.* v. *Robinson*, 3 T.L.R. 71; but it is said in that case that it is a discretion which will be exercised with the greatest caution, and the application will only be granted where the justice of the case manifestly requires it. There only remains to be considered the question of terms.

Upon a motion for new trial in this Court, it appeared by the affidavits that the defendant, who lived at Sackville, was relying upon his attorney to send him word when to come to St. John to attend the trial; that there were a large number of cases standing ahead of the defendants, but in consequence of there being a run on the docket, his case was reached and tried before the defendant could get word and be present. The affidavits also disclosed a defence upon the merits. A new trial was granted upon the payment of the cost of the trial, the costs of resisting the application for a new trial, but not of the affidavits, and on the defendant paying into Court the amount of the verdict, or giving security to the satisfaction of the clerk: *Trueman* v. *Wood*, 18 N.B.R. 219.

In *Dickenson* v. *Fisher* (1887), 3 T.L.R. 459, the action was brought for damages for the death of some cattle which were alleged to have died in consequence of eating strands of wire rope which had dropped from the defendant's fences. The defendants were colliery proprietors, and their property was fenced with wire rope; but their defence was that part of the plaintiff's fields were also fenced with wire rope, and that the cattle might have been killed by eating this. The action was tried by Mr. Justice A. L. Smith at Liverpool, and was eleventh in the list for trial on a certain day. The cases which preceded it having been disposed of with unexpected rapidity, the defendant's witnesses, who resided at Wigan, had not arrived when the case was called on, and judgment was given for the plaintiff. The Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) were of the opinion that on the payment of all costs of the trial by the defendants, and the payment of the damages into Court, the defendants were entitled to a new trial, which they granted accordingly.

The same rule was followed in *Holden* v. *Holden* (1910), 102 L.T. 398, in which some of the circumstances were similar to those in the present case. The head note of the case is:—

> Where a respondent and co-respondent do not appear in a divorce suit, and a decree *nisi* is pronounced, the Court may make an order for the re-hearing of the suit if, under all the circumstances of the case, it is satisfied that there has been a mistake as to the date of the hearing, or some misunderstanding has arisen with regard to the case, but it will only do so if an affidavit is filed swearing that there is a good ground of defence and if the whole of the costs thrown away are paid to the petitioner.

Following the rule adopted in these three cases, as being only fair to the plaintiff in the circumstances, a new trial will be granted in this case upon the following terms: the defendant will have to pay the costs of the undefended trial and the costs of resisting the present motion; and, either pay the amount of the verdict into Court or give security to the satisfaction of Mr. Justice White for the payment of the amount of the judgment, if any, that the plaintiff may recover against it upon the new trial. The defendant to have such time as may be allowed it by the Court in which to comply with these terms; if not complied with, the verdict and judgment to stand, and this motion to be dismissed with costs.

New trial granted on terms.

ONT.

H. C. J. 1912

May 7.

BROWN v. ORDE.

Ontario High Court of Justice, Middleton, J., in Chambers. May 7, 1912.

1. DISCOVERY AND INSPECTION (§ IV—20)—SLANDER—MEMBER OF COUNCIL —QUESTIONS AS TO GENERAL CHARACTER.

In an action for slander upon a member of the governing body of a municipality in respect of his fitness for such membership, questions upon the examination of the plaintiff for discovery touching his general character, competence, capacity and ability are relevant and must be answered.

2. DISCOVERY AND INSPECTION (§ IV—20)—EXAMINATION—APPLICATION TO COMPEL ANSWERS.

Upon a motion to compel answers upon an examination for discovery the pleadings and particulars are to be treated as the basis of the inquiry to be made as to whether the questions asked are relevant to the issues, and if objection is to be taken to the particulars or pleadings it must be done by substantive motion.

APPEAL by the plaintiff from an order of MacTavish, Local Judge at Ottawa, directing the plaintiff to attend and answer certain questions which he refused to answer upon his examination for discovery.

The appeal was dismissed.

J. King, K.C., for the plaintiff.
H. M. Mowat, K.C., for the defendant.

MIDDLETON, J.:—The action is for slander. The plaintiff, a Controller of the City of Ottawa, complains that, whereas on the 10th November, 1911, upon the death of one James Davidson, Controller, he (the plaintiff) was appointed to fill the vacancy thus created, during the election campaign the defendant, at a meeting of the electors, spoke of the degradation of the civic government by the plaintiff's appointment to succeed Davidson, who stood head and shoulders above the other members. The innuendo alleges that this meant "that the plaintiff had neither the character, competency, capacity, ability, skill, nor knowledge properly to perform the duties of a member of the said Board of Control, or that the plaintiff had so misconducted himself that it was a public disgrace and insult to appoint him to the office of member of the Board of Control."

Upon the examination of the plaintiff for discovery, the defendant's counsel sought to examine him touching his character, competence, capacity, and ability. The plaintiff declined to answer any such questions; basing his refusal upon the ground that the words were spoken concerning him in his official capacity, and not in reference to his business capacity.

In the first place this is manifestly incorrect. The unfitness to occupy the public office, suggested by the alleged slander, arises from the general character and reputation and business

standing of the plaintiff. In the second place, by the innuendo which I have quoted, the plaintiff has elected to bring his private character into the controversy; in fact, I do not see how he could do otherwise.

Upon this appeal the ground is entirely shifted; and I confess myself utterly unable to follow the learned argument presented by the plaintiff's counsel. He discarded entirely his own pleadings, and sought to treat the defendant's plea of fair comment as an attempt to justify; and then, so regarding the plea, sought to shew that the particulars furnished were not adequate.

It appears to me that this is dealing with something in no way in issue upon this motion. I have to take the pleadings and the supplementary particulars as they stand, and merely to determine whether the questions asked are relevant to the issues so raised. I cannot treat the motion as one attacking either the pleadings or the particulars. If these are insufficient for any reason, they must be attacked directly.

I think the questions were properly asked, and that the inquiry is entirely relevant to the issues raised.

The appeal must be dismissed with costs.

Appeal dismissed.

Annotation—Discovery and inspection (§ IV—32)—Examination and interrogatories in defamation cases.

Annotation

Discovery in defamation actions.

By Ontario Con. Rule 439, Rules of 1897, the party to an action whether plaintiff or defendant may without order be orally examined before the trial, touching the matters in question by any party adverse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as a witness, except as provided in the Con. Rules. A person examined orally for discovery is subject to cross-examination and re-examination and the examination, cross-examination and re-examination, is to be conducted as nearly as may be as at a trial: Ont. C.R. 451. Default in refusing to answer any lawful question to be put by the examiner, or by any party entitled to examine, is a contempt of Court and is punishable by attachment: C. R. 454.

A party is also liable, if the plaintiff, to have his action dismissed; and, if the defendant, to have his defence struck out: C.R. 454.

A party has the right to examine for discovery, not only for the purpose of obtaining information from the opposite party, as to material facts which are not within his own knowledge, and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence of the facts admitted: *Attorney-General* v. *Gaskill*, 20 Ch.D. 519; *Humphries* v. *Taylor Drug Co.*, 39 Ch.D. 693; *Colter* v. *McPherson*, 12 P.R. 630; *Macdonald* v. *Sheppard Publishing Co.*, 19 P.R. 282; *Morley* v. *Patrick*, 21 O.L.R. 240.

In British Columbia there is an additional method of obtaining dis-

ONT.

Annotation

Discovery in defamation actions.

Annotation (*continued*)—Discovery and inspection (§ IV—32)—Examination and interrogatories in defamation cases.

covery, other than discovery of documents only, which corresponds with the English practice, namely, the delivery of interrogatories in writing.

By marginal rule 343 of the British Columbia Supreme Court Rules of 1906, either party by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite party. The particular interrogatories proposed to be delivered are to be first submitted to a Judge and leave for delivery of same is to be given only as to such of them as the Court or Judge considers necessary for the disposal fairly of the cause, or the saving of costs: B.C. Rule 344 of 1906. This rule is identical with the English Supreme Court Rule of 1883, bearing the same marginal number. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or may be struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous: B.C. Rule 349 of 1906; *Fisher* v. *Owen*, 8 Ch.D. 651, 653; *Allhusen* v. *Labouchere*, 3 Q.B.D. p. 660; *National Association* v. *Smithies*, [1906] A.C. 434.

A party must discover the nature of his case, or the facts on which he relies in support of his case as distinguished from the evidence of his case, or from the way in which he is going to make up his case: *Eade* v. *Jacobs*, 3 Ex.D. p. 337; *Attorney-General* v. *Gaskill*, 20 Ch.D. 529; *Marriott* v. *Chamberlain*, 17 Q.B.D. 164, 55 L.J.Q.B. 448, 54 L.T. 714; *Nash* v. *Layton*, [1911] 2 Ch.D. 71, 80 L.J. Ch. 636, 104 L.T. 834; *Hooton* v. *Dalby*, [1907] 2 K.B. 18, 76 L.J.K.B. 652, 96 L.T. 537; *Benbow* v. *Low*, 16 Ch.D. 96.

Interrogatories must not be of such a nature as to be oppressive and to exceed the legitimate requirements of the particular occasion: *White* v. *Credit Reform*, [1905] 1 K.B. 659; *Sanderson* v. *Baron von Radeck*, 119 L.T.Jour. 33 (H.L.).

In actions against newspapers or trade periodicals where responsibility for the publication of the alleged libel is admitted, the practice, is, in the absence of any special reason to the contrary, to refuse to compel the defendant to disclose the name of the writer of the libel or of his informant: *Plymouth, etc., Society* v. *Traders' Association*, [1906] 1 K.B. 403; *Hope* v. *Brash*, [1897] 2 Q.B. 188; *Hennessy* v. *Wright*, 24 Q.B.D. 445*n*, 36 W.R. 879 (C.A.); *Parnell* v. *Walter*, 24 Q.B.D. 441, 59 L.J.Q.B. 125, 62 L.T. 75, 6 Times L.R. 138.

A party is not bound on an examination for discovery to disclose what evidence he is going to use, although he may be asked if he has disclosed his whole case: *Coyle* v. *Coyle*, 19 P.R. 97.

In an action for damages for libel in respect of a circular, issued by defendant company, in which it was stated that the defendants acted on advice in issuing the circular, it was held that the names of the persons to whom the circular was sent, and the names of the persons by whom the advice was given, must be disclosed on examination for discovery: *Massey-Harris* v. *DeLaval Separator Co.*, 11 O.L.R. 591. The fact that the names of some of the parties' witnesses would be disclosed on the answering of questions otherwise material, is not a sufficient reason for refusing to answer: *Savage* v. *C.P.R. Co.*, 15 Man. R. 401; *Morley* v. *Patrick*, 21 O.L.R. 240; *Williamson* v. *Merrill*, 4 O.W.R. 528; though ordinarily the party is not compelled to disclose the names of his wit-

ONT.

Annotation

Discovery in defamation actions.

Annotation (*continued*)—Discovery and inspection (§ IV—32)—Examination and interrogatories in defamation cases.

nesses, or as to whether he consulted with other persons not parties to the action as to taking legal proceedings: *Gibbins* v. *Metcalfe*, 14 Man. R. 364; *Coyle* v. *Coyle*, 19 P.R. 97.

In *Edmondson* v. *Birch & Co. Ltd.*, [1905] 2 K.B. 523, an action for libel in which the defence of privilege was set up, the plaintiff sought to administer to the defendants an interrogatory inquiring what information the defendants received which induced them to make the statement complained of, and from what that information was derived. The Court came to the conclusion, from correspondence which had passed between the parties, that the interrogatory as framed was not put *bonâ fide* for the purposes of the pending action, but in order to enable the plaintiff to bring an action against a person or persons from whom the information was derived, and held, therefore, that the part of the interrogatory which asked from whom the information was derived must be disallowed.

If publication of the alleged slanderous words is not admitted, plaintiff may always interrogate the defendant as to whether he, the defendant, did not speak the words set out in the statement of claim, or words to that effect: *Dalgleish* v. *Lowther*, [1899] 2 Q.B. 590, 68 L.J.Q.B. 956, 81 L.T. 161. The form of this interrogation may be as follows:

"Did you on or before the day of speak the following words to the plaintiff (here insert the words complained of) or words to that effect?" "Were such words spoken in the presence of (here insert names of the parties as set forth in the statement of claim or particulars) or some, and which of them?" If particulars of a plea of justification have been delivered, the interrogatories must be confined to the matters stated in such particulars: *Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q.B. 148, 64 L.J.Q.B. 578; *Arnold* v. *Bottomley*, [1908] 2 K.B. 151, 77 L.J.K.B. 584, 98 L.T. 777.

Interrogatories will not be allowed which are directed to establishing a defence not raised on the pleading: *Hindlip* v. *Mudford*, 6 Times L.R. 367. The defendant may interrogate to prove facts which he alleges to be true in support of his defence of fair comment: *Walker* v. *Hodgson*, [1909] 1 K.B. 239, 78 L.J.K.B. 193. A defendant will not be allowed to deliver interrogatories merely for the purpose of obtaining information upon which to base his particulars of justification ordered to be delivered to the other party: *Zierenberg* v. *Labouchere*, [1893] 2 Q.B. 183, 63 L.J. Q.B. 89, 69 L.T. 172; *Waynes & Co.* v. *Radford*, [1896] 1 Ch.D. 29. Plaintiff may interrogate a defendant who has set up a plea of privilege as to facts relied on as creating privilege: *Barratt* v. *Kearns*, [1905] 1 K.B. 504, 74 L.J.K.B. 318, 21 Times L.R. 212. So also the interrogation will be allowed as to facts from which an inference of malice may be drawn against the defendant: *Martin* v. *Trustees of British Museum* (1894), 10 Times L.R. 215.

In an action for slander where privilege is pleaded, the defendant may be asked what information he had which induced him to believe the words were true, or what steps he had taken, before speaking the words, to ascertain whether they were true or not: *Elliott* v. *Garrett*, [1902] 1 K.B. 870, 71 L.J.K.B. 415, 86 L.T. 441; Odgers on Libel and Slander, 5th edition, 656.

ONT.

Annotation

Discovery in defamation actions.

Annotation (*continued*)—**Discovery and inspection (§ IV—32)—Examination and interrogatories in defamation cases.**

But where in an action for a libel in a newspaper a defence of fair comment was pleaded, and the plaintiff sought to ask the defendants whether the words complained of were based on information obtained from the same source as an earlier and laudatory notice of the plaintiff, which had appeared in the same newspaper, and whether they had made inquiries as to the truth of the statements in such notice, the interrogatories were disallowed as being irrelevant to the issue of malice, the earlier notice being neither defamatory nor malicious: *Caryll* v. *Daily Mail Publishing Co., Limited* (1904), 90 L.T. 307.

Where a plaintiff put on the defendant's words a defamatory innuendo he was not allowed to interrogate the defendant as to whether he intended to make the imputations alleged in the innuendo: *Heaton* v. *Goldney*, [1910] 1 K.B. 754, 79 L.J.K.B. 541, 26 Times L.R. 383.

Interrogatories addressed to matters which are relevant only in aggravation or diminution of damages are not encouraged: *Ibid.*; *Lever* v. *Associated Newspapers*, [1907] 2 K.B. 626, 76 L.J.K.B. 1141, 23 Times L.R. 652.

Leave to administer interrogatories will be refused when they are to be put merely with the object of ascertaining the names of witnesses by whom the plaintiff proposes to establish his case: *Knapp* v. *Harvey*, [1911] 2 K.B. 725, 80 L.J.K.B. 1228.

Where the action is for libel in the way of the plaintiff's trade, and no special damage is alleged, but only general diminution of profits, the plaintiff may be examined on discovery as to the amount of diminution, and how it was made out: *Blatchford* v. *Green*, 14 P.R. 424.

When the defendant has not pleaded justification in an action for libel he is not entitled to administer interrogatories asking the plaintiff if he did certain acts, with a view to shewing that the statements in the alleged libel were true: *Timmons* v. *National Life Assurance Co.*, 19 Man. R. 227; *Bullen* v. *Templeman*, 5 B.C.R. 43.

In an action for libel in which the defendant has pleaded qualified privilege, to which the plaintiff has replied claiming malice on the part of the defendant, the defendant may ask questions which are relevant to the issue of defendant's honest belief as tending to shew the absence of malice, although they may incidentally prove the truth of the libel, and although justification has not been pleaded: *McKergow* v. *Comstock*, 11 O.L.R. 637.

Where the defendant in an action for libel did not justify but pleaded privilege and that he acted without malice towards plaintiff, and that "any words which he may be proved to have used were uttered honestly and in a *bonâ fide* belief of their truth," the defendant is not bound on examination for discovery to give the name of the person who had told him of the alleged misconduct with which (as he admitted) he charged plaintiff: *Sangster* v. *Aikenhead* (1905), 5 O.W.R. 438, affirmed, 5 O.W.R. 495.

Where in a second action for libel between the same parties the defendants pleaded that the item was a fair and accurate report of proceedings in a police court, the defendant's manager was required to reattend on examination for discovery, and answer questions which re-

ONT.

Annotation

Discovery in defamation actions.

Annotation (*continued*)—Discovery and inspection (§ IV—32)—Examination and interrogatories in defamation cases.

lated to the former action: *Bateman* v. *Mail Printing Co.* (1903), 2 O.W. R. 242, Street, J.

Where the alleged slanders were said to have been uttered in presence of the plaintiff's wife and other persons named, and plaintiff answered on examination for discovery that his wife and the others had told him what the defendant had said, his objection to further answer by repeating what they had told him was sustained; the defendant is not entitled to have a rehearsal of the plaintiff's evidence: *Lawrie* v. *Maxwell* (1904), 3 O.W.R. 284.

As to discovery of an alleged defamatory statement made by defendant to his wife, see *Williamson* v. *Merrill* (1905), 5 O.W.R. 64.

Upon the trial of an action for libel, section 5 of the Ontario Witnesses and Evidence Act, as enacted by 4 Edw. VII. ch. 10, sec. 21, would be applicable, and the defendant would not be excused from answering proper questions because the answers might tend to criminate him. Ont. Con. Rule 439 of 1897, as amended by Rule 1250, puts a party on his examination for discovery in the same position as he would be in if he were being examined as a witness at the trial, and he is, therefore, not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him; if he first objects to answer on that ground, his answer is within the protection of section 5. *Regina* v. *Fox* (1899), 18 P.R. 343, applied. *Chambers* v. *Jaffray*, 12 O.L.R. 377. (D.C.).

Section 5 of the Ontario Evidence Act as substituted by 4 Edw. VII. ch. 10, sec. 21, for sec. 5 of R.S.O. 1897, ch. 73, is as follows:—

"No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him, and if but for this section the witness would therefore have been excused from answering such question, then although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him on the trial of any proceeding under any Act of the Legislature of Ontario."

Ontario Con. Rule 439 of 1897, is as follows:—

"439. A party to an action or issue, whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest, and may be compelled to attend and testify *in the same manner, upon the same terms, and subject to the same rules of examination of a witness*, except as hereinafter provided."

Meredith, C.J., in *Chambers* v. *Jaffray* (1906), 12 O.L.R. 377, at p. 382, said:—

"This rule, in my opinion, therefore, puts a party on his examination for discovery, as far as the question under discussion is concerned, in the same position as he would be in if he were being examined as a witness at the trial, and he is therefore not excused from answering any question that is properly put to him upon the ground that the answer to it may

ONT.

Annotation

Discovery in defamation actions.

Annotation (*continued*) — **Discovery and inspection (§ IV—32) — Examination and interrogatories in defamation cases.**

tend to criminate him, and if he objects to answer on that ground his answer is within the protection of sec. 5. This is secured to him by the words of the Rule—'testify in the same manner, upon the same terms, and subject to the same rules of examination of a witness.'"

Magee, J., said in the same case, 12 O.L.R. 377 at 382:—

"A person charged with a crime may, through the medium of a contemporaneous civil action, which may never be brought on for trial, be required to submit himself to examination as to his guilt, while deprived of the right to use his own testimony so obtained, and assured only that while he has to furnish his accusers with particulars on which they may obtain other evidence against him, his own words cannot be so used against him on the criminal prosecution. Such a change in the law should require a very clear declaration of intention on the part of the Legislature, and when the Act of 1904, 4 Edw. VII. ch. 10, sec. 21, declares that the incriminating answers which it compels shall not be used against the deponent on the trial of any proceeding under the Provincial Act, one might well hesitate to say that the enactment was intended to apply to an examination for discovery the very essence of which is that the answers shall be used, and by one side only, at the subsequent trial. The fact that the trial is in the same action does not make such intention more clear when it is considered that if the old practice of obtaining discovery in a separate action were used, the Act of 1904 would not have the effect claimed. The case, however, seems to be governed by the decision of the Divisional Court in *Regina* v. *Fox*, 18 P.R. 343. That decision, it is true, was upon the effect of the similar enactment in the Canada Evidence Act as amended, while the present question involves the witnesses and Evidence Act of Ontario as amended in 1904; but for the purpose of the present appeal the enactments are in effect the same. If anything, the Provincial Act, 4 Edw. VII. ch. 10, sec. 21, is less favourable to the appellant, as by it no 'person' shall be excused from answering, while the Dominion Act has it that no witness shall be excused, though the Divisional Court did not consider the difference to be of moment. Sections 2 and 21 of the Canada Evidence Act, it is true, make the Act and the laws of evidence applicable to all proceedings in respect of which the Parliament of Canada has jurisdiction; but I do not read the decision in *Regina* v. *Fox*, 18 P.R. 343, as distinguishing between the examination for discovery and the action itself as being such a 'proceeding.' I take it that the Court went upon the ground that the action itself was a proceeding under Dominion jurisdiction; see judgments of Ferguson, J., at p. 347, and Robertson, J., at p. 349. That case stands in the appellant's way, and I think the appeal should be dismissed."

B.C.

C. A. 1912

Jan. 10.

REX v. MAH HUNG.

British Columbia Court of Appeal. Macdonald, C.J.A., Irving and Galliher, JJ.A. January 10, 1912.

1. APPEAL (§ VII J 7—435)—INSTRUCTIONS TO A JURY—DEFINING CHARACTER OF OFFENCE—CRIMINAL CODE (1906), SEC. 216*f*.

On a criminal trial an instruction is not erroneous by which the jury were told, in substance, that the accused would be guilty of the

offence of procuring under Cr. Code (1906), sec. 216 (*f*), only if they found that, at the time the accused induced a woman to enter a brothel she was not already an inmate of such a place.

2. JURY (§ II B—59)—CRIMINAL CASES—JUROR HAVING PREJUDICED OPINION—DECLARATION OF SAME AFTER HAVING BEEN SWORN.

A juror in a criminal case who, after he has been sworn, without objection or challenge, states that he is prejudiced against the accused will not be discharged, as objection to his qualification comes too late.

[*Reg.* v. *Stewart* (1845), 1 Cox. C.C. 174; *Rex* v. *Edmonds* (1821), 4 B. & Ald. 471; *Rex* v. *Sutton* (1828), 8 B. & C. 417; *Reg.* v. *Wardle* (1842), Car. & M. 647, followed.]

CRIMINAL appeal by way of case stated, from a conviction by Murphy, J., at the October (1911) assizes at Vancouver.

The appeal was dismissed and the conviction upheld, the Chief Justice dissenting, being in favour of ordering a new trial.

In the case stated for the opinion of the Court, the learned Judge said:—

The accused was tried before me and a jury at the October assize on an indictment reading as follows:

"(1) That Mah Hung . . . . unlawfully did procure one Katie Stephens, a woman, to leave her usual place of abode . . . . such place not being a brothel, with intent that she should for the purpose of prostitution become an inmate of a brothel . . . .

"(2) That the said Mah Hung afterwards . . . . unlawfully did procure the said Katie Stephens, a woman, to become a prostitute . . . .

"(3) That the said Mah Hung . . . . unlawfully did administer to the said Katie Stephens cocaine and other drugs with intent thereby to stupefy her so as thereby to enable a man to have unlawful carnal connection with her, the said Katie Stephens . . . ."

After the case for the Crown was concluded, and while witnesses were being examined for the defence to establish the fact that Katie Stephens, named in the indictment, was a prostitute, well known to the police as such since 1907, and that she had prostituted herself to Chinamen and white men in different rooms and places of questionable repute in the City of Vancouver, resorted to by her and such Chinamen and white men for the purposes of prostitution, being fully satisfied that the evidence before the Court which is attached and made part of this case stated established at the times mentioned in the indictment the said Katie Stephens was a prostitute I withdrew the second count in the indictment from the jury with the consent of counsel for the Crown. The accused was found guilty by the jury on the first count in the indictment and acquitted on the third count, and sentenced to three years' imprisonment with hard labour.

In my charge to the jury dealing with the first count, I stated:

"The Code says any woman or girl to leave her usual place of abode in Canada—it makes no difference if that woman is a prostitute or not as far as that element of it is concerned—no man has a right to procure her to leave her place of abode for the purpose that is afterwards set out.

"The next stage of the case is such place not being a brothel. That is a very important feature of this crime which you are investigating.

B.C.

C. A.
1912

REX
v.
MAH HUNG.

Statement

A brothel is defined by the Code as follows: A brothel or common bawdy house is a house, room, set of rooms, or place of any kind, kept for the purpose of prostitution, or occupied or resorted to by one or more persons for such purposes. Now you have to find this girl—that is, if you find the first element has been proven, that is, that he procured the girl to leave Vancouver—you have to go further and find that she was in a brothel in Vancouver when he procured her to leave here in order to justify the prisoner. In that connection you will have to remember what the definition of a bawdy house or brothel is. It is possible for a woman to be a prostitute and not be an inmate of a bawdy house. I have told you it is no justification for a man to procure a woman to go away because she is a prostitute. If she is merely a street walker, and not an inmate of a house of ill-fame, and if she did not keep a room to which she took men for purposes of prostitution, then the room is not a brothel and she is not an inmate thereof under the Code. On the other hand, if she, as a street walker, did go out and solicit men, and having got men on the street, took them to her room, and kept that room for the purpose of prostitution, then she is an inmate of a brothel. You have to find on the evidence adduced here if this girl was an inmate of a brothel; that is, if she used the room she lived in for carrying on the business of prostitution and that was her business and only business. She might be a street walker and prostitute and yet not be the inmate of a brothel. If she merely went out on the street and solicited men and took them to a brothel or a house of assignation for a short time, she would not be an inmate of a brothel; her room is where she lives, but if she makes that room the headquarters of a house of prostitution, then she is an inmate of a brothel. You have to decide and find beyond reasonable doubt that this girl was not an inmate of a brothel, and that is, you must decide whether she was rooming in a house of prostitution or ill-fame; that is, whether she kept a room in some part of this city primarily for the purpose of bringing men there to have intercourse with her. I charge you that it is quite possible for a girl, say, being employed in a restaurant and having a bedroom in the city, to occasionally take a man to her room to have intercourse with her, but that would not constitute that room a brothel or her an inmate of a brothel, because the Code says such rooms must be kept for the purpose of prostitution; that is, it must be the main object of the person occupying that room —the purpose of having sexual intercourse with men that she took there—and unless it was being used for that purpose primarily and not as a living room, but for the purpose of prostitution, it is not a brothel; if you find this girl, although a prostitute, was not in a bawdy house in the sense that I have explained—was not using her room as the headquarters of prostitution, taking men there, or carrying on the business of prostitution in her room, then the second element of this crime is made out. In dealing with that element you must remember that if you have any reasonable doubt, then you must give the prisoner the benefit of that doubt; but you must have a reasonable doubt only on the evidence that was adduced before you here, and on that evidence you must affirmatively make up your minds she was not in a brothel at the time he took her away, remembering what I told you as to what a brothel is."

B.C.

C. A.

1912

REX v. MAH HUNG.

Statement

Whilst the jury were being empanelled, Mr Russell, for the defence, challenged several for cause, on the ground that they had served on a previous jury which tried and convicted another Chinaman, Dr. Lew, for theft. In such first trial some evidence was given shewing that Dr. Lew and Mah Hung had together taken two white girls—one McDonald and the Stephens mentioned in this case—to Prince Rupert The challenges were disposed of by triers.

After some of such challenges had been disposed of, two men, who had served on such former jury, were called as proposed jurors. Having been in Court whilst the triers were disposing of persons in the same position as themselves, and, presumably, having observed that statements made by such persons that they were prejudiced against the accused usually resulted in the triers disqualifying such persons, these two men, without waiting for triers, volunteered the statement that they were prejudiced. There were, when this happened, several jurors empanelled, and one of these, who had not served on the former trial and had been sworn without objection, on hearing the two men make the statement that they were prejudiced, arose in the jury box and stated that he, too, was prejudiced. I thereupon stated in open Court that to disqualify a man from service as a juror his prejudice must be such as would lead him to disregard his oath, which was that he bring in a verdict according to the evidence; that a juror's prejudice must go to this extent, and that such a statement of prejudice by a juror must mean this and not be a mere subterfuge to escape jury duty. The juror in the box made no further statement and counsel for the accused raised no objection.

The swearing of the jury was completed just before the Court rose for the evening adjournment.

On re-assembling next morning immediately after the Court opened, the following remarks passed between the foreman of the jury and myself:

"Foreman of the jury:—Your Lordship, since the adjournment last evening it has come to my attention that one of the jurymen stated that he was prejudiced in this case. Should it be necessary for the jury to bring in a certain verdict, would that enable the accused's counsel to appeal?

"The Court:—I do not think you need worry about that. You are empanelled as a jury and I have no doubt that the gentlemen of the jury will respect their oaths."

The trial then proceeded in the usual way without further reference by anyone to this particular matter.

The points reserved for the opinion of the Court are:

"(1) Was the extract from my charge above set out a correct statement of the law?

"(2) With reference to the juror's statement of prejudice, was I right in allowing the trial to proceed under the circumstances above outlined?"

The conviction was upheld, MACDONALD, C.J.A., dissenting.

J. A. Russell, for accused.

W. A. Macdonald, K.C., for the Crown.

B.C.

C. A.
1912

REX
v.
MAH HUNG.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—The conviction should be quashed and a new trial ordered.

I think the learned Judge's charge was calculated to convey to the minds of laymen a wrong impression of the law upon a very material point in the case. The offence charged was that the accused unlawfully procured a woman to leave her usual place of abode, such place not being a brothel, with intent, etc. The onus was upon the prosecution to prove that she had a usual place of abode and that such usual place of abode was not a brothel. The learned Judge charged:—

If you find the first element has been proven, that is, that he procured the girl to leave Vancouver, you have to go further and find that she was in a brothel in Vancouver when he procured her to leave here, in order to justify the prisoner.

I think that is an erroneous statement of the law; it was calculated to lead the jury to understand that unless the prisoner was able to prove that the woman was taken from a brothel in Vancouver he could not justify himself. Those words were also calculated to lead the jury to believe that the offence was made out if the prisoner procured the girl to leave Vancouver; whereas it was necessary for the Crown to prove, not that she was procured to leave Vancouver, but that she was procured to leave her usual place of abode in Vancouver. Now, there may have been no sufficient evidence that this woman had any usual place of abode in Vancouver. From the evidence which is before us, consisting partly of her own, it would be very difficult to say that she had a usual place of abode. The evidence is that she was a common street walker, that she would stay a night in one place and another night in another. Before going to Prince Rupert she went with the prisoner to Agassiz, where she stayed a night in a Chinaman's hut; on return to Vancouver she stayed the next night in a room provided by the prisoner, and apparently the following night in the house of Dr. Lew, and then departed with the prisoner for Prince Rupert. I refer to this evidence only for the purpose of shewing how necessary it was to give a correct and precise charge to the jury and to point out clearly the elements which constitute the crime charged, and what the Crown was obliged to prove. The Crown was required to prove that she had a usual place of abode, and the character of that place of abode. If she had no usual place of abode in Vancouver, then the procuring of her to leave Vancouver would not be an offence; or, if she had a usual place of abode and it was not proven that that usual place of abode was not a brothel, then no offence was committed in procuring her to leave. Taking the charge as a whole, I am convinced that the jury could not have had a clear notion of the law governing the case. In

fact, the whole charge was calculated to mislead them with regard to the elements of the offence which they were required to consider and pass upon. All through the charge the jury were being impressed with what constituted a brothel, and with the fact that they were to find whether she had been taken from a brothel. In another place the learned Judge says: "You have to find on the evidence adduced here if this girl was an inmate of a brothel." Now, clearly, it was not necessary to find this, at all. The fact that the learned Judge afterwards said: "You must affirmatively make up your minds she was not in a brothel at the time he took her away" was not sufficient, in my opinion, to remove the impression which the jury were almost bound to receive from the earlier parts of the charge. But even this is inaccurate and calculated to mislead. Neither there nor elsewhere does he lay stress on "usual place of abode." As, in my opinion, substantial wrong was done, and in all probability a miscarriage of justice brought about, I think the conviction ought not to be allowed to stand.

On the other question, the refusal of the learned Judge to discharge a juryman after he had been sworn, I think the course pursued, in the circumstances of this case, was right.

I would quash the conviction and order a new trial.

IRVING, J.A.:—I have not been able to come to the same conclusion as that reached by the learned Chief Justice, for this reason: The Judge was dealing here with a definition of the crime with which the man was charged; nothing else. A definition as to the onus of proof of the different facts that went to the making up of proof of that charge would be quite a different matter and could be dealt with separately. The only point submitted to us aparently is, was the definition of the crime he gave correct? The statute provides that a prostitute, although she may be known to be a prostitute, if she is not living in a brothel, shall have the protection of the statute; and that is what the Judge was endeavouring to point out to the jury. He, as Judges often do when they are pointing out something to the jury, went over the case several times, using different language in every instance. In his charge he dealt with the matter four times. In the first place he said: "You have to go further and find that she was in a brothel when he procured her to leave, in order to justify the prisoner." That, it is suggested, is too strong. I do not think it is. But, assuming that it is, he later on says this: "You have to decide and find beyond reasonable doubt that this girl was not an inmate of a brothel; if you find this girl, although a prostitute, was not in a bawdy house, in the sense that I have explained"—which I understand to mean that she was living there and receiving gain. And again: "You must

B.C.
C. A.
1912
REX
v.
MAH HUNG.
Irving, J.A.

make up your minds that she was not in a brothel." I think that he fairly pointed out to the jury the object of the statute in the conclusion he came to, viz., that she was to be protected if she was not an inmate of a brothel at the time. Charges to the jury must be read reasonably. You cannot pick up two or three lines and say: "Well, now, that remark has put the thing before the jury in a wrong sense." You must consider the whole effect of what was said to the jury, and you have to take the whole thing as it would appear to them, and as it appears to counsel at the trial. This you can judge of according to the objections —if any—advanced by him at the time. On that part of the case I am satisfied that the Judge did what was right.

Then, with reference to the other point, it appears that a juryman volunteered the statement that he was prejudiced, after he had been sworn; but the Judge did not think proper to discharge him. In my opinion the Judge was perfectly right. A juryman has no business to volunteer a statement of that kind. Jurymen, after they are sworn, are expected to live up to the oath they have taken. A juror is not at liberty to be asked questions in order to found a challenge before he is sworn. And after he is sworn he speaks through his foreman.

In the case of *Reg.* v. *Stewart* (1845), 1 Cox, C.C. 174 at p. 175, we find the following:—

> At the commencement of the case, and as each juryman came into the box, C. Jones, Serjt., for the prisoners, asked him whether he was a member of a certain association for the prosecution of parties committing frauds upon tradesmen. Clarkson and Bremridge, for the prosecution, objected to this proceeding.
>
> Baron Alderson:—It is quite a new course to catechise a jury in this way.
>
> Serjt. Jones:—I have a right, my Lord, to challenge, and I submit that I am entitled to ask for information that is necessary to enable me effectively to exercise that right. At all events, your Lordship will perhaps intimate to the jury that such of them as are members of this association had better retire from the box.
>
> Baron Alderson:—I cannot allow you to cross-examine the jury, nor will I intimate to them anything on the subject you mention. If you like to challenge absolutely you may do so."

There are other authorities on that point. One is to be found in *The King* v. *Edmonds* (1821), 4 B. & Ald. 471.

Another reason the Judge could not deal with the case was because it was too late. A prisoner could not be in any better position than if he had endeavoured to challenge the man. The challenge must be made in proper time. The authority for that is *Rex* v. *Sutton* (1828), 8 B. & C. 417, where it was found, after the trial had been proceeded with, that there was an alien on the jury, and Lord Tenterden, C.J., at p. 419, says:—

> I am not aware that a new trial has ever been granted on the ground that a juror was liable to be challenged, if the party had an opportunity of making his challenge.

He had a challenge here and he did not take advantage of it.

Another authority on the same point is *Reg.* v. *Wardle* (1842), Car. & M. 647 at p. 648, where the prisoner having been arraigned and the jury sworn without any challenge, the foreman of the jury stated that the prisoner had a relation on the jury.

> Corbett, for the prosecution:—I submit this jury may be discharged without giving any verdict, and a new jury be called and sworn.
>
> Erskine, J. (having conferred with Tindal, C.J.):—I have conferred with the Lord Chief Justice, and we are of opinion that I have no power to discharge the jury [that means, I imagine, on the ground of challenge], and that the case must proceed.

For these reasons I think the Judge was right in refusing to discharge the jury on that occasion.

GALLIHER, J.A.:—It appears to me that our consideration of the case stated is confined to two points, and two only. First, as to whether what the learned trial Judge has said is a correct exposition of the law; and second, with regard to the juryman.

Now, in the view I take of the Judge's statement here, he was dealing with the section of the Act as to what the legal interpretation of that Act was, and what elements were necessary to constitute a crime or to relieve the prisoner, as the case may be. If I thought that there was any reference to onus at all, or if this stated case was on his charge generally, or if he did not charge the jury as to whom the onus rested upon in regard to whether it was or was not a brothel from which she was taken, I would feel considerable doubt in the way he has put it here. But as I regard it he is dealing simply with the legal phase of the section of the Criminal Code. And I do not think as the case is before us we can go beyond that.

Being confined to that, I am of the same opinion as my brother IRVING. It is not necessary for me to practically repeat, at all events any considerable portion of what my brother IRVING has said with regard to the other point reserved. I agree with him that the Judge was right in not asking the juror to be withdrawn. On the whole I am of the opinion that the conviction should stand.

Conviction upheld, MACDONALD, C.J.A., *dissenting.*

Re NEWTON.

ONT.

H. C. J.
1912

April 2.

Ontario High Court, Middleton, J. April 2, 1912.

1. WILLS (§ III G—138)—CONDITIONAL GIFT—AUTHORITY TO MAKE APPOINTMENT DURING LIFE OF DONEE OF POWER.

Under a will giving certain property to the testator's wife during life and widowhood and upon her death to such one or more of the testator's children as she may appoint by will and if she re-marry, to such one or more of the children as the executors may appoint, a child's share of the proceeds of the land when sold under the Ontario Settled Estates Act cannot be paid out of Court to him on his attaining his majority even with the consent of the widow and of such of the other children as are of age.

2. WILLS (§ III G—126)—POWER OF APPOINTMENT BY WILL—REVOCABILITY OF SAME DURING LIFE OF TESTATOR.

It is of the very essence of a power of appointment by will that it is revocable and to become operative only upon the death of the donee of the power.

APPLICATION for an order authorising the payment out of Court to one of the sons of a deceased testator of a share of the money realised from a sale of the testator's estate.

The application was denied.

F. W. Harcourt, for the applicant.

MIDDLETON, J.:—By the will, the testator gave the property to his wife during life and widowhood; upon her death "to such one or more of my children as she may by will appoint." If the wife remarries, then the property is to go to such one or more of the children as the testator's executors may appoint and direct.

The land has been sold under the Settled Estates Act, and the proceeds are in Court.

One of the children, now a grown man, desires to take up farming on his own account; and the widow and such of the children as are adults are willing that a share should be now paid to him to assist him in this enterprise.

I would gladly assent to this, but find myself unable to do so. The power to appoint which is given to the widow is a power to be exercised by will; and the very essence of such a power is, that it is in its nature revocable; and the appointment will become operative only upon the death of the widow. There is the further difficulty that, if the widow should re-marry, she then loses the power to appoint, and a new power of appointment would then arise in the executors.

The executors cannot now appoint, because their power does not come into existence until the marriage of the widow.

The testator has succeeded in tying up his estate until the death or remarriage of his widow, and has thus furnished another illustration of the doubtful wisdom of giving to testators the wide power they now possess to control their estate.

Application denied.

MEAFORD ELEVATOR COMPANY v. PLAYFAIR.

ONT.

C. A.

1912

Jan. 17.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. January 17, 1912.

1. NEGLIGENCE (§ I D—73)—DAMAGE TO ELEVATOR—FREIGHT STEAMER UNLOADING.

The owner of a freight steamer from which grain was being unloaded into an elevator is liable for damages for breaking a part of the elevator caused by the steamer not being properly and sufficiently moored to withstand the strain upon her by the turning of another vessel in the harbour, the officer in charge of her knowing that the other boat was going to turn, and having the opportunity to moor her more securely or of obviating the danger.

2. NEGLIGENCE (§ I D—73)—VESSEL IMPROPERLY MOORED — DAMAGE — ANOTHER VESSEL TURNING.

The owner of a steamer turning in a harbour in proximity to another vessel from which grain was being loaded into an elevator is not liable for the breaking of a part of the elevator caused by the surging back and forward of the steamer being unloaded due to insufficient mooring, where turning a vessel in a harbour is a common manœuvre well known and understood by those engaged in and about docks.

APPEAL by the defendants from the judgment of Teetzel, J., *Meaford Elevator Co.* v. *Playfair*, 2 O.W.N. 803, giving the plaintiffs damages for injuries to an elevator.

The appeal was dismissed as to defendant, Playfair, and allowed as to the Montreal Transportation Company.

F. E. Hodgins, K.C., for the defendant James Playfair.

F. King, for the defendants, the Montreal Transportation Company.

A. H. Clarke, K.C., for the plaintiffs.

MOSS, C.J.O.:—This action was tried by Teetzel, J., without a jury, and resulted in a judgment for the recovery by the plaintiffs from the defendants of $5,700 damages. The defendants' interests and defences being almost entirely separate and distinct, they brought separate appeals, which, however, were argued together. The plaintiffs' case was and is, that both defendants are liable to them. Each defendant claims that there is no liability on his part, no matter what may be the case as regards the other defendant. And both contend that the plaintiffs were guilty of contributory negligence, and that for that reason their action should fail.

The plaintiffs, the proprietors of a dock and grain elevator and plant, at or in the harbour at Meaford, complain that, owing to the combined negligence of the employees in charge of the steam freighters "Mount Stephen" and "Kinmount," owned by the defendant Playfair and the defendant the Montreal Transportation Company, respectively, while the plaintiffs were engaged in unloading a cargo of grain from the "Mount Stephen" into the elevator, and for that purpose using an ap-

ONT.

C. A.
1912

MEAFORD ELEVATOR CO.
v.
PLAYFAIR.

MOSS, C.J.O.

pliance known as "the elevator leg" in one of the hatches, the "Mount Stephen's" moorings parted, and she drifted backwards, thereby catching and entangling the leg in the hatch, so that it was pulled away from the elevator and smashed and rendered useless during the remainder of the season of navigation, thereby putting the plaintiffs out of the elevating business until the next season.

As against the defendant Playfair, the plaintiffs charge that the "Mount Stephen" was negligently, insufficiently, and unskilfully moored to the docks, and left without proper attention and supervision while the work of unloading was proceeding, with the result that, owing to the strain upon the mooring lines and cables occurring in the process of unloading, and to the violent disturbance of the waters of the harbour occasioned by the efforts of the "Kinmount" to turn in the vicinity of the "Mount Stephen," the latter vessel was torn from her moorings and caused the injury to the leg.

The plaintiffs' complaint against the other defendant is, that the "Kinmount" was so negligently manœuvred and handled while endeavouring to turn in close proximity to the "Mount Stephen" as violently and forcibly to affect the "Mount Stephen" at her moorings.

The main facts are simple enough. Early in the morning of the 28th November, 1908, the "Mount Stephen" arrived at the plaintiffs' elevator and moored at the dock. The work of unloading seems to have been proceeded with without delay, the leg being placed in hatch No. 2 which is well forward. While the work was in progress, the "Kinmount" came into the harbour, and apparently acting upon a suggestion or direction said by the first mate of the "Mount Stephen" to have originated with him, but was conveyed to the "Kinmount" by one Robert Shaw, an employee of the plaintiffs in charge generally of the unloading operations, and especially of the movements of the leg, tied up to the dock immediately astern of the "Mount Stephen." She remained there while the mate went ashore and held a short conversation with the plaintiffs' manager, the effect of which was disputed. At all events the mate returned to his vessel, her forward lines were cast off and she proceeded to head out so as to pass by the "Mount Stephen." She proceeded slowly working past with her head pointed south-westerly, so as to bring her bow gradually over to the dock on the other side of the harbour, until finally her bow was lodged on the bank on the other side, and she lay across the harbour, with her stern within from 20 to 30 feet of the "Mount Stephen's" starboard side.

In taking up this position she was for a time quite close to the "Mount Stephen." There was a conflict of testimony as to the position of the "Mount Stephen," and as to whether the

leg was at that time still in hatch No. 2, or whether it was lifted out of that hatch until the "Kinmount" passed, and then again replaced in it.

Upon the whole, having regard to the positive testimony of Robertshaw, to whose evidence the learned trial Judge attached credit throughout, the better conclusion is, that, during the movement of the "Kinmount" alongside the "Mount Stephen," the leg was removed from hatch No. 2 and replaced after the former's stern had cleared the latter's bow. The work of unloading was proceeded with, until it was considered that sufficient grain had been removed from the forward part, when the leg was taken out of hatch No. 2, and the "Mount Stephen" was moved forward a distance of about 72 feet until the leg was over hatch No. 6 in the after part. It was then placed therein and the work resumed and continued at that point until about 4,000 bushels had been removed. Then the "Mount Stephen" commenced to drift or surge rapidly backwards, and, before the leg could be got out of the hold, it was caught and broken.

About half an hour had elapsed between the time when the leg was replaced in hatch No. 2, and this occurrence. During this time apparently little or no attention had been paid to the movement of the "Kinmount" by anyone on board the "Mount Stephen." As a matter of fact those in charge of the "Kinmount" appear to have been endeavouring to bring her stern around to the south. The shifting of the "Mount Stephen" had brought her so much further south that her bow lay further south than the "Kinmount's" stern. The latter's wheel had been used with a starboard rudder, making what is termed a port wheel, until, as was said, she grounded. The depth of the water in the harbour was said to have been about 20 feet, and the "Kinmount" was drawing about 19 feet 6 inches. According to the mate's testimony the wheel which was in charge of the captain, who was not a witness at the trial owing, it is said, to illness, was stopped when she grounded. A line was thrown out and passed from the starboard side under the stern to a spile or post on the dock some distance south of the "Mount Stephen's" bow. The mate said that while they were heaving on this line with a steam winch, the wheel was not in motion, because of the danger of the line under the stern getting entangled in it. The line parted under the strain and was taken in. The mate was unable to say whether after that the wheel was again put in operation, but there was evidence from which it might be concluded that it was, and that it caused a very considerable commotion in the water. So far as appears from the time the "Mount Stephen" was moved forward until her lines parted, no warning was given to the "Kinmount," nor was any attempt made by those in charge of the "Mount Stephen" or

ONT.

C. A.

1912

MEAFORD ELEVATOR CO. v. PLAYFAIR.

MOSS, C.J.O.

the elevators to prevent the "Kinmount" from continuing her operations. Those in charge of her were apparently not cognizant of the manner in which the "Mount Stephen" was secured to the dock, and they had no reason for thinking that she was not sufficiently and safely moored.

The learned trial Judge has found, upon conflicting testimony, that, though unable to say that the "Mount Stephen" was not reasonably and sufficiently moored while the waters of the harbour were undisturbed by storm or the movements of other vessels, she was certainly not sufficiently moored to withstand the strain put upon her by the operations of another ship of the size of the "Kinmount," when the force of water from the wheel of such ship would be cast against her bow.

There is no good reason for not accepting this finding, which is well supported by the testimony—nor the further finding that the officer in charge of the "Mount Stephen" knew of the proximity and movements of the "Kinmount." This danger must have been apparent to the officer, at the time when he was moving the "Mount Stephen" forward, for he saw the "Kinmount" then alongside, and knew that she was there for the purpose of turning. He then had an opportunity, when adjusting the lines of the "Mount Stephen" at her new position at the dock, to have used an additional line or additional lines; or, if he found that he could not sufficiently secure his vessel against the effect of the "Kinmount's" operations, he could have warned her, or at least endeavoured to make those in charge of her aware of the situation; and, if he found himself unable to control the "Kinmount's" movements, and felt that his lines could not withstand the action of her wheel, he should have ordered the leg out of the hatch in which it had been placed.

The learned trial Judge has found that in all these respects there was a failure of duty on the part of those in charge of the "Mount Stephen." It is beyond question that the parting of the lines was due, in part at least, to the disturbance of the waters of the harbour caused by the "Kinmount's" wheel. It is not improbable that, even with another line out, in addition to those used, the breaking of the cable and the parting of the line would have taken place eventually; but it is shewn that, with the additional line, the vessel would in any case have been held to her place at the dock long enough to have enabled the leg to have been easily removed from the hatch.

The evidence amply supports the learned trial Judge's conclusion that, in so far as the injury to the leg is concerned, it was due to the negligence of those in charge of the "Mount Stephen" in failing properly and sufficiently to moor her under the existing circumstances. So far, therefore, as the lia-

bility of the defendant Playfair is concerned, the appeal must fail.

But, as regards the liability of the other defendants for the actions of those on board the "Kinmount," the question is less easily answered in the plaintiffs' favour. The plaintiffs are bound, of course, to make out, as against these defendants, a reasonable case of negligence in the handling and management of the "Kinmount," but for which the accident would not have happened.

It does not conclude the matter against the defendants to say that having regard to the fact that it was apparent to those in charge of the "Kinmount" that the leg was in operation on the "Mount Stephen" and that they knew that the operation of the wheel in turning would cause a considerable disturbance of the waters of the harbour, which might result in drawing the "Mount Stephen" from her moorings, unless she was secured by means of cables and lines in such a manner as to enable her to withstand the force of the water.

The operation which the "Kinmount" was engaged in was not an unusual or extraordinary manœuvre. It is a common method of turning a vessel in a harbour, and especially in a narrow or comparatively small harbour. It was well known to and understood by mariners and others engaged in and about docks. And those in charge of vessels lying at docks where such movements or movements of a similar nature are taking place, or are likely to take place, must take, and very properly in most instances do take, every reasonable precaution to guard against and prevent any evil effects from the conditions usually engendered by those movements.

According to the evidence, those in charge of the "Kinmount" had no reason to suppose that there was any failure on the part of those in charge of the "Mount Stephen" to take, as they should have taken, into account the conditions existing in the harbour when the "Mount Stephen" was shifted from her first berth to that which she occupied when the accident happened.

In the absence of any intimation to the contrary, or warning from those in charge of the "Mount Stephen," and in view of the unloading operations which were being carried on, those in charge of the "Kinmount" had a right to assume that the "Mount Stephen" was properly secured, and that there was no objection to the "Kinmount" proceeding with her operations.

It appears that, although, according to the mate of the "Mount Stephen," there was danger to be apprehended, neither he nor any one on board the "Mount Stephen," whether in the employ of the plaintiffs or the defendant Playfair, took any step or was at any pains to avert that danger by notifying those in charge of the "Kinmount" and endeavouring to get them

ONT.

C. A.
1912

MEAFORD ELEVATOR CO. v. PLAYFAIR.

MOSS, C.J.O.

to stop the wheel, or by taking steps to remove the leg until the "Kinmount" had ceased to operate her wheel.

The evidence appears to fail to attach any notice of danger to those in charge of the "Kinmount," or any reasonable ground for not supposing that, as well by reason of the well known ordinary practice with regard to securing vessels engaged in unloading at elevators, as by reason of no warning of danger or intimation of desire that they should suspend operations, they could safely proceed with their operations.

On these grounds, the plaintiffs appear to fail in establishing liability against the defendants the Montreal Transportation Company. That being so, the appeal should be allowed, and the action should be dismissed as against them. They should also receive their costs of appeal.

As to the defendant Playfair, he must pay the costs of the action, in so far as they were properly incurred as against him, together with the costs of the appeal.

As regards the amount of damages awarded, there is ample evidence to sustain the assessment made by the learned trial Judge. The loss in receipts of elevator charges was clearly the result of the inability to proceed with the work caused by the injury to the leg and its equipment, and it is shewn that there were orders given, or elevator space bespoken for quantities quite sufficient to justify the claim allowed for loss of earnings or profits from the operation of the elevator during the remainder of the season.

GARROW, MACLAREN, and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The accident was caused by the movement of the "Kinmount" and the want of firmer mooring of the "Mount Stephen," so that, apart from the question of contributory negligence, the plaintiffs are entitled to recover if both ships were, or either was, guilty of negligence in doing that which caused the accident.

The trial Judge found that each ship was so guilty, and I am unable to say that he [illegible] wrong in either respect.

The "Kinmount," knowing the position of the "Mount Stephen," executed a movement, which violently displaced the waters in the harbour, and which was pretty sure to displace the "Mount Stephen" from such mooring as held her to the dock at the time. The "Kinmount" might have come about without putting such a strain upon the other ship, and without causing her to break from the mooring, such as it was.

The "Mount Stephen" ought to have been better moored; if she had been she would have withstood the disturbance unnecessarily caused by the "Kinmount" long enough to have saved the elevator from the injury complained of.

Without the negligence of the "Kinmount" the accident would not have happened; likewise, without the negligence of the "Mount Stephen" it would not have happened. The negligence of each aided by the negligence of the other, caused the trouble; and so both are liable for the ensuing injury to the plaintiff; even though, alone, the negligence of neither would have caused it.

I am also unable to say that the other finding—that the plaintiffs were not guilty of contributory negligence, was wrong; the evidence sufficiently supports it.

An objection in regard to the damages was also made; it was contended that the plaintiffs could have damages only in respect of the contracts existing at the time of the accident, which owing to that accident, they were disabled from performing; but that is plainly an erroneous contention, in no manner countenanced by any of the cases referred to in connection with it. The defendants are entitled to compensation for the loss of earnings which would have been derived from the use of the elevator, if it had not been injured, during the time needed to put it in working order again.

The conclusion now reached by the other members of the Court exonerating the "Kinmount" has caused me to very carefully reconsider the evidence in the hope of being able to agree in that view, but that I am unable to do.

If the commander of the "Kinmount" were a competent mariner, as no doubt he was, he must have known that the movement he undertook near to the elevator and the unloading "Mount Stephen" was likely to cause that vessel to break away from her moorings, and to cause the injury complained of in this action. It is made quite plain by the evidence of the two experienced mariners, who give their evidence on the plaintiffs' behalf at the trial, but give it in an impartial and altogether satisfactory manner, that the manœuvre of the "Kinmount" in coming about when and where she did was a risky thing, a thing very likely to injuriously affect the "Mount Stephen" and one which might break her moorings had she been moored even as those witnesses thought she should have been, unless done with the utmost care in the movement of the "Kinmount's" propellor. The force of the water which displaced the "Mount Stephen" was caused entirely by the motion of the "Kinmount's" propellor, which must have been impelled by greater force than reasonable care under the circumstances warranted. I am not prepared to assent to the proposition that the master of the "Kinmount" had a right to act upon the assumption that the "Mount Stephen" was firmly moored; vessels are by no means always properly moored, especially when in a temporary berth; but this is not at all an essential question. I agree that those in charge of the "Mount

ONT.

C. A. 1912

MEAFORD ELEVATOR CO. v. PLAYFAIR.

Meredith, J.A.

Stephen" ought to have warned the master of the "Kinmount" of the "Mount Stephen's" insufficient mooring; but their failing to do so was no justification for the "Kinmount" doing a negligent act, for which there was no reasonable excuse, seeing that she might have come about quite handily in another part of the harbour where there would have been no danger to anyone. The evidence of the witnesses Wright, McGregor, and Zealand, seem to me to make out a very plain case of negligence on the part of those in charge of the "Kinmount," and the question is purely one of fact so that the judgment at the trial ought not to be lightly disturbed.

I would dismiss the appeal.

Judgment varied.

MARTIN v. LUSSIER.

QUE.

S. C. 1912

Jan. 22.

Quebec Superior Court. Trial before Saint-Pierre, J. January 22, 1912.

1. VENDOR AND PURCHASER (§ I D—21)—RESCISSION—DEFICIENCY IN QUANTITY OF LAND.

Article 1502 of the Civil Code of Quebec, which provides for the abandonment of a sale of land by the purchaser and recovery from the vendor of the price, if paid, where there is a deficiency of quantity so great as to raise the presumption that the purchaser would not have bought if he had known of it, is applicable only for the protection of an actual purchaser of an immovable property and not for the protection of the transferee of a right of redemption conferred by a *"contre-lettre"* given by the transferee back to the transferor concurrently with the making by the latter of an absolute conveyance by the terms of which *"contre-lettre"* the transferor was given the privilege of redeeming the property within a fixed period at a certain price but was under no obligation to do so.

2. VENDOR AND PURCHASER (§ I D—21)—SALE OF VENDOR'S RIGHT OF REDEMPTION.

The remedy of the purchaser of a mere right of redemption which he has the option to exercise but without any obligation to redeem in respect of a deficiency in quantity in the land, is dependent upon art. 992 of the Civil Code of Quebec and upon proof being made of error, fraud, violence or fear under said statute.

3. VENDOR AND PURCHASER (§ I B—7)—DEDUCTION FOR DEFICIENCY IN QUANTITY.

Where a right of redemption in house property was sold under a deed of sale describing the property by its boundaries and as having a frontage of forty-five feet and further describing the property as being the same as is actually enclosed and possessed by the vendor, a deficiency of seven feet in the frontage will not give rise to a claim for diminution of price or annulment of the contract if the purchaser was not deceived or misled either as to the value or as to the extent of the property to which the right of redemption applied, in view of the fact that the property had been sold *en bloc* and that the entire frontage was taken up by the buildings thereon.

THIS was an action by Martin *et al.* against Lussier, one Beausoleil being joined as a defendant in warranty to set aside a deed of sale unless the vendor consented to pay the value of the shortage of a property sold.

The action was dismissed.

J. O. Lacroix, for plaintiff.
A. Duranleau, for defendant and plaintiff-in-warranty.
R. Delfausse, K.C., for defendant-in-warranty.

SAINT-PIERRE, J.:—This case, which is one of considerable interest, is without any direct precedents so far as I know at least as to the form in which it came before me.

The facts are quite simple and may be condensed as follows:—

On August 22nd, 1907, by deed passed before Desautels, N. P. Lussier, the defendant in the principal action, sold to one Tardif, an immovable property situated in the then town of St. Louis, now annexed to the city of Montreal. In the deed of sale the property was described as being "a lot of land of 45 feet frontage on City Hall avenue by 65 feet in depth, more or less, with the buildings thereon erected." The principal building was a house containing several tenements fronting on the east side of City Hall avenue and covering the whole width of the lot. The deed then goes on giving a full description of the boundaries, together with the "tenants and aboutissants" on the three other sides of the property, and is made to close up with the following declaration: "Such as the same is actually enclosed and possessed by the said vendor."

The price of sale was $3,000, of which $1,500 were paid cash to the vendor and the other $1,500 were to go to one Forest, to be paid as called for according to the terms and conditions contained in a certain deed of obligation consented to by Lussier, the vendor, to said Forest.

In a "*contre-lettre*" which was drawn up as a supplement to the above deed of sale, Lussier was given the privilege of redeeming his property within a period of five years by reimbursing Tardif his payment of $1,500, and re-assuming the obligation of satisfying Forest's claim with respect to the other $1,500.

Tardif, the purchaser, took immediate possession of the property, but allowed Lussier to occupy it as his tenant under a contract of lease.

Eleven months later, on July 7th, 1908, Lussier sold and transferred his right of redemption to Dame Marie-Louise Martin, the present plaintiff, who, being separated as to property from her husband, bought it in her own name with the consent of the latter. The price paid for the purchase of Lussier's right was $500. Naturally, the purchaser, to give effect to her design of redeeming Lussier's property would have to assume all the obligations of the latter towards Tardif as well as towards Forest.

QUE.

S. C.
1912

MARTIN
v.
LUSSIER.

St. Pierre, J.

The plaintiff and her husband had not long been substituted to Lussier's right, when upon having the property measured, they discovered that instead of forty-five feet frontage it only had thirty-seven feet and three or four inches. As the property is sixty-five feet in depth, this shortage in the width of the property reduced its size by 448 superficial feet. That is to say that whilst it should have given a superficial area of 2,925 feet it only shewed 2,477 feet. Hence the present litigation.

Curiously enough, in her declaration Dame Marie-Louise Martin, when referring to her purchase, speaks as though she had actually bought the lot itself; and in her conclusions after declaring that she desisted from her said purchase, she prays that her deed be declared null and void and set aside, and that Lussier, her vendor, be condemned to re-imburse her the sum of five hundred dollars, which she paid him as the price of the purchase, and a further sum of thirteen dollars for the costs of the deed, "unless," as she adds, "said defendant consents to pay her the sum of $280, which is the value of the shortage represented by the 448 superficial feet which, as she says, were sold to her but not delivered."

Upon being served with this suit at law, Lussier at once called in one Beausoleil, one of his "*auteurs,*" as his warrantor, putting him "*en demeure*" to protect him against the pretentions thus set forth by Dame Marie-Louise Martin. Beausoleil did not oppose the action in warranty thus taken out against him. On the contrary, having appeared by counsel, he took up the defence or "*fait et cause*" of Lussier.

This defence is two-fold. In the first place he denies that the plaintiff had any right to such action as the present one against Lussier, so long as she had not actually redeemed Lussier's property; secondly, he claims that even had she redeemed the property, her action which is in the nature of an action "*quantum minoris*" could not be sustained, it being apparent by the description given of the property in the deed of sale by Lussier to Tardif as well as in the "*contre-lettre*" by Tardif to Lussier, and also in the deed of sale of the right of redemption by Lussier to the plaintiff herself, as well as in all the previous deeds by which said property had been conveyed from vendor to purchaser that on every one of those occasions it had been so sold and conveyed as a "*corps certain*" or "*en bloc*" (*per aversionem*) and not by measurement.

On reading plaintiff's declaration one will readily discover that she evidently based her action upon article 1502 of the Civil Code, which article reads as follows:—

> 1502. If the deficiency or excess of quantity be so great in comparison with the quantity specified that it may be presumed the buyer would not have bought if he had known it, he may abandon the

sale and recover from the seller the price, if paid, and the expenses of the contract.

The course suggested in this article will, no doubt, account for the fact that in her action the plaintiff thought that she would represent herself as the actual purchaser of the property itself, whilst, in reality, and as a matter of fact, she had only purchased the right to redeem it. In other words, instead of possessing a *jus in re* she only had acquired a *jus ad rem* which two things are widely different the one from the other.

The option, which in her conclusions, she gave the defendant to cover up the deficiency in the superficial area of the property by the payment of the sum of $280, shews that she was manifestly acting under misconception as to what her rights were. That sum of $280 she claims in her action as forming part of the property itself and as representing what was lacking in its size. Now, it is clear that such sum of money could not be demanded by the plaintiff from the defendant unless she, at the same time, laid claim to the rest of the property, that is to say, unless she first gave effect to her right of redemption; otherwise she might keep that money which represents as she pretends part of the property, and this to the detriment of Tardif the actual owner of said property, to whom that money, if susceptible of being claimed at all, should go, at least so long as the plaintiff had not redeemed the property.

Article 1502 C.C. was enacted for the benefit of the actual purchaser of an immovable property, and not for the transferee of a right of redemption, a right which said transferee may or may not give effect to.

The distinction I am now pointing out should not be construed, however, as shutting the plaintiff out from any recourse she may be entitled to exercise against her vendor.

If she can shew that she was either deceived or misled, she could look for her remedy not in article 1502 of the Civil Code, but in the provisions of article 992 which are in the following terms:—

> 992. Error, fraud, violence or fear, and in certain cases, lesion, are causes of nullity in contracts. . . . Error is a cause of nullity only when it occurs in the nature of the contract itself or in the substance of the thing which is the object of the contract or in something which is a principal consideration for making it.

The plaintiff having paid the sum of five hundred dollars for the latter's privilege of redeeming his property from Tardif, and furthermore having to pay $3,000 for the price of the property itself, if she actually exercised her right to redeem it, would undoubtedly be justified in expecting a fair value or *quid pro quo* for what she was to get. Had the property been sold to Tardif at so much a foot or by measurement and had said property shewn a superficial area of 2,477 feet

QUE.
S. C.
1912
MARTIN
v.
LUSSIER.
St.-Pierre, J.

only, where it should have covered 2,925 feet, she clearly would have had the right to assert that she had been led into an error, and that she was entitled to have her contract annulled and set aside.

This, however, is not what took place. True, the property which Lussier had the right to redeem was said to measure 45 feet frontage by 65 feet in depth, but at the same time said property was fully described as being enclosed within well-defined boundaries, and the plaintiff, was made aware by her deed that the property when redeemed was to be accepted as that which had been possessed and occupied within its actual boundaries, by Lussier himself and by all his *auteurs* before him.

Such being the case, I fail to see that she was deceived or misled either as to the value or as to the extent of the property to which her right of redemption applied, and that she might now be admitted to claim any relief. She got the right or privilege which she actually bought. She got it knowing full well what Lussier's right of redemption applied to, namely, a property which had been sold as a whole, *en bloc*, and which was enclosed within well-known boundaries and within such limits as her vendor, and before him her vendor's *auteurs* had owned and possessed it.

The action is therefore, without foundation, and should be dismissed, and it is so dismissed with costs.

Action dismissed.

ONT.
D. C.
1912
Feb. 1.

McEACHEN v. GRAND TRUNK RAILWAY CO.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. February 1, 1912.

1. MASTER AND SERVANT (§ II C 2—195)—RAILWAY EMPLOYEE—WALKING ON RAILWAY TRACKS—NEGLECT TO LOOK AND LISTEN.

An employee of a railway company is guilty of contributory negligence, which will bar a recovery of damages by his personal representatives against the railway company for his death in the course of his employment, where it is shewn that the deceased was walking between two parallel tracks in a railway yard, and, without looking to ascertain if any train was approaching, stepped upon a track on which a freight train was moving and where the yard helper on one of the moving cars had done his utmost to warn the deceased, and when it became apparent that no notice was being paid to the warnings, immediately gave the stop signal, and caused the brakes to be applied, although not in time to prevent the deceased being struck.

2. TRIAL (§ II C 8—146)—RAILWAY EMPLOYEES—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

In an action for negligence against a railway company the trial Judge should confine all questions of ultimate negligence to the time from which the defendants or their servants could have anticipated the danger.

ONT.

D. C.
1912

McEachen
v.
G.T.R. Co.

3. Trial (§ V C—281)—Sufficiency of jury's findings—Negligence action—Specific finding on one only of several grounds.

Where several grounds of negligence are alleged, and the jury make a finding on one only, the allegations in the other grounds are negatived by implication.

Appeal by the plaintiff from the judgment of Meredith, C. J.C.P., at the trial, dismissing the action without costs, upon the answers of the jury to questions submitted to them.

The action was brought by Mary McEachen, widow of Allan McEachen, on behalf of herself and her two children, to recover damages for the death of Allan, who was run over by a train of the defendants, while engaged in work for the defendants, owing, as the plaintiff alleged, to the negligence of the defendants.

J. G. O'Donoghue, for the plaintiffs.
D. L. McCarthy, K.C., for the defendants.

Britton, J.:—This is an action by the plaintiff, who is the widow of the deceased Allan McEachen, who was in the employ of the defendants, as a carpenter and rightfully in such employment upon and about defendants' premises. The action is by the widow for herself and on behalf of the infant children of deceased—for damages, the plaintiff alleging that the death was caused by negligence of the defendants. The deceased was run over by a train of defendants and killed, on the 21st December, 1910. The negligence alleged by the plaintiff is everything mentioned in sec. 3, sub-secs. 1 to 5 inclusive, of the Workmen's Compensation for Injuries Act. The case came on for trial at Toronto, and was tried by Chief Justice Sir Wm. Meredith and a jury on the 2nd October, 1911. The learned trial Judge submitted questions to the jury, and the jury upon these, found that the defendants were guilty of negligence, which occasioned the death of McEachen. The negligence found by the jury was "that the cars should not" (have been cut) "be cut loose without a man being in charge of the brake." This is not the negligence complained of, and in view of all the evidence such an answer by the jury is hardly warranted. That, however, is not material in view of the next question and answer.

Question 4. "Was the accident caused wholly or partly by the negligence of the deceased?" To which the answer was "partly." That, of course, means that the deceased by his own negligence, in part contributed to the accident which caused his death. And that answer, if founded upon evidence, bars plaintiff's right to recover unless recovery can be had by reason of question No. 6 and the answer thereto.

Q. 6. Could the trainmen after they became aware that the deceased was coming to the switching track by the exercise of reasonable care have prevented the accident? A. Yes.

ONT.

D. C.
1912

McEACHEN
v.
G.T.R. Co.

Britton, J.

I entirely agree with the contention of counsel for plaintiffs that if the evidence disclosed that the trainmen after they saw the danger of deceased—could reasonably have done anything to prevent the accident—the defendants might be responsible for the trainmen's negligence notwithstanding the finding in answer to the second question.

This question 6 has to do with ultimate negligence—it presupposes that there may have been negligence on the part of deceased—that by reason of the deceased's own negligence in part he was in danger, then after the trainmen knew of such danger, could they have done anything to prevent the accident? If there was any evidence that would permit of the finding as the jury have found in answer to 6, then that finding should not be disturbed, but in my opinion, there is no evidence to warrant any such finding, the evidence is all the other way. There can be no presumption in favour of deceased. All those who know do not speak of there being anything to shew negligence or from which negligence can be imputed after the deceased was in danger, or known to be in immediate proximity to, and actually stepping into danger.

Ultimate negligence, or negligence to create such liability as is implied in question 6, cannot be as to the car equipment—with brakes, bell, whistle or anything of that kind. All these things have reference to negligence negatived by the finding in answer to the second question.

Unable as I am to discover any evidence which would permit the answer of the jury to the 6th question, to stand as creating a liability on the part of defendants in this action, my conclusion is that the judgment should stand and this motion be dismissed—with costs if exacted.

Nothing would be gained by a new trial even if we should be of opinion for any reason that the plaintiffs should have one. No doubt all the evidence possible was forthcoming and the case was fully argued.

RIDDELL, J.:—The deceased who was a foreman carpenter on the Grand Trunk Railway, was killed on the 21st December, 1910, on the defendants' line. At the place of the accident, a little west of Windermere avenue, there were, north of the elevated track, four separate lines running between the Bolt Works and the elevated track. Numbering from the south track, No. 3 held, immediately before the accident, a switching train, seven cars, a caboose and engine, making a train of some 300 feet long. The engine was facing westward, "nosing" the train, which was, therefore, west of the engine; and at the west end of the train were the caboose and a box car, which were to be set up the straight track No. 3; the remainder of the train then to be switched around west of the Bolt Works.

This operation seems to have begun with the westerly car, about 50 feet east of Windermere avenue. The yard-helper, Rowan, got up on the foremost car, the box car west of the caboose, and saw the deceased walking "right in the centre between the two tracks on the eight feet" between tracks Nos. 2 and 3. The bell was continuously ringing, but no whistle was blown. There was nothing to indicate any danger to the deceased, as he would be well out of the way of the train. A train was coming from the west toward the locus on track No. 1.

When the box car on the track 3 was about a car length east of the deceased, Rowan saw him step to the north over upon track 3. Rowan "shouted and gave a frantic stop signal" to the engineer. The hand brakes on the box car were on the east end, and Rowan did not have time to apply them—he was taken up with trying to warn the deceased. The cars were going west about 4 or 5 miles per hour, and the yard-helper could not have stopped them in a car length, as he thinks. It seems probable that the train passing east on track No. 1 prevented the deceased hearing the bell, the noise of the west-going train, or the shouts of the yard-helper. He did not turn round to see if any train was approaching. The engineer applied the brakes as soon as he got the signal, but the cars did not stop in time, and the box car and short caboose ran over and killed the unfortunate man. The engineer, called by the plaintiff, says he could not have stopped any quicker.

At the close of the plaintiff's case, her counsel mentioned the several grounds of negligence upon which he relied, and the learned trial Judge charged the jury with great care upon the various allegations of negligence: (1) that Rowan should have warned the deceased; (2) "As to the whistle, there is no dispute . . . on the facts, and, if you attribute the happening of the accident to the omission to whistle, you will say so, and I will deal with the question of law or the Court will deal with that afterwards;" (3) "Then it is said that the train was not stopped in time;" (4) "It is said there ought to have been a brake at the rear of the car" (this is explained later as being the west end of the box car); (5) "That Rowan ought to have rushed immediately to the rear of the car and have applied the rear brake" (*i.e.*, in this case, as explained later, the east end of the box car).

The charge proceeds to deal with contributory negligence—and questions are submitted. Counsel upon this appeal complains that the learned Judge was not right in his law when addressing the jury; and, if we take out one sentence from all the rest, a plausible argument may be framed that this contention is correct—but the jury were not allowed to find a general verdict or to deal with the law at all—and any such error

ONT.

D. C.
1912

MCEACHEN
v.
G.T.R. Co.

Riddell, J.

(if such there were, and I think there was not, taking the charge as a whole) could not affect the answers of the jury or the result.

The following questions were submitted (I subjoin the answers to save repetition):—

1. Were the defendants guilty of negligence in operating the shunting train? A. Ten for negligence, two against.

2. If so, what was the negligence? A. That the cars should not be cut loose without a man being in charge of the brake. Ten for, two against.

3. If there was negligence, was the accident to the deceased caused by such negligence? A. Ten say yes, two say no.

4. Or was the accident caused wholly or partly by the negligence of the deceased? A. Eleven say partly, one says wholly.

5. Damages? A. To the widow, $1,000; to Ronald, $750; to Catherine, $750.

Thereupon counsel for the plaintiff asked that the jury should be told that they were at liberty to say that, in all the circumstances, there was negligence, without mentioning any specific negligence. This the Chief Justice rightly refused. Counsel contended then that "kicking off the cars in the way it was done was negligence," and his Lordship left that to the jury.

The jury then retired; and counsel for the plaintiff addressed the Court:—

Mr. O'Donoghue: I suggest to your Lordship that you should leave this question to the jury also: Could the defendants, notwithstanding the negligence, if any, of deceased, have avoided the accident?

His Lordship: That is not the question you handed up to me. I will ask them, if you choose, whether Rowan, after he became aware of the position of this man—that he was crossing the track—could, by the exercise of reasonable care, have prevented the accident happening.

Mr. O'Donoghue: I am submitting the general question.

His Lordship: Well, I will not put the general question.

Mr. O'Donoghue: I was just getting it on the notes.

His Lordship: I will leave to the jury the question—although I think there is no evidence of it, the evidence is all against you on it—whether, after the trainmen—or it would really be this man Rowan—became aware that this man was going to cross the track, he could, by the exercise of reasonable care, have prevented the accident.

Mr. O'Donoghue: I have no objection to that, but I also want to ask this one.

His Lordship: Well, I will not do that.

Mr. O'Donoghue: I only want to get it on the notes. The question I was asking was: Could defendants, notwithstanding the negligence, if any, of the deceased, have avoided the accident, by the exercise of reasonable care?

* * * *

His Lordship: Call the jury back.

The jury are here accordingly brought back into Court, and the following takes place:—

His Lordship: Counsel for the plaintiff desires me to ask another question. I am going to ask it, although it is involved in the questions you have already been asked. This is what I will ask you: Could the trainmen, after they became aware that the deceased was crossing the switching track, by the exercise of reasonable care, have prevented the accident?

Mr. O'Donoghue: Your Lordship will understand that that is not the question I submit.

His Lordship: I understand it perfectly. It is a better question than yours. I will not submit it the other way. If you want it, I will ask, "Could Rowan?"

The question following was then added and given to the jury. (I subjoin also their answer):—

"6. Could the trainmen, after they became aware that the deceased was coming to the switching-track, by the exercise of reasonable care, have prevented the accident? A. Yes: ten for, two against."

Upon this the learned Chief Justice said: "I think I must enter judgment for the defendants on these findings. The jury, in their answer to the second question, place the negligence of the defendants upon this ground: that the car should not have been cut loose without a man being in charge of the brake. The effect of that finding, according to the cases, is to negative all the other grounds of negligence that were put forward by the plaintiff—therefore, to negative the failure to whistle as not having been the efficient cause of the accident, and all the other grounds of negligence upon which Mr. O'Donoghue relied. It was not even argued by counsel that there was negligence in not having a man in charge of the brake before the car was cut loose. There is no evidence to support either view—that it was negligence or that it would not have been negligence to have a man in charge of the brake—and what evidence there is is altogether against the idea that, if there had been a man in charge of the brake, it would have had any effect whatever. If the signal to the engine-driver could not have prevented it, through his stopping by means of his brake, it follows, as a matter of course, that the other man could not have stopped the car—it would have taken longer probably. Then I think, also, that there was no evidence whatever to support the answer to the sixth question. There was nothing that could have been done, upon the evidence—with the appliances that were there at all events—to have stopped the car in time to have prevented the accident after it was seen that the man was stepping on to this track upon which the shunting train was."

Counsel upon the appeal before us urged that, by reason of the form of the 6th question, the jury might have thought that

ONT.

D. C.
1912

MCEACHEN
v.
G.T.R. Co.

Riddell, J.

they were precluded from finding negligence of the defendants before the deceased started for the track No. 3. It is plain that this is not so—the jury have found negligence of the defendants before this point of time—and it is equally clear that the trial Judge is right in confining all questions of "ultimate" negligence to the time from which the defendants or their servants could have anticipated any danger—any negligence before that time must be negligence covered by questions Nos. 1 and 2.

It is also plain that nothing appears in the evidence justifying the answer of the jury to question No. 6, or indeed to question No. 2. But, in any event, the answer to question 2 precludes a finding of any other negligence than that specifically found; it is not necessary to give authority for such a thoroughly established proposition. The jury then have found against the plaintiff upon whether the absence of the whistling, etc., caused the accident; and, even were the statutory duty to whistle to be held to exist under the circumstances, the jury have found it immaterial that such duty (if any) was not fulfilled.

It must be plain that the unfortunate man's own want of the most ordinary care contributed to the accident.

I think the motion must be refused, and with costs, if asked.

FALCONBRIDGE, C.J., agreed that the appeal should be dismissed with costs.

Appeal dismissed.

CAN.

S.C.
1912

Feb.12.

The Incumbent and Churchwardens of THE PARISH OF ST. STEPHEN'S (intervenants, appellants) v. The Incumbent and Churchwardens of THE PARISH OF ST. EDWARD'S (plaintiffs, respondents).

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ. February 12, 1912.

1. CHARITIES AND CHURCHES (§ I C—24)—TRUST DEED OF CHURCH LANDS —EXTENSION AND DIVISION OF PARISH.

Where a conveyance of land was made to the rector of a certain parish, "his successor and successors in office forever," in trust to erect and maintain a church thereon, and a statute, 39 Vict. Que. 1875, ch. 74, declared that the land and the new church to be erected thereon should "be vested in the rector and churchwardens of the church" and their successors in office "in trust for the uses and purposes ecclesiastical of the said parish," and after many years there was added to the parish a portion of a non-contiguous parish in which a chapel was afterwards built, served at first by the incumbent of the church of the parish but to which the congregation removed after a time, the chapel thus becoming the parish church, and an incumbent was appointed to the old church, and churchwardens were elected thus making two separate churches between whose congregations many discussions arose as to their respective rights culminating in a division of the parish by which the part which had formerly been the old parish was made into a separate parish and called by a new name while the strip of non-contiguous territory which had been added to the old parish retained the old name, the title to the old church was not vested in the corporation of the parish retaining the

CAN.
S. C.
1912
PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

old name, since the trust on which the land was conveyed had a territorial meaning and related to a defined and well understood parochial area and to the maintenance within that area of a church for the purposes ecclesiastical of the original beneficiaries, the inhabitants of the district formerly known by the old name.

APPEAL by the intervenants, from the judgment of the Court of King's Bench, of the Province of Quebec, affirming the judgment of the Superior Court of that province in an action to have deeds conveying a certain lot of land with the church thereon annulled and cancelled. The appeal was dismissed with costs.

Messrs. E. Lafleur, K.C., and *C. M. Cotton*, for appellant.
F. W. Hibbard, K.C., for respondent.
L. H. Davidson, K.C., for the Synod, Bishop and Dean of Montreal.

SIR CHARLES FITZPATRICK, C.J.:—This is not a case, as might well be imagined because of certain features of the controversy, of a schism leading to a separation into distinct and conflicting bodies; it is merely a contest between the inhabitants of two parishes, all of whom profess the same religious faith and acknowledge one ecclesiastical authority, about the ownership, or rather the right to use, a church for the purpose of divine worship. At first sight it would appear as if such a disagreement could have been settled at far less expense and much more satisfactorily by the proper church judicatories; but since the parties have chosen to litigate their differences in the civil Courts, it is our duty to inquire into the facts and decide to the best of our ability the issues raised in the pleadings and evidence.

The appellant and respondent are religious corporations in which are vested the goods and property of the Anglican Church within the limits of their respective parishes (35 5 C.C., 14 and 15 Vict. ch. 176 as amended; 53 Vict. ch. 123, secs. 6 and 7, and 35 Vict. ch. 19, sec. 1). The question at issue between them in this suit is with respect to a piece of land described in the proceedings as lot 1817, in St. Ann's Ward, in the city of Montreal, with the church thereon erected and situate within that territorial area which is not, for the religious purposes of the Anglican community, subject to the jurisdiction of the respondent corporation. There is no dispute as to the facts.

Under the authority conferred by the Act, 35 Vict. ch. 19 (1871), the Synod of the Diocese of Montreal divided the parish of Montreal into ten parishes, to one of which was given the name of St. Stephen's. Each of the new parishes was vested with all the powers conferred on the parent parish by the Royal letters patent issued under the provisions of the Imperial Act, 31 Geo. III. ch. 31. Subsequently, in June, 1875, Mr. John Harris donated the property in question to Reverend T. F. L. Evans, then rector of the said parish of St. Stephen's "his suc-

CAN.

S. C.
1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

Fitzpatrick, C.J.

cessor and successors in office for ever, to the use and upon the trust following:—

> In trust to erect or cause to be erected and maintained on the said lot of land a church to be devoted to the performance of Divine worship therein, according to the rites and ceremonies of the Church of England in Canada: It being understood and agreed that should it at any time become expedient, in the judgment of the rector of said church and of the churchwardens of such church, with the consent and participation of the Bishop of the Diocese of Montreal, to change the site of said church, and to sell the said lot of land and premises, the said rector by and with the consent and participation of the said churchwardens and of the said Bishop of the Diocese, shall have full liberty to sell the same, provided the proceeds be applied to the purchase of a new site, and the erection and maintenance thereon of a church to be devoted to the worship of Almighty God, according to the rites and ceremonies aforesaid.

This property was not at that time within the boundaries of St. Stephen's and an Act of the legislature was passed (39 Viet. ch. 74, 1875) at the instance of the rector and churchwardens authorizing the sale of the then existing parish church and the application of the proceeds towards the construction of a new church on the lot donated by Mr. Harris. The statute provides further (sec. 3) that the lot shall with the church to be thereon erected "be vested in the said rector and churchwardens of *St. Stephen's Church* and their successors in office in trust for the uses and purposes ecclesiastical of the said parish of St. Stephen's." If we apply to the word "parish" the meaning given in Halsbury's Laws of England, vol. 11, p. 442, and in Seldon, History of Tithes, p. 260, it is obvious that this statute creates a trust of which the lot in question is the subject, and the members of the Church of England in Canada, residing within "that district or circuit of ground which was then committed to the charge of the incumbent having the cure of souls therein" are the beneficiaries, that is, the parish of St. Stephen's. It would seem to be the duty of this Court to see that the property so formally dedicated is not diverted from the trust which is thus declared by an act of the legislature to be attached to its use.

Subsequently the boundaries of the parish of St. Stephen were altered so as to include the donated lot, the old church was disposed of, and a new church built, partly out of the proceeds of that sale; and this new church—the object of this litigation—became the parish church of St. Stephen's. After twenty years of peaceable enjoyment, some of the congregation having moved to another part of the city or to the suburbs, it was thought desirable to again extend the boundaries and in 1897 a portion of the non-contiguous parish of St. James the Apostle was added to the then parish of St. Stephen's. (In my view of

the case, it is not necessary to consider the legality of this proceeding which was questioned here.) The then existing church continued to be the church for the new parish, under the same name. For the convenience of those parishioners who lived far from the parish church and chiefly in the territory detached from St. James' and added to the old parish, it was found necessary to build a "chapel of ease" which was at first served by the incumbent of St. Stephen's; but in course of time to this "chapel of ease" the corporation removed, carrying with them all the books and registers of the parish as then legally constituted. Thereupon the "chapel of ease" became the parish church *de facto* and the old parish church was used as a "chapel of ease" to serve the religious needs of those parishioners who continued to reside in its immediate neighbourhood. An incumbent was appointed to the old church at the request of the bishop and, with the consent of the rector, and churchwardens were elected. Here again I do not feel it necessary, because of the judgment dismissing the exception to the form and from which no appeal was taken, to express an opinion as to how far all those proceedings were conducted in accordance with the law regulating the Church of England in Canada. The existence of those two churches under such conditions within the same parochial area produced the consequences which might have been expected. An acrimonious discussion arose between the two congregations as to their relative positions and resulting legal rights; and, after many futile efforts to restore peace and harmony, it was finally decided to re-divide the district into two parishes. The result of the division was to detach the circuit of ground which constituted the old parish of St. Stephen, as enlarged to bring within its limits the church now in litigation, and to restore to it a separate parochial existence under the name of St. Edward's; the remaining portion, that is the portion which was formerly a part of the parish of St. James the Apostle, and for the religious purposes of which the chapel of ease was originally built, continued in existence as a separate parish under the old name of St. Stephen's.

The question to be decided is: In which of these two corporations vests the legal title to the church built on the Harris property, the subject, as I have said, of the trust created by statute for the benefit of the members of the Church of England in Canada resident in the old parish of St. Stephen's, now known as the parish of St. Edward's? By the Temporalities Act and the Provincial Act, 39 Viet. ch. 74, the legal title, previous to the change made in the boundaries of St. Stephen's by the addition of a portion of St. James the Apostle, was in the religious corporation or ecclesiastical body known as the rector and churchwardens of St. Stephen's church who held it in trust for the uses and purposes ecclesiastical of those members

CAN.

S. C.
1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

Fitzpatrick, C.J.

of the Church of England in Canada residing within that parish. When the boundaries of St. Stephen's were extended to include a part of St. James the Apostle, the inhabitants of the wider area became the beneficiaries of the trust; but, when the district for the benefit of whose inhabitants the trust was originally created, and within which was the subject of the trust, was carved out of the wider area and restored for parochial purposes to its original boundaries under the new name of St. Edward's, what became of the title to the church? A religious corporation with a new name is created, it is true; but that corporation is brought into existence for the special purpose of providing for the administration of the old parochial district for whose uses and purposes ecclesiastical the trust was created; and I am disposed to hold that on a true construction of the statute, 39 Vict. ch. 74, Que., this new corporation which is the successor in office of the trustees named in that statute, holds possession of the property for the purposes ecclesiastical of the original beneficiaries, the inhabitants of the district formerly known as the parish of St. Stephen's and now known as St. Edward's. By the severance of St. Edward's from St. Stephen's that district including the property which is the subject of the trust passed from under the ecclesiastical jurisdiction of the rector and churchwardens of St. Stephen's. The statutory trust (if I properly understand the meaning of the word "parish" in ecclesiastical law) arose out of and was conditioned upon the continued existence of the relation for ecclesiastical purposes between the incumbent and the people; and that relation once severed, the trust failed. The beneficiaries remained, however, and, were it necessary for the purpose of this case, I would say that their new trustees are the rector and churchwardens of St. Edward's who are charged with the administration for purposes ecclesiastical of the district or circuit within which is situate the property in dispute. I am also of opinion that, for the reasons given by Mr. Justice Anglin, the title to the property in dispute vested in the new parish by virtue of the Church Temporalities Act. I am content, however, to formally agree with the trial Judge and not to go beyond the conclusion of the plaintiff's demand. They do not ask that the property be declared to be vested in them and all that is necessary for us now to do on these pleadings is to decide that the title to the property is not vested in the intervening parties and their intervention must be dismissed with costs.

May I join in the hope expressed in the Courts below that, as the question of the title to this church will not be as the result of this litigation judicially settled because of the state of the pleadings, some action may be taken by the competent authorities to amicably adjust, with due regard to the rights of both parties, this unfortunate dispute. The parishioners of St.

Stephen's have some equitable interest in the property and, had we the necessary material before us, I would be disposed to determine the nature and extent of that interest.

The appeal is dismissed with costs.

DAVIES, J.:—The respondents were the plaintiffs in an action brought by them against the Synod of the Diocese of Montreal, the Lord Bishop of Montreal and the Dean of Montreal, to have a deed of lot 1817 of St. Ann's Ward, Montreal, with the church building thereon erected, made by the defendant the Dean of Montreal to the Lord Bishop, on the 4th March, 1901, cancelled and annulled in so far as the same conveyed or purported to convey any right or title to the said property, and a further deed from the Lord Bishop of Montreal to the Synod of the Diocese cancelled and annulled absolutely and the necessary entries made on the registration register where the title of the lot was registered.

An exception to the form was taken to the action by the defendant on the ground that the plaintiff was not such a corporation as was entitled to sue under the Church Temporalities Act. This exception to the form was overruled by judgment dated the 29th December, 1906, and no appeal was taken therefrom.

The defendant, the Synod of the Diocese of Montreal, as well as both the *mis-en-cause*, submitted to justice, the *mis-en-cause* Evans in his personal capacity and not as being a member of the intervenant corporation.

By its intervention, the corporation of St. Stephen's church of the parish of St. Stephen, the appellant herein, concurred in the conclusions of plaintiff's declaration, but asked that "the ownership of St. Edward's church (the property in dispute) be declared to be vested in the intervenant as proprietor thereof."

The judgment of the Superior Court rendered on the 1st day of February, 1908, annulled the deeds attacked by plaintiff's declaration and dismissed the intervention, but made no adjudication otherwise as to the ownership of the property.

The judgment of the Court of King's Bench, rendered on the 28th day of June, 1910, simply confirmed the judgment of the Superior Court, Trenholme, J., dissenting.

The appeal before us is one by the intervenant appellant (all other parties being made respondents) and the only question before us is whether the intervenant's claim should be allowed and the ownership of St. Edward's church be declared to be vested in it as proprietor, in its corporate name of "The Incumbent and Churchwardens of the Parish of St. Stephen's."

To understand the unhappy and unfortunate disputes which have given rise to this litigation, it is necessary to give a brief

CAN.

S. C.
1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

DAVIES, J.

statement of some at least of the more material facts which have occasioned the disputes.

In 1875, there existed in Montreal an ecclesiastical parish of the Church of England known as St. Stephen's, with boundaries defined by Canon XXVIII. of the Synod of the Diocese of Montreal.

In June, 1875, one John Harris conveyed to the Rev. Mr. Evans, rector of St. Stephen's parish, and his successor and successors in office for ever, the land in dispute in trust to erect or cause to be erected and maintained thereon a church for divine service according to the rites and ceremonies of the Church of England in Canada, with a provision authorizing a sale of the premises with the consent and participation of the churchwardens and the bishop of the diocese, provided the proceeds were applied to the purchase of a new site for a church to be conducted according to such rites and ceremonies.

The actual site thus conveyed though adjoining the parish was not within its bounds, and these bounds were at once properly enlarged so as to embrace the site.

At this time there was already a church within the parish known and used as the parish church, and application was made by the rector and churchwardens to the legislature for power to sell this old church property and build a new church upon the Harris site.

In 1875, the legislature passed the Act prayed for, giving the necessary authority and the old church premises were sold and a new church erected upon the present disputed site, partly from the funds raised by this sale, and partly from voluntary subscriptions given by the then parishioners and other churchmen outside of the parish.

Subsequently the bounds of St. Stephen's parish were enlarged by adding a part of another parish not contiguous to the old St. Stephen parish, but lying in the western part of Montreal.

Later on and after a chapel for divine worship had been erected in the newly added portion of the parish, in what was known as the upper town or Westmount, the larger part of the congregation, from various reasons, amongst them, change of residence from the east part of the city to the west, worshipped there, leaving but a small minority of the old parishioners worshipping in the old parish church in the lower town.

Still later, by a decree No. VIII. made by the Bishop of Montreal, dated the 12th January, 1901, and confirmed by the Synod, the parish of St. Stephen's, as then existing and enlarged, was divided, the part which had formerly been the old St. Stephen's parish being made into a separate parish and called St. Edward's, and the new part which had been added

on to the old parish remaining thenceforth as the parish of St. Stephen's.

These alterations first enlarged the old St. Stephen's parish adding to and embracing within it a part of another parish but not contiguous to it, and afterwards divided the enlarged parish into two parishes called respectively St. Edward's and St. Stephen's—the former comprising the old St. Stephen's parish as it existed before the addition of the uptown part, having the disputed premises within it, and the latter comprising the new or uptown addition with the new church built after that addition became part of the enlarged parish of St. Stephens.

Both, therefore, of these parishes have churches within their bounds. The one in dispute is that within the limits or bounds of the present parish of St. Edward's. It was originally beyond doubt built as and for the church of the then parish of St. Stephen's. It was so maintained for many years. It is the parish church at the present time of the parish of St. Edward's, with a legally constituted ecclesiastical corporation known as the incumbent and churchwardens of the parish of St. Edward's.

The contention on the part of the appellants, as I understand it, is that when the uptown addition was made to the old parish and a church was built there, the rector and a large majority of the congregation or parishioners moved there and worshipped in their new church there, that such church became the parish church and its rector and churchwardens were in deed and in fact the rector and churchwardens of St. Stephen's parish as then constituted, and that the division of such parish into two parishes later on did not affect or take away their legal rights which entitle them to have the claim they make maintained, namely, "that the ownership of St. Edward's Church be declared to be vested in them as proprietors thereof."

This contention if maintained would leave them as the owners of both churches, the one within and the one without their parish bounds. That fact alone would not of course defeat their claim if it is found otherwise valid. Its validity depends upon the proper construction of the Harris trust deed, the act of the legislature of 1875, the 3rd section of which I quote hereafter, and the application of "The Church Temporalities Act" as re-enacted in 1890, some eight or nine years before the uptown or Westmount church was erected. It is true their claim, if allowed, would not enable them to sell the church without the consent of the bishop. But apart from that their rights of ownership would, I take it, be unhampered.

Turning to the Harris deed of 1875, we find it conveying to the rector of the then parish of St. Stephen's a block of land adjoining the parish limits, in trust, on which to erect a church

CAN.

S. C. 1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

DAVIES, J.

to be devoted to the performance of divine worship according to the rites and ceremonies of the Church of England in Canada. As I have said, the parish boundaries were at once properly enlarged so as to include this site. I cannot doubt that although not so expressly stated, the church so to be erected was intended to be for the benefit of Church of England residents of St. Stephen's parish, that is, it was to be for the spiritual benefit of the members of the Church of England of that parish as then territorially known. The location, the safeguards the donee provided with respect to its possible subsequent sale, as well as the uses it was, until sold, to be applied to, combine to convince me that at any rate so long as the church was not with the combined consent of rector, churchwardens and bishop sold, it was to be used for the religious benefit chiefly, at any rate, if not exclusively, of the residents of the then parish of St. Stephen.

Whether in case a sale took place the proceeds were to be necessarily applied in the purchase of a site territorially within the then parish is not now before us. Other considerations might well enter into the determination of that question arising out of the inferences which might necessarily have to be made from the fact that all parties, rector, churchwardens and bishop, had consented to sell. But at any rate until the time came when in the combined opinions of the lord bishop, the rector and the churchwardens of the parish the premises were sold, the church was to be for the benefit as I have said of the members of the Church of England in the parish which the grantor knew about, had in his mind, and desired to benefit. That such also was the meaning understood by the rector, the grantee, and his churchwardens of the time, appears to me clear from the petition they presented to the legislature in 1875, asking for power to sell their old church upon the Harris site, which petition is recited at length in the preamble of the statute passed.

That the legislature so understood the terms of the Harris trust appears to me clear from the statute they passed granting the prayer of the petition, authorizing the sale of the old church, strictly requiring its proceeds to be applied towards the erection of a new church on the Harris land, and declaring in the 3rd section that the land and new church should "*be vested in the rector and churchwardens of St. Stephen's church, and their successors in office, in trust for the uses and purposes ecclesiastical of the said parish of St. Stephen's.*"

Surely that must mean the parish of St. Stephen's as then territorially known and existing. A reasonable interpretation might well hold that it did not exclude some additional territory which might be afterwards legally added to the parish. But I find it impossible to hold that it can mean the absolute ex-

clusion of the then territory and people embraced within St. Stephen's parish, or the application of the trusts to another and distantly situated part of the city, although that part had become legally entitled to be called by the old name of the parish of St. Stephen's.

After the 17th April, 1898, the new church was completed at Westmount, churchwardens and other officials appointed, and services thereafter conducted there by the rector. No doubt a very large majority of the former residents of the original St. Stephen's parish having moved uptown worshipped thereafter in that Westmount church (now St. Stephen's). The remaining members or adherents of the church in the old parish, however, it appears from the minutes of the vestry meetings put in evidence, met, and on the 11th April, 1898, passed resolutions asking the rector to authorize the lord bishop to place a clergyman in charge of their church. On the 30th May, a special meeting was convened for the purpose of reorganizing the congregation and appointing officers for the remainder of the ecclesiastical year. The churchwardens and other necessary officials were then appointed and as I gather from that time forward the services of the church were regularly maintained under a regularly appointed clergyman, who, since the division of the parish, has become the incumbent of St. Edward's. Since that division, at any rate, all the temporal affairs of the church, now known as St. Edward's, have been managed by the incumbent and the duly appointed churchwardens and other officials.

It was not until 1901, when all attempts made to settle the unfortunate differences which had arisen between the congregations had failed, that the old parish of St. Stephen's was sub-divided, the Westmount division retaining the old name of St. Stephen's parish and the original St. Stephen's parish being designated as St. Edward's.

Immediately arose the question which ecclesiastical body, the incumbent and churchwardens of St. Stephen's, or the incumbent and churchwardens of St. Edward's, was the legal successor for the purposes of the trusts of the Harris deed of the old ecclesiastical body called "The Rector and Churchwardens of St. Stephen's Church."

It will be observed that neither of the contestant bodies have a rector. The clergyman or parson is called the incumbent in each case.

I do not think the fact of one or other of them retaining the old name of St. Stephen's can really affect the issue. It is a question of substance and of fact not of mere name. If the lord bishop when making the division had avoided the old name St. Stephen's altogether and given each of them a new name, that could not have affected the result.

CAN.

S. C.
1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

Davies, J.

That must depend upon matters of substance, and for the reasons I have before given, I am of opinion that the trust has a territorial meaning and relation to a defined and well understood parochial area, and the maintenance within that area of divine worship in a church specially designated for services of a distinct and special religious character.

The area now known and embraced within the parish of St. Edward's answers really and substantially to the description of the area intended and described alike in the Harris deed and in the act of the legislature of 1875, which latter declares in whom the lands were vested and the uses and purposes for which they were so vested.

The area now embraced in the present parish of St. Stephen's does not answer to such description, and the intervenants in their corporate name of "The Incumbent and Churchwardens of the Parish of St. Stephen's" cannot be said to be the true successors of the "Rector and Churchwardens of St. Stephen's Church" in whom by the act of the legislature of 1875, the lands conveyed by the Harris deed and the church built thereon were vested.

The Church Temporalities Act of 53 Viet. ch. 123, amending that of 14 and 15 Viet. ch. 176, enacts:—

> That from and after the passing of this Act, the soil and freehold of all churches and chapels of the communion of the said Church of England in Canada now erected or hereafter to be erected in the said diocese of Montreal, and of the churchyards and burying grounds attached or belonging thereto respectively, shall be in the parson or other incumbent thereof for the time being, and the churchwardens to be appointed as hereinafter mentioned by whatever title the same may now be held.

Section VII. enacts:—

> And be it enacted, that such churchwardens so to be elected and appointed as aforesaid, shall, during their term of office, together with the incumbent, be a corporation, under the name or style of "The Incumbent and the Churchwardens of ..... Church (*or chapel, as the case may be*), of the Parish of ..... or of (*naming the place, as the case may be*), in the Diocese of Montreal."

The provisions of sec. 4 of that Act would seem sufficient to cover the case of the election of churchwardens not taking place from any cause on the prescribed day.

Now the intervenants in their corporate name of "The Incumbent and Churchwardens of the Parish of St. Stephen's" intervene in this action and ask "that the ownership of St. Edward's church be declared to be vested in them as proprietor thereof." They certainly are not the corporate body designated by the Church Temporalities Act as "The Incumbent and the Churchwardens of ..... Church (or chapel as the case may be) of the Parish of ..... in the

Diocese of Montreal," and cannot be held to be the successors of the corporate body mentioned in the legislation of 1875.

It would be a surprise I should imagine to the incumbent of the present St. Stephen's church in the parish of Montreal to be told that he was also incumbent of St. Edward's church in that parish, or that the churchwardens of the former church were also churchwardens of the latter.

They do not claim as incumbent or churchwardens *of a church or chapel* in the parish of Montreal, but as incumbent and churchwardens *of the parish* of St. Stephen's, and the law does not, so far as called to our attention, provide for any such corporate body. It provides only for corporations known as incumbents and churchwardens *of churches or chapels* in parishes in Montreal diocese.

The law and the facts being in my opinion as I have stated, I agree with the judgment of the Court of Appeal confirming that of the Superior Court in dismissing the intervention on the ground that the intervenants "The Incumbent and Churchwardens of the Parish of St. Stephen's" are not, for the purposes of the trust we are discussing, the successors of the corporation known and called "The Rector and Churchwardens of St. Stephen's Church" in the legislation of 1875, before referred to and set out by me. I have no doubt on the two substantial points on which this appeal must turn, first, that the intervenants are not, with regard to this church property, the legal successors of the old corporation in which the title was vested; and secondly, that the present parish of St. Stephen's is not the parish for whose use and benefit the Harris deed and the legislation of 1875 enacted that church land should be held —but that the parish of St. Edward's is.

With respect to the absence of the title of rector, I agree that any objection which might be raised on that score is overcome by the first section of the Church Temporalities Act of 1890. If it was not so the objection would be fatal to the right of the intervenant. On my mind that section leaves no reasonable doubt. Construing, therefore, the trust deed, the statute of 1875 and the Temporalities Act together in the light of the proved facts, I find that the Courts below were right in dismissing the appellant's intervention.

This appeal should be dismissed and the costs should follow the result.

IDINGTON, J. (dissenting):—I think this appeal must be allowed with costs, for the reason assigned by Mr. Justice Trenholme in the Court of Appeal. I may be permitted, however, to add a test, even if extreme, yet I think logical. Suppose the entire district now constituting the parish of St. Edward's had from the time of the determination of the authorities of appel-

CAN.

S. C.
1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

Idington, J.

lant to build a church elsewhere and use it, been submerged by Paganism and then severed from the rest of St. Stephen's parish, and so remained for a generation, in whom would the property in question be vested? Would it not have remained vested in appellant? And if upon a revival of the Anglican form of Christian worship in the district, by reason say of missionary efforts put forth by appellant in this very church in question, it became expedient to create a new parish surrounding the church, could it be possible to contend that by virtue of the trust suggested the church belonged to the new generation of believers?

It does not seem to me possible to maintain such a contention upon the language used in this deed, and the act of the legislature following it.

Nor do I think that it is within the purview of the Temporalities Act relied upon by Mr. Justice Cross to divest the appellants of the property and as a matter of course vest it in respondent and thus entirely disregard the terms of the trust.

It is regrettable to find such a case as this litigation presents.

It seems to me that if a judgment is rendered in favour of the appellants, then there is no way of making financial use of the property without the sanction of the bishop, as the original trust required, and which requirement I hope has not been weakened by the peculiar wording of the Act. Justice can thus be done all concerned in a way we cannot in this suit.

DUFF, J. (dissenting):—I think the appeal should be allowed. The act of 1875 indisputably gave the title to the property in dispute to the corporation then known as the Rector and Churchwardens of St. Stephen's Church and their successors in office. These successors are as it appears to me the present appellants and the property is consequently vested in them. The continuity of the corporation seems to have been uninterrupted since the passing of the Act and nothing has occurred so far as the evidence shews which could have the effect in law of divesting them of the property.

The general provisions of the Church Temporalities Act, 14 and 15 Vict. ch. 67, which are relied upon by the respondents, cannot, I think, consistently with principle, be held to override the enactments of the special statute of 1875, dealing, as those enactments do, with this particular property. The appellants do not complain of that part of the judgment below which annuls the conveyances executed by the rector and by the bishop of Montreal; and no question is before us touching the nature or the execution of the trusts declared by the Act of 1875. It consequently appears to be unnecessary to express any opinion upon these points.

ANGLIN, J.:—A study of the Harris deed and the Quebec statute of 1875—39 Viet. ch. 74—has satisfied me that after the enactment of that statute the property in question was vested in "the (said) rector and churchwardens of Saint Stephen's church and their successors in office"—an ecclesiastical corporation (14 and 15 Viet. ch. 176, sec. 6)—"in trust for the uses and purposes ecclesiastical of the said parish of St. Stephen's." If, under the terms of sec. 3 of 39 Viet. ch. 74, there is room for any doubt, in view of the authorization which sec. 2 of that statute gives to the application of the purchase money to be derived from the sale of the "old" St. Stephen's parish church and its appurtenances "towards the erection of a church to be also called Saint Stephen's church, on the said lot"—the Harris lot—I agree with Mr. Justice Cross that thereafter the church site in question and the building erected upon it were "held by the same title as that which is provided for the church property in general by the Temporalities Act," 14 and 15 Viet. ch. 176. By sec. 1 of that statute it is enacted that:—

> the soil and freehold of all churches and chapels of the communion of the said Church of England in Canada now erected or hereafter to be erected in the said diocese of Montreal, and of the churchyards and burying grounds attached or belonging thereto respectively, shall be in the parson or other incumbent *thereof* for the time being, and the churchwardens to be appointed as hereinafter mentioned, by whatever the same may now be held, whether vested in trustees for the use of said church, or whether the legal estate remains in the Crown by reason of no patent having been issued though set apart for the purposes of said church or chapel, churchyard or burying ground: Provided always that nothing in this section contained shall extend to affect the tenure of any parsonage or rectory now established by letters patent, or of any proprietory church or chapel.

St. Stephen's church built on the Harris land was a parish church; it was not a "proprietory church or chapel." Though originally part of the parish of Montreal established by Royal letters patent, after its erection into a separate parish by Canon XXVIII. of the synod of the diocese of Montreal, promulgated under the authority of the statute, 35 Viet. ch. 19, St. Stephen's parish could not correctly be described as "established by letters patent." The proviso therefore does not except it from the operation of sec. 1 of the Temporalities Act. Neither do I find anything in the statute 39 Viet. ch. 74, in the nature of a provision of a special Act so inconsistent with the general provisions of the Church Temporalities Act that their application is excluded.

Upon the erection of the parish of St. Edward's (comprising the territory of the parish of St. Stephen's as it stood in 1875 and including the Harris church site which was canonically

CAN.

S. C.
1912

PARISH OF ST. STEPHEN'S v. PARISH OF ST. EDWARD'S.

Anglin, J.

added to it in 1876) and the appointment of an incumbent and the nomination and election of churchwardens of St. Edward's church erected on the Harris property (formerly called St. Stephen's), who, *virtute officiorum*, became a corporation under sec. 6 of the Temporalities Act, the soil and freehold of the church, church site, and appurtenances in question, therefore "vested in trustees for use of the said church," became vested in the new body corporate thus formed (Temporalities Act, sec. 1) as successor of the former corporation of St. Stephen's church, if indeed it is not the same corporation under a new name, as I think it may be.

The trust declared by sec. 3 of the 39 Viet. ch. 74, viz., "for the uses and purposes ecclesiastical of the said parish of Saint Stephen's was, in my opinion, a trust for the benefit of the parish of Saint Stephen's, as then territorially constituted. It may be that adherents of the Anglican church in territory subsequently added to this original parish would be entitled to share in the benefit of the gift. But it is not consistent with the trust, as declared by the statute, that the land, which is the subject of it should be held for the benefit of a parish which, though bearing the name St. Stephen's, comprises no part of the territory which formed the parish of St. Stephen's when the Harris deed was executed and the statute 39 Viet. ch. 74 was enacted—at all events so long as the subject of the trust remains *in specie* as donated and there is an incumbent duly nominated and churchwardens duly elected for the church erected on it, and Anglican worshippers residing within the territory originally comprised in the parish of St. Stephen's assert their right to the benefit of services in that church.

The rector and churchwardens of the "new" St. Stephen's church, may, in some sense and for other purposes, be the "successors" of the rector and churchwardens of St. Stephen's, in whom, by the statute of 1875, sec. 3, the property in question was vested; but their "successors" for the purposes of the trust declared by that statute are, in my opinion, the persons who fill the position of parson or incumbent and churchwardens of the very church to which the statute itself refers as "a church to be also called Saint Stephen's" and to be erected on the Harris lot. That "quality" the respondents possess and it marks them as the statutory successors of the former rector and churchwardens of St. Stephen's in whom the property in question was vested. They are, I think, the same corporation under a new name.

It would, therefore, appear probable that, by virtue of the provisions of the trust deed and of the 39 Viet. ch. 74, the respondents' title to the property might be established. But secs. 1 and 6 of the Church Temporalities Act, providing that the incumbent of each church or chapel with its churchwardens

shall be a corporation, in which the church or chapel shall be vested, put that title, in my opinion, beyond question. If the incumbent and churchwardens of the church now called St. Edward's are not the corporation in which the Harris lot and the church upon it were vested by the Act, 39 Viet. ch. 74, they are its successors for the purposes of the trust, and upon their institution as a body corporate the church and lot became vested in them under the provisions of the Temporalities Act which, on that event happening, divested the former corporation as a pre-requisite to vesting the property in the new body corporate.

The case of alienation with the consent of the bishop of the diocese, provided for in the Harris deed, has not arisen. If that provision of the deed is still efficacious since the enactment of the 39 Viet. ch. 74, it is not now necessary to consider its effect.

Neither are we presently concerned with any equitable or moral claim which the congregation of the new St. Stephen's may have for compensation or re-imbursement in respect of monies advanced by them towards the erection of the present St. Edward's church.

It suffices for the purposes of this appeal to determine that the trusteeship of and the title to the property in question became vested in the respondents upon their institution as incumbent and churchwardens of the church now called St. Edward's, which is the place of worship duly appointed for adherents of the Anglican faith in the territory formerly comprised in the parish of St. Stephen's.

The appeal fails and should be dismissed with costs.

Appeal dismissed.

BRITISH NORTH AMERICA MINING CO. v. PIGEON RIVER LUMBER CO.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. February 15, 1912.

1. PRINCIPAL AND AGENT (§ III—32)—AGENT'S AUTHORITY—APPOINTMENT BY PAROL—CONTRACT BY DEED.

An agent appointed by parol cannot bind his principal by deed.

2. PRINCIPAL AND AGENT (§ III—32)—AUTHORITY TO MINE—SALE OF TIMBER—RIGHTS OF PRINCIPAL.

Under an instrument authorizing an agent to mine and explore the property of his principal and "to act for and take such action or actions as he may consider necessary in the interest of" his principal, such agent was appointed and employed to "mine and explore" only and the general words in the concluding part of the document are limited to that employment and gives the agent no power to sell trees and timber from the principal's property.

3. PRINCIPAL AND AGENT (§ II D—26)—AGENT'S AUTHORITY—RATIFICATION—WHAT CONSTITUTES.

Where an agent sold pulp wood from the land of his principal, though he was authorized in writing only to mine and explore the

ONT.

C. A.
1912

B.N.A. MINING CO. v. PIGEON RIVER LUMBER CO.

property, a letter from the principal stating that the matter of "selling the pulp-wood would be taken up when" the agent returned to his principal's head office was insufficient to add to the agent's authority.

4. ESTOPPEL (§ III D—63)—SILENCE OF A DIRECTOR OF COMPANY—INFORMING OTHER DIRECTORS FORTHWITH—IMMEDIATE INSTRUCTIONS TO PROTECT RIGHTS.

No estoppel by conduct to deny an agent's authority is established on the part of the principal merely because one of its directors who had no particular management of the property in question upon being shewn a contract for the sale of pulp wood from the principal's land made by an agent who was employed for another purpose and for that alone, said nothing until he returned to the head office where he lost no time in informing the other directors as to the sale, resulting in the principal's solicitors at once taking the necessary steps to protect the principal's interest.

5. SALE (§ III B—62)—RECLAIMING PROPERTY—NO AUTHORITY IN AGENT TO SELL.

When pulp wood from his principal's land was sold by an agent without authority, the principal is entitled to follow the pulp wood into the buyer's hands.

[*Greer* v. *Faulkner*, 40 Can. S.C.R. 399, affirming *Faulkner* v. *Greer*, 16 Ont. L.R. 123, followed.]

APPEAL by the defendants (the lumber company and one Smith) from the judgment of Sutherland, J., *B.N.A. Mining Co.* v. *Pigeon River Lumber Co.*, 2 O.W.N. 303, in favour of the plaintiffs. The facts are stated in the judgment.

The appeal was dismissed with costs.

Messrs. *I. F. Hellmuth*, K.C., and *C. A. Moss*, for the defendants.

Messrs. *L. G. McCarthy*, K.C., and *Frank McCarthy*, for the plaintiffs.

GARROW, J.A.:—The plaintiffs are a mining company, incorporated by special Act in the year 1847, amended by 9 & 10 Edw. VII. ch. 69(D.), having their head-office at the city of Montreal, and owned a parcel of land, about ten square miles in extent, known as Prince location, in the district of Thunder Bay. Upon this land, the statement of claim alleges, the defendants had trespassed and cut therefrom a large quantity of pulp-wood amounting to about 2,500 cords, which they had removed from the land and caused to be floated in the Jarvis river, where it was when the action commenced; that the plaintiffs on the 16th June, 1910, demanded possession of and the return of such pulp-wood; and that the defendants deny the title of the plaintiffs thereto, and refuse to give up possession thereof or to return the same. And the plaintiffs claimed a declaration as to the title to such pulp-wood, an account, damages, a return of the pulp-wood, and an injunction. . . .

The defendants the Pigeon River Lumber Company pleaded that they purchased the pulp-wood from the defendant Smith, who had a title thereto under a contract in writing made with one Spittal, the authorised agent of the plaintiffs; that they

found such contract registered in the registry office for the district of Thunder Bay on the plaintiffs' lands, and purchased the pulp-wood in good faith, and were innocent purchasers for value without notice; and other matters by way of defence which need not be set out.

The defence set up by the defendant Smith was of similar purport, in so far as the origin of his alleged title to the pulp-wood was concerned, which he derived through the contract in writing referred to by his co-defendants. He further pleaded that the plaintiffs were estopped by the conduct of their officers; claimed by way of set-off certain allowances for work done for the plaintiffs; alleged that, by the plaintiffs repudiating the action of their agent Spittal, this defendant had suffered loss, damage, and expense, in consequence of his failure to perform his contract with his co-defendants for the supply of pulp-wood. And, by way of counterclaim, he asked to recover from the plaintiffs $4,800 for moneys expended and improvements made upon the plaintiff's lands, and $2,000 for damages because of the interference with his right to cut wood on the plaintiffs' lands.

There were also subsequent pleadings, in which the defendants charge fraud if the plaintiffs repudiate or had not authorised Spittal to enter into the contract under which the defendants claimed. And the plaintiffs ask that the contract, which had been registered, should be set aside and declared null and void.

At the trial, although a considerable amount of extraneous matter was introduced, it was quite obvious, as Sutherland, J., more than once remarked during its progress, that there was really but one main question to be tried, namely, Spittal's authority. And, after hearing all the evidence, the learned Judge held that Spittal had no authority; that the plaintiffs were entitled to the pulp-wood, which had while the action was pending been sold, by consent, and the proceeds paid into Court; that the instrument executed by Spittal, which had been registered (but after and not before the defendants the Pigeon River Lumber Company purchased from the defendant Smith) was and should be declared to be null and void and set aside; that the defendants should be restrained from further trespassing; and, as to the counterclaim of the defendant Smith, that the claim of the plaintiffs for trespass beyond the recovery of the pulp-wood and the claim of the defendant Smith should be set off the one against the other.

I agree with the conclusions of Sutherland, J., who, in his judgment, sums up the result of the evidence so fully and so fairly that I am afraid I can add but little, usefully, to what he has said.

ONT.

C. A. 1912

B.N.A. MINING CO. v. PIGEON RIVER LUMBER CO.

Garrow, J.A.

That the pulp-wood had been cut and removed by the defendant Smith from the plaintiffs' lands, no one disputed. The title of the defendants the Pigeon River Lumber Company, under the circumstances, wholly depended upon whether or not the defendant Smith had acquired a good title as against the plaintiff by the instrument called in the statement of defence a contract in writing, dated the 25th October, 1909. This instrument, when produced at the trial, turned out to be something more than a mere contract in writing, namely, a so-called indenture under seal. The parties to it are the plaintiffs, described as "the vendor," and Fred. J. Smith, lumberman, described as "the purchaser." And it professes, on the part of the plaintiffs, to agree to sell to the purchaser "all the spruce and balsam trees and timber now standing, growing, or being" on the whole of the plaintiffs' before-mentioned parcel of ten square miles, at the price of fifty cents per cord. The testatum clause is as follows:—

> In witness whereof the parties hereto have hereunto affixed their hands and seals the day and year first above written.
>
> The British North American Mining Co. (seal)
>
> In the presence of A. H. Dowler. — Per C. D. Spittal, Manager. (seal)
>
> F. J. Smith. (seal)

The plaintiffs denied that this instrument, which was not under their corporate seal, was their deed or executed with their authority; the contrary of which the defendants attempted to prove by the production of the writing under which Spittal was appointed, which writing was as follows:—

> Montreal, August 11th, 1909.
>
> To Whom it May Concern:
>
> Mr. C. D. Spittal, whose signature subjoins, is authorized to mine and explore all the properties of the British North American Mining Company, namely Prince Location, Spar Island, and Mink Island, etc., and to act for and take such action or actions as he may consider necessary in the interest of the company.
>
> The British North American Min. Co.,
> G. Durnford, Vice-Pres.
> Geo. Bonner, Sec.
>
> Chas. D. Spittal.

But to its sufficiency there is clearly more than one obvious objection.

The plaintiffs' Act of incorporation (clause 13) contains specific directions as to the mode in which the corporation may execute instruments under their corporate seal. Such directions require, in addition to the corporate seal, the signature of the president or of any two directors, and that the instrument should be countersigned by the secretary. But, quite apart from these statutory requirements, it is clear, upon general principles, that an agent appointed by parol cannot bind his principal by deed: see *Berkeley* v. *Harding*, 5 B. & C. 355; *Powell* v. *London*

and Provincial Bank, [1893] 2 Ch. 555; *Hebblewhite* v. *McMorine*, 10 M. & W. 200.

In addition, and apart from any question of the mere form of the contract, the document by which Spittal was appointed, in my opinion, conferred no authority whatever upon him to enter into a transaction such as the one in question. He was appointed and employed to "mine and explore," and nothing else, so far as appears; and the general words in the latter part of the document are and should be limited by construction to the particular employment mentioned in the first part of it: see *Harper* v. *Godsell*, L.R. 5 Q.B. 422; *Jacobs* v. *Morris*, [1902] 1 Ch. 816. It is not easy to see how a person employed to mine and explore could, by reason only of that employment, justify selling any part of his employers' property—much less enter into a contract of the magnitude and importance of the one in question.

Efforts, which in my opinion quite failed, were also made by the evidence to extend and enlarge Spittal's authority beyond that contained in his written appointment. For this purpose, reliance was chiefly placed upon a letter said to have been written to Spittal by the plaintiff, saying, among other things, that "buying the machinery and selling the pulp-wood would be taken up when he (Spittal) went to Montreal." The plaintiffs by their witnesses say that no such letter was ever written. It was not produced at the trial nor very satisfactorily accounted for. But the letter itself, even accepting all that the evidence shews of its contents, was wholly insufficient to add to Spittal's previous written authority. Indeed, if anything, it goes to support the plaintiffs' contention that Spittal never had nor ever was intended to have such authority, and was, if he was corresponding about it at all, which the plaintiffs deny, asking to be granted such authority.

Efforts, equally futile and without sound foundation, were also made to set up a case of estoppel by conduct, because one or more of the plaintiffs' directors are said to have become aware of the sale by Spittal to the defendant Smith; and particularly that Colonel Hamilton, a director, had, about the last of April or the first of May, 1910, been shewn what purported to be the agreement of sale, or a copy of it, in the hands of a solicitor at Fort William. Colonel Hamilton, however, lost no time on his return to Montreal in informing his fellow-directors of what he had seen, and the plaintiffs' solicitors were at once instructed to take the necessary steps to protect the plaintiffs' interests. Colonel Hamilton appears to have acted in the premises with a wise business discretion, in not at once making an outcry which might have had disastrous consequences to the plaintiffs' other and very much larger interests involved in the mining operations then proceeding, which were entirely in

ONT.

C. A.
1912

B.N.A. MINING CO. v. PIGEON RIVER LUMBER CO.

Garrow, J.A.

charge of Spittal. Colonel Hamilton, after all, was only one of several directors, and had no particular charge or management of the property, which on the occasion in question he was visiting chiefly by way of recreation, and not as a matter of business. Such a foundation is, under the circumstances, quite too slender upon which to build a case of estoppel; and, like all the other defences set up, must fail.

The plaintiffs were entitled to follow the pulp-wood itself, as by the pleadings they claimed to do, and Sutherland, J., accordingly, quite correctly, applied the principle laid down in this Court, affirmed in the Supreme Court, in the very similar case of *Faulkner* v. *Greer*, 16 O.L.R. 123; *Greer* v. *Faulkner*, 40 Can. S.C.R. 399.

The appeal, in my opinion, wholly fails and should be dismissed with costs.

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

MEREDITH, J.A.—The trial Judge reached, I am quite sure, a right conclusion in this case, and reached it by the right way. The plaintiffs are suing to recover pulp-wood which unquestionably was theirs, and still is unless the defendants have acquired title to it under them; or else they are in some way prevented asserting title to it against the defendants.

The defendant's attempt to prove title in themselves, under a sale of it by the plaintiffs to one Smith and by him to them, quite failed for want of authority in Spittal to bind them in the sale he made of it, as standing wood, to Smith. Spittal's authority was in writing and did not extend to a sale of the plaintiff's lands or any part of them; but was limited, as the trial Judge considered, to mining and exploring the lands, and all things that he might consider in the interests of plaintiffs in connection therewith. The sale of the wood had not any sort of connection with such mining or exploring; and, though it may not materially affect the legal question, I may add that Spittal's authority, in this respect, was questioned before the sale to Smith and in that transaction, and also in the subsequent transaction between Smith and the defendants; and, that both seemed to recognize, and to act upon the recognition, that something more than the written authority was needed to make the sale valid; and yet neither took the reasonable precaution to make sure of his power; so that the case looks to me like the too common one in such localities of taking chances, and, if anything turns up, as perhaps is too frequently not the case, of "bluffing it through."

The defendants quite failed to prove anything in the shape of a contract depriving the plaintiffs of their property in the pulp-wood; and I can find nothing like a ratification by the

ONT.

C. A. 1912

B.N.A. MINING CO. v. PIGEON RIVER LUMBER CO.

Meredith, C.J.

defendants on the unauthorized sale, in the evidence adduced at the trial.

Then the extraordinary contention was made that the plaintiffs were taking advantage of the fraud of their agents, in bringing this action, and that the law would not permit them to do that; but, in truth, is not the boot on the other foot; is it not the defendants who are seeking to take advantage of the fraud of this person? If the plaintiffs had accepted, and retained the price of the pulpwood, there might be something in the contention; but as the facts are it seems to me to have no sort of weight or application.

The third point is that the plaintiffs cannot have their own property back again, but must be contented with damages assessed at the actual value of the wood, "on the stump" at the time it was cut, that is, that the defendants may dictate the character of the action which the plaintiffs shall bring; and that one may strip the land of another of its timber—which is not, like coal, a dead thing—and satisfy the wrong with the market price of the property taken: see *Faulkner* v. *Greer*, 16 O.L.R. 123; *Greer* v. *Faulkner*, 40 Can. S.C.R. 399.

I would dismiss the appeal.

Appeal dismissed.

BROWN v. HOPE.

B.C.

C. A. 1912

April 2.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.

1. DAMAGES (§ III A 4—71)—DELAY IN DELIVERING A DREDGE—NET EARNINGS FOR DELAYED TIME AS GENERAL DAMAGES—PLEADING.

Where a dredge was not delivered within the time specified in a contract of sale the net earnings thereof for the time delivery was delayed may be awarded the purchaser as general damages, notwithstanding that the plaintiff's pleading claimed only special damage, if such loss was included in the items of special damage claimed, although not allowed under that heading.

2. EVIDENCE (§ VII G—625)—DAMAGES—OPINION EVIDENCE.

While the general rule is that in a civil action any fact which tends to affect the amount of damages is relevant and admissible, opinion evidence is not admissible in support of a claim for special damage for delay in delivery of a chattel *ex gr.* (a dredge) under a contract of sale, to shew a mere probability that the purchaser, had he obtained the earlier delivery contracted for, might have obtained a contract with certain commissioners for public works for the use thereof but was deprived of the opportunity of so doing by the delay. (*Per* Irving, J.A.)

3. SALE (§ III A—51)—LIABILITY OF SELLER FOR DELAY IN DELIVERING A DREDGE WITHIN STIPULATED TIME.

The seller of a dredge, who had knowledge of, or from the circumstances could infer the use the purchaser was to make of it, must compensate the latter for not delivering it within the stipulated time, so that he may be placed in the position he would have occupied had there been a prompt delivery.

[*Clydesdale Shipbuilding Co.* v. *Don Jose, etc.*, [1905] A.C. 6, specially referred to.]

B.C.
C. A.
1912
BROWN
v.
HOPE.

4. DAMAGES (§ III A 4—71)—SELLER'S FAILURE TO DELIVER DREDGE WITHIN STIPULATED TIME—BONUS PAID FOR SPEEDY DELIVERY OF SCOWS.

The non-delivery of a dredge within the time stipulated therefor does not entitle the purchaser to recover as damages a sum of money paid by him as a bonus to ensure the completion of scows, necessary for use with the dredge, before the date fixed for delivery of the dredge, as such loss was not within the contemplation of the parties at the time the contract of purchase was entered into.

AN appeal by the defendants and a cross-appeal by the plaintiffs from the judgment of Murphy, J., awarding plaintiffs judgment for the balance due on the purchase price of a dredge and allowing defendants counterclaim in part.

The appeal and cross-appeal were both dismissed.

G. E. McCrossan, for appellant.

E. V. Bodwell, K.C., for respondent.

MACDONALD, C.J.A.:—I would dismiss the appeal and cross-appeal.

IRVING, J.A.:—By a contract dated 21st February, 1910, the plaintiffs agreed to ship to the defendants on or before 28th April, 1910, a dredge. The price was $8,050, of which $1,000 was paid in cash. The dredge was not shipped until 6th June. The plaintiffs then brought an action for the price, and recovered judgment for $7,614. The defendants counterclaimed for damages and specifically claimed (a) $5,000 loss of profit on a dredging contract which they expected to obtain when they ordered the dredge; and (b) $2,500 loss on cost of scows, this sum being the amount thrown away or needlessly incurred, in consequence of the plaintiffs' delay in making delivery of the dredge.

The learned trial Judge thought the case was governed, so far as the delay in delivery of the dredge was concerned, by *Elbinger Actien-Gesellcrafft* v. *Armstrong* (1874), L.R. 9 Q.B. 473, and that the defendants were entitled to damages; but he refused to allow any damages in respect of the contract for the bonus paid for hurried construction of the scows, or for loss of profit of an expectation of obtaining a particular contract.

The damages which he thought proper to allow were ordered to be assessed by the Registrar, not the damages specifically claimed, but general damages which he based on the net earning power of the dredge per day for 39 working days.

From this judgment the defendants appeal. It was said the only damages asked for were the two items above set out, and no claim had been made for general damages.

It was also objected that as there was no evidence given at the trial which would enable the Judge to assess the damages on the basis settled by him as the proper basis of assessment, he should have dismissed the action instead of directing an assessment. In my opinion neither of those objections should be allowed to prevail.

B.C.

C. A.
1912

Brown
v.
Hope.

Irving, J.A.

By sec. 14 of the Arbitration Act (sec. 68 of the Supreme Court Act) power is given to the Court or Judge to refer to the Registrar for inquiry and report, and by sec. 15 the Court or a Judge may refer "for trial," whether the Judge will deal with the case himself or refer it under these sections is a matter for his discretion. In *Wallis* v. *Sayers* (1890), 6 T.L.R. 356, the Lords Justices complained of the practice of dealing with a common law action as if it were a Chancery suit. The report is interesting to read. It would seem that the practice of referring matters to the Registrar may be overdone. Although it is usual for the trial Judge himself to dispose of damages, I cannot say that there was not jurisdiction to refer this matter. It is perfectly clear that he could allow an adjournment for the purpose of allowing the evidence to be got together.

As to the argument that because of the non-pleading of general damages, and of the omission on the part of the plaintiff to give evidence at the trial, as to what damages had been sustained by the delay in delivering the dredge, the Judge should have dismissed the action instead of in his judgment ordering a reference, I am of opinion that the discretion of the Judge should not be interfered with. I do not think anyone could say he was wrong if he had before reserving his judgment ordered the amendment to be made, and expressed his intention of referring the assessment to the Registrar, in the event of his coming to the conclusion that the defendants were entitled to any damages. It was his duty to get to the heart of the dispute. In my opinion, the general damages, though not pleaded, were included in the special damages, and sufficient evidence had been adduced to shew that the delay in delivery had occasioned loss to the defendants. The division of damages into special and general has been said by Lord Macnaghten to be more appropriate to cases of *tort* than to cases of contract. Very often, as in this case, the same evidence that was submitted to prove the specified damage for loss of the expected contract, was sufficient to shew that there was a substantial loss occasioned by the delay, and that the defendants were, at the very outset, aware that such would be the result of delay; and it would be contrary to justice to dismiss the action because the defendants were not prepared to establish what was the exact pecuniary loss. In *London, Chatham & Dover R. Co.* v. *South Eastern Ry.*, [1892] 1 Ch. 120, where the action was rather one for specific performance than an action for damages for breach of contract, and where the pleadings did not ask for damages, Kay, L.J., at p. 152, said:—

> I need not consider these difficulties. If the case were one in which justice required that such damages should be given, the Court would not be prevented, under our present system, by any technical difficulty from doing justice.

B.C.

C. A. 1912

BROWN v. HOPE.

Irving, J.A.

The measure of damages proposed by the learned trial Judge is practically the same as that adopted by Lord Cairns in *Trent and Humber Co., In re Cambrian Steam Packet Co.* (1868), L.R. 4 Ch. 112, at p. 117.

As to proving damages for delay, see Lord Halsbury's speech in *Clydebank Shipbuilding Co.* v. *Don Jose, etc.*, [1905] A.C. 6, at p. 11. The law of damages contemplates that the person complaining should be placed in the same position as he would have been in if the contract had been performed, and the plaintiffs having been informed of or knowing the circumstances from which they could infer the use the dredger would be put to, ought to compensate the defendants for the delay in delivery.

As to the $2,500 for loss on scows, the claim is this, that the dredge was expected to be ready for shipment on the 28th April. In order to have a scow ready by the date on which the dredge would arrive, had it been shipped on that date, the defendants had to pay a bonus of $2,000. As the dredge did not arrive when expected, they, the defendants, feel that the bonus was thrown away and that they are entitled to recover it from the plaintiffs. Such a loss does not seem to me to have been in the contemplation of the parties.

As to the $5,000. There is a difference, as pointed out by Mr. Bodwell, between determining whether the plaintiff is entitled to any damages, *i.e.*, substantial or nominal, or none at all, and the assessment of the damages. The Judge deals with the first. The jury have to deal with the latter. In exercising this duty they have a very wide field, and to assist them the Judge gives directions, but in giving those directions the Judge does not lay down hard and fast lines, and then send the jury away to work out the result according to his directions. He puts before them the case in a more general way, and then they make an award such as they think proper to give under all the circumstances.

But where the Judge has to determine the damages without a jury, he lays down for himself with exactness the rule that he thinks ought to be followed. Can the plaintiffs complain that he by awarding a sum for general damages, takes into consideration the established fact that there was plenty of employment to be had? I don't think they can.

Can the defendants complain that the Judge refuses to regard the contract with the commissioners as a settled thing? I don't think they can.

The Judge in my opinion, arrived at a fair measure of compensation. In my opinion the trial Judge was right in stopping the defendants' witness Mathers from giving evidence as to what the commissioners would do, p. 95.

The general rule is that in a civil action any fact which tends to affect the amount of damages is relevant and admissible, but

this question seeks to obtain the opinion of the witness, and that is not permissible.

I would dismiss the appeal and cross-appeal, and refuse the application for a new trial. I would refuse this on the ground only that it is unnecessary; the course adopted by the trial Judge is sufficient to meet the justice of the case. The amount of damages ought to have been settled by the parties themselves: see Lord Halsbury at the foot of p. 612 in the *Owners of No. 7 Steam Sand Pump Dredge* v. *S.S. Greta Holme*, [1897] A.C. 596.

GALLIHER, J.A.:—I would dismiss the appeal.

Appeal and cross-appeal dismissed.

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, and Magee, JJ.A. February 22, 1912.

1. WATERS (§ II D—95)—OVERFLOW OF BANKS—CHANNEL NARROWED BY MUNICIPAL BRIDGE—LIABILITY OF MUNICIPALITY.

When the work incidental to the building of a bridge over a creek where it is crossed by the highway narrowed its banks so as to cause the plaintiff's lands to be periodically flooded, the cause of action is not the building of the bridge but the damage caused by the floods, and after he has parted with the land he has no right to restrain the municipality from maintaining the bridge, nor can he recover damages from the municipality on the basis of any depreciation in the selling price of the land because of its liability to be flooded.

[*West Leigh Colliery Co.* v. *Tunnicliffe and Hampson, Limited*, [1908] A.C. 27, at p. 29, followed; *McClure* v. *Township of Brooke* (1902), 5 O.L.R. 59 (C.A.), distinguished.]

2. COURTS (§ II C—185)—DRAINAGE CASES—TRANSFER OF ACTION—REFERENCE TO DRAINAGE REFEREE.

It is not a valid objection to the jurisdiction of a drainage Referee in Ontario to whom an Assize Judge had ordered a transfer of the action for trial, that no question of drainage arose in the case, as by the Municipal Drainage Act, 10 Edw. VII. (Ont.) ch. 90, sec. 99, the Court has the power, where the action is brought within two years from the occurrences of the damage, to so refer for trial, not only where proceedings for the relief sought might properly have been taken before the drainage referee but also in cases where the Court is of opinion that the action might more conveniently be tried by him.

This was an action for damages for the flooding of the plaintiff's lands, begun in the High Court of Justice by writ of summons issued on the 28th December, 1909.

The action was set down for trial at Sandwich, and came before BOYD, C., who made an order on the 18th May, 1910, directing "that the matters in dispute between the parties be transferred for trial by the Referee appointed under the provisions of the Municipal Drainage Act, to be tried pursuant to the provisions of the said Act, and all proceedings herein may be had and taken as if the action had originally been brought under and by virtue of the said Act."

ONT.

C. A.

1912

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Referee Henderson.

The referee (George F. Henderson, Esquire, K.C.) accordingly proceeded with the trial, and gave judgment on the 30th May, 1911, as follows:—

The plaintiff is the owner of a low-lying farm, situated between Cedar creek and Lake Erie, almost at a point where that creek finds its outlet into the lake. When he purchased the property, he found a considerable portion of it to be low-lying, swampy land, into which there ran a trend of water, which some of the witnesses have dignified by the term of creek, but which is hardly to be called such, known as Pike creek, and the swamp on the plaintiff's property being called Pike swamp. Being apparently a man of means as well as enterprise, he conceived the idea of reclaiming this land, and for that purpose constructed an embankment along the edge of Cedar creek and built a pumping station with a view to taking the water from the outlet of Pike creek by means of pumping, and thus discharge it into Cedar creek. This succeeded for the first year or so after the construction of the pump, but subsequently became of no use to the plaintiff because of another chain of events to which reference must be made.

Cedar creek is a stream of somewhat unusual size for a creek, and is the outlet for a large number of drainage schemes in the upper township, as well as for drainage in the township of Gosfield South. It is a natural watercourse in every sense of the term. For some time prior to the period of the plaintiff's ownership of the property, the highway crossing that stream to the east of his property, the stream being crossed by a bridge, belonged to the township. In 1891, that bridge was reconstructed, apparently under the control of a joint committee representing the county council as well as the township council; and the question arises as to which municipal body was responsible for its being where it now is. I find, on the evidence, that the bridge was constructed by the township council, although the county council supplied one-third of the cost of its construction, and probably, through its officers, had more or less to do with the details of the construction. As a matter of legal effect, it was a work of the township, not a work of the county. In any event, the liability was beyond question township liability. It replaced what was undeniably a township bridge and a township bridge alone; and, whoever may have owned it pending construction, it was at once taken over by the township as a township bridge, and the township was responsible for its continuance. This bridge, constructed in 1891, remained until 1907, when it was replaced by the structure with which the highway is crossed to-day. The opening of the present bridge is practically of the same size as that of 1891, but it is a more modern construction, and the absence of spiles give it a greater capacity, if otherwise unobstructed.

The 1891 bridge replaced a former bridge of a greater span, there being a difference, which the evidence does not with abso-

lute accuracy determine, but approximately a difference of forty feet. The natural stream was at least one hundred feet in width at that point, and the span of the present bridge is somewhat less than seventy feet, the bridge being a cement and steel structure, and its abutments being built in the ordinary way.

There are differences in the width of the opening at water levels, depending upon the height of the water. The result of the construction of that bridge was materially to narrow the stream. It had in fact greater capacity than the bridge which was formerly there, that is, from an ordinary engineering point of view; and, had something else not happened, this trouble might not have arisen. In the year following its construction, however, and at the time of the spring freshet, the opening of the bridge became partially blocked by the accumulation of ice and débris brought down by the spring freshet, and the force of the water, which was held back by that blocking, broke through the bank of the creek, which happened to be a very short distance only from the water of the lake, at a point almost immediately west of the bridge, and thus created a new outlet to the lake for the waters of the creek.

There is a highway running along that bank, the south-westerly bank, of the creek; and the township authorities, instead of at once filling up the opening made by this flood water, and in that way repairing the highway, thought proper to build a bridge over it and maintain the highway in that condition. That appears to have been a large opening; and, when the bridge over it was completed, it gave not only a larger opening for the waters of the creek but a shorter course to the lake than the original course, which was some little distance further down stream.

The bridge was maintained by the township authorities as a bridge for ten years, and during those ten years the bulk of the water coming down the creek took the more ready means of access to the lake under this newly constructed bridge; and, as incidental to that, the opening under the highway bridge, to which reference has first been made, became considerably lessened by the deposit of sediment brought down stream and checked in its course or flow partly by the abutment of the bridge and partly by the natural checking of the current of the water turning the corner.

At the end of the ten-year period, to which I have referred, the township authorities, for some reason which is not perhaps easy to understand, saw fit to take away the bridge and block up this place in the road which had been washed out ten years before. I say it is not easy to understand why they did that, because about that time they appear to have purchased land to build a new outlet for the creek on the easterly side of the main bridge. However, they did it, and apparently did it as a part of a scheme of reconstruction of the bridge, which had been built in 1891, and which again required reconstruction. I perhaps have

ONT.

C. A.
1912

WIGLE
v.
TOWNSHIP
OF GOSFIELD
SOUTH.

Referee
Henderson.

not made it clear that the bridge as built in 1891 was somewhat of an old-fashioned structure, supported on spiles, and that the bridge which replaced it in 1907, in the month of October, was the cement and steel bridge to which I have referred. Perhaps I was somewhat confusing in my early references to that. The result was, that in the month of October, 1907, conditions were entirely changed, and the waters coming down Cedar creek had no further outlet than that under the cement bridge, with the accumulated sediment to which reference has already been made. The evidence satisfies me that there never has been since the construction of the bridge in 1891 a free flow of water down Cedar creek or a free outlet for the water brought down Cedar creek except during the ten-year period, when there was an alternative outlet by means of the wash-out course.

In the latter part of the month of December, 1907, the plaintiff, for the first time, suffered a flood, which crossed over his bank and flooded a great portion of his farm. That was in the winter season, when apparently no appreciable damage resulted. In the following spring, 1908, he had two floods. Some question arises as to the character of these. There is a great deal of evidence; and, as is unfortunately only too customary in this class of case, there is an attempt to shew that the floods were, or some one of them was, of an extraordinary character; and, as again frequently happens in this class of case, witnesses are called to verify that position. While satisfied that there was an extraordinary flood, they do not agree as to just when that happened; none of them speak of more than one flood. The plaintiff was damaged by two floods; and, for that and other reasons, I am satisfied that there was nothing extraordinary, in the proper sense of the term, about either of the floods which caused him damage. The township authorities would not be responsible for any really extraordinary flooding within the proper meaning of that term, as it is defined by the Court of Appeal in *Coghlan* v. *City of Ottawa* (1876), 1 A.R. 54, which is the only case which occurs to me at the moment.

There is no pretence that other floods which happened in the following year, 1909, were extraordinary. The plaintiff suffered damage to his lands in each year; and the question is whether or not the defendants are responsible. I think Mr. Wilson is right in his position that the defendants had no right to obstruct the full flow of the natural stream. Unfortunately, the case has been argued on both sides without any citation of authorities.

I am arriving at a conclusion without having had the advantage of any personal search for authority. Either party must take the result of any failure that ensues. It appears to me that the defendants can be in no higher position than the ordinary riparian owner. They are not the owners of the fee, but they have control of the highway for highway purposes; and I think it proper to assume that, for the purposes of this case, they have

ONT.

C. A.

1912

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

Referee Henderson.

the rights of a riparian owner. As I understand the law, any riparian owner, whether up-stream or down-stream from his neighbour, has a right to protect himself against the common enemy, flood-water, whatever the result may be to his neighbour. Mr. Wigle had the right to erect the embankment which he did. It is not contended otherwise. I cannot understand any principle upon which the defendants had the right to place an obstruction in the bed of the stream so as to interfere with the flow of the water. The evidence satisfies me that the bridge did interfere with the flow of the water. If that bridge had not been there, the water would not have been held back so as to overflow the plaintiff's land. It is not contended that the defendants acquired a right to maintain a bridge by lapse of time, or upon any other legal principle that I can think of, or to which counsel has referred.

I assume that none of the work was done by by-law. The closing of the wash-out course was done without even a resolution of council; and, although the evidence is silent as to the authority for the building of the bridges in 1891 and 1907, the argument has proceeded on the assumption that there were no by-laws.

I am forced to the conclusion that the defendants have maintained a bridge which is an obstruction to the stream, because it narrows it and holds back water, and it is responsible for the consequences. If I am right in this, it becomes a question of assessment of damages. The plaintiff's damages are divisible into two parts, the first or more important part at the end, and I propose to deal with it first, that is, the depreciation in the market value of his property. He bought the land originally in partnership with a friend. Shortly before the commencement of this action, he entered into a contract, which has subsequently been carried out, to sell the property for $14,000. It had cost him $11,700. It may have been a good bargain or a bad bargain. After purchasing he had improved it by the construction of the dyke and pumping station, and probably otherwise. He certainly had done considerable ditching on it. The purchaser says that he bought it with full knowledge of the disability which attached to it, expecting that it might be overflowed from year to year, as it was overflowed in 1908 and 1909. He says that, if it had not been subject to that disability, he would have been willing to pay $19,000 for it, instead of $14,000. That, however, was never a practical question with him, and he gave that valuation to-day as a matter of opinion only. In other words, he puts the depreciation at $5,000. The plaintiff himself puts it in as $4,000. One witness called by the defendants says that there is no depreciation in value; but I attach no importance to his evidence: first, for the reason that he did not impress me as being the kind of a man who could give satisfactory evidence of valuation; and, beyond that, for the reason that it is rather absurd to say that there is no depreciation.

ONT.

C. A.
1912

WIGLE
v.
TOWNSHIP
OF GOSFIELD
SOUTH.

Referee
Henderson.

I viewed the land yesterday, and was somewhat surprised to find the plaintiff putting the depreciation at as high a figure as $4,000. Counsel for the defendants asks me to use my knowledge obtained on the view, and takes the responsibility for my doing so. I do not find it necessary, however, to act upon that alone, as it is in evidence that, on the dissolution of the partnership between the plaintiff and his friend who was with him in the purchase of the property, the value was placed at $16,000, and he paid his partner $8,000 for the half interest. This was after the damage had occurred; and this incident is perhaps the best evidence of value. It agrees with my own impression; and, considering that evidence as well as my own impression, I think that the plaintiff is entitled to $2,000 for depreciation.

Counsel have not overlooked the question as to whether it is a case for the allowance of permanent depreciation, in view of the fact that the present owner has purchased with knowledge of the disabilities attaching to the land.

The other branch of the damages is made up of a number of items which are detailed in the particulars filed; and, if my arithmetic is correct, amount to $4,690. I do not propose to discuss these in detail. I have considered the different items carefully as they were given by the witnesses in evidence, and I am there again applying the knowledge, which I obtained on the view, so far as it is helpful; and on the whole I have taxed off the plaintiff's particulars of damages the sum of about $1,500; and I conclude to treat the matter as a jury would treat it, and allow the plaintiff for damages in the two years the sum of $3,000, that is, within a very few dollars of the actual arithmetic as I arrived at it during the course of the hearing.

In the result, I find the plaintiff entitled to recover damages in the amount of $5,000 with costs of the action.

The defendants appealed to the Court of Appeal from the judgment of the Referee; and the plaintiff cross-appealed, seeking to increase the damages.

J. H. Rodd, for the defendants. The Referee, having found no question of drainage involved in the action, had no power to deal with the questions "pursuant to the provisions of the said Act" (the Municipal Drainage Act) as recited in the order of transfer, as the questions involved did not come within the purview of such provisions: *Northwood* v. *Township of Raleigh* (1882), 3 O.R. 347, at pp. 357 and 358; *McGillivray* v. *Township of Lochiel* (1904), 8 O.L.R. 446. In any event, the proceedings never became instituted under the Municipal Drainage Act until the making of the order of transfer, and no cause of damage existing more than two years prior to that date should have been considered: *Whitehouse* v. *Fellowes* (1861), 10 C.B.N.S. 765. Assuming that the Referee had jurisdiction, he erred in holding that the plaintiff had a right to complain of the shortening of the

bridge in 1891, because he was not then the owner of the lands in question. The bridge then constructed was sufficient for the waters which came down, and it was not until the Corporation of Colchester South diverted into Cedar creek the waters from over 3,000 acres of their lands, that any inadequacy appeared, and the defendants are not responsible for the damages resulting: *Dickson* v. *Carnegie* (1882), 1 O.R. 110; *Law* v. *Town of Niagara Falls* (1884), 6 O.R. 467; *Brown* v. *Street* (1844), 1 U.C.R. 124; *Austin* v. *Snyder* (1861), 21 U.C.R. 299; *Dickson* v. *Burnham* (1868-70), 14 Gr. 594, 17 Gr. 261. The plaintiff constructed his pumping system while this was the only outlet, and he was not in any worse position after the closing of the accidental channel than he was before. The plaintiff had no right to this accidental outlet: *County of York* v. *Rolls* (1900), 27 A.R. 72. If he suffered any permanent depreciation in the value of the lands by this closing, an equal enhancement in value was made by the breach, and to this enhancement he was not entitled. No damages whatever, therefore, should have been allowed for depreciation; nor should he be allowed for prospective damages: *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson Limited*, [1908] A.C. 27; *Young* v. *Grand River Navigation Co.* (1856), 13 U.C.R. 506, at p. 507. By the breach, the waters of Cedar creek were diverted over his neighbour's land, and it was the duty of the defendants to close up the opening; and the bridge constructed was intended to be only a temporary way. Unless the plaintiff shewed negligence in construction he could not succeed: *Patterson* v. *Township of Peterborough* (1869), 28 U.C.R. 505; *Langstaff* v. *McRae* (1892), 22 O.R. 78. In any event, the closing was done in September, 1907, and the action was not begun for more than two years after the damage was done: *Bureau* v. *Gale* (1911), 44 S.C.R. 305. The damages allowed are excessive.

M. Wilson, K.C., for the plaintiff. The defendants cannot now question the jurisdiction, because the Court had jurisdiction to make the transfer under sec. 99 of the Drainage Act, and because the defendants are estopped from objecting to the proceedings by their consent and request, as appears by their solicitors' letters. Besides, the defendants accepted and acquiesced in the order as issued, and acted thereon. The defendants could not delay the trial of an action until the lapse of two years from the time of the damage, and then object to the jurisdiction of the Referee because of the lapse of such two years before the order of reference. On the contrary, the action having been brought within the two years, sec. 99, sub-sec. (2), applies. The plaintiff, however, does not admit that he is bound by the limitation of two years. The plaintiff is entitled to damages against the defendants, for the reasons given by the learned Referee: *Coghlan* v. *City of Ottawa*, 1 A.R. 54. The defendants had a remedy against the upper municipality: 10 Edw. VII. ch. 90, sec. 3, sub-sec. 3 (O.); *Sutherland-Innes Co.* v. *Township of Romney* (1899), 26 A.R. 495;

ONT.

C. A.
1912

WIGLE
v.
TOWNSHIP
OF GOSFIELD
SOUTH.

Argument

S.C. (1900), 30 S.C.R. 495. The plaintiff was entitled to have the free and full flow of Cedar creek, or such a substitute as would give a like advantage or protection to the plaintiff's land. There was no reasonable evidence upon which it could be found that the damage in question would have arisen from the act of the Corporation of Colchester South, if the defendants had left the creek unobstructed by the bridge. Moreover, the bridges and obstructions were placed by the defendants in Cedar creek, and the defendants filled up the relief outlet, all after the alleged drainage in Colchester. See *In re Townships of Orford and Howard* (1891), 18 A.R. 496. The damage was occasioned by reason of a wrongful permanent obstruction made by the defendants in Cedar creek. The plaintiff is entitled to a greater sum for damages for the permanent injury to his farm than that allowed by the Referee.

Rodd, in reply.

February 22, 1912. MOSS, C.J.O.:—This is really quite a simple case, and, as viewed in the light of the evidence as developed before the Drainage Referee, might very well have been tried and disposed of at the non-jury sittings. But the parties appear to have formed and acted upon the view that it was a case proper to refer to the Drainage Referee, by whom it was fully tried; and this is an appeal by the defendants and cross-appeal by the plaintiff from his judgment. An objection was made, at this late stage of the case, to the authority or jurisdiction of the Referee to deal with the case under the order, because, it was said, the case did not fall within the provisions of the Municipal Drainage Act, for two reasons, one being that a question of drainage was not involved; the other being that the cause of complaint arose more than two years before the commencement of the action.

The damages in respect of which the plaintiff brought his action arose from flooding his land, the earliest having occurred on the 30th December, 1907, and the others in the years 1908 and 1909. The action was commenced on the 28th December, 1909. The cause of the flooding was the erection by the defendants in 1907 of a bridge across Cedar creek, which had the effect of narrowing its channel.

From the nature of the case it is apparent that the cause of complaint here is not the building of the bridge but the damage occasioned by the subsequent floods. In other words, the cause of action is the damage, and the plaintiff could not have instituted an action seeking damage until he had suffered some. Probably he could, while still owning the land, have applied for and obtained an injunction; but he did not seek this remedy; and his only claim is and must be for the damage fairly and reasonably attributable to the floodings which took place before he commenced this action. And the cause of complaint in respect of these damages did not arise until within two years be-

fore the issue of the writ: *Whitehouse* v. *Fellowes*, 10 C.B. N.S. 765. That being so, an answer to both grounds of objection to the Referee's authority is supplied by the amendment to the Municipal Drainage Act, 9 Edw. VII. ch. 78, sec. 2, now sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90, which empowers the Court or Judge to transfer an action, not only where it appears that the relief sought therein is properly the subject of proceedings under the Act, but where it appears that it may be more conveniently tried before and disposed of by the Referee. It never could have been intended that, because the reason given in the order of transference afterwards turned out not to be the best reason, all that took place after the making of the order should be set aside and treated as nugatory.

Upon the evidence before him, the Referee concluded that there was an improper interference with the width of the channel of Cedar creek, the result being that in times of freshet there was an interruption of the flow of the stream, which had the effect of flooding the plaintiff's lands. This finding is in accordance with the great preponderance of the testimony.

The question is thus reduced to one of the extent to which the plaintiff suffered damages for which he ought to be compensated in this action. Having parted with the land, he has now no right of action to restrain the continuance of the obstruction of the stream. Nor can he suffer damage by reason of any subsequent flooding.

One item of his claim is for depreciation in the selling value of the land by reason, as it is said, of the fear of future flooding, and the prejudice against the continuance of such a state of affairs. The plaintiff did not, as he might have while still owner, take steps to prevent the possibility of such future damage. And, by reason of the absence of a by-law, the case is not one in which compensation is being awarded under the provisions of the Municipal Act as for lands injuriously affected by the work that has been done. In that case every claim for compensation would be settled once for all. Here the plaintiff is confined to such damages as properly and naturally result from each flooding; and alleged depreciation in the selling value is not comprised therein. This follows upon the principle that the damage, not the erection of the bridge, is the cause of action.

Lord Macnaghten's statement in *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson Limited*, [1908] A.C. 27, at p. 29, made in a subsidence case, seems not to be distinguishable in principle from this case. After first expressing the opinion that the damage not the withdrawal of support was the cause of action, he said: "If this be so, it seems to follow that depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself." And the Lord Chancellor said (p. 34): "To say that the surface land would sell for less because of the apprehension of future sub-

ONT.

C. A.
1912

WIGLE
v.
TOWNSHIP OF GOSFIELD SOUTH.

MOSS, C.J.O.

sidence is no doubt true. To say that the depreciation in present value caused by that apprehension ought to be included as an element of compensation is, in my view, unsound. For that is asking compensation, not for physical damage which has in fact arisen, but for the present influence on the market of a fear that more such damage may occur in future." See also *Rust* v. *Victoria Graving Dock Co.* (1886), 36 Ch. D. 113.

A contrary view would involve the possibility of a purchaser who acquired the property at a reduced price afterwards recovering for the future apprehended damage from persons who had already been charged for it by an allowance against them for depreciation in selling value. The sum of $2,000 allowed by the Referee under this head should be disallowed.

With regard to the other items of the claim, a number of which appear to be unsustainable and others to be exaggerated, there were some obvious mistakes and omissions in the summation of items. Allowing for these, and after examination of the particulars, and consideration of the evidence, it appears to me that a fair compensation to have allowed would have been the sum which my brother Garrow has named.

The result is, that the judgment should be varied by reducing the sum which the plaintiff is to recover from the defendants to $1,320; and the cross-appeal should be dismissed.

The plaintiff should pay the costs of the appeal and cross-appeal.

GARROW, J.A.:—Appeal by the defendant and cross-appeal by the plaintiff from the judgment of the Drainage Referee in favour of the plaintiff.

The proceedings were commenced by a writ of summons issued out of the High Court, dated the 28th December, 1909; and the action proceeded to trial in the usual way. At the trial, the action was referred to the Drainage Referee for trial, under the provisions of the Municipal Drainage Act.

The complaint of the plaintiff is, that the defendants had by their acts interfered with the free flow of the waters of Cedar creek by closing up a certain outlet, and erecting a bridge which materially narrowed the natural channel, thereby causing the plaintiff's lands to be flooded to his injury.

The cause of action thus disclosed is not, I think, one falling within the class of complaints for the trial of which special provision is made in the Municipal Drainage Act. But the order of reference was not moved against, and, moreover, appears to have been made by consent, although not so stated on its face, so that the decision in *McClure* v. *Township of Brooke* (1902), 5 O.L.R. 59 (C.A.), does not apply. And it should also be noted that, since that decision, the statutes have been further amended: 9 Edw. VII. ch. 78, sec. 2, practically restored sec. 94 of R.S.O. 1897, ch. 226, which, at the time of that decision, had been repealed by 1 Edw. VII. ch. 30, sec. 5. This may make it necessary, should

the circumstances again arise, to reconsider *McClure* v. *Township of Brooke* in the light of subsequent statutory changes.

The learned Referee found the issues in favour of the plaintiff, and assessed the damages at $5,000, for which the plaintiff has judgment, which damages, the plaintiff by his cross-appeal contends, should be increased.

The defendants, besides contending that the reference was improperly made to the Drainage Referee, say that the bridge and its openings are sufficient for the waters which by nature would flow in the stream, and that the injury of which the plaintiff complains is really caused by additional waters brought into it in large quantities by several extensive drainage schemes, having their outlets above the bridge, and that, in any event, the damages allowed are excessive.

The defendants also contended before us that the plaintiff's claim was barred by the special limitation clauses of the Municipal Drainage Act. There was no plea of the Statute of Limitations; and, even if there had been, it would have been of no avail, because the plaintiff's claim from its nature does not fall within the special provisions of that Act.

Coming now to what may be called the merits: the facts seem to be very fairly and also with considerable fullness stated in the judgment of the learned Referee. He arrived at the conclusion, upon the evidence, that the effect of the new bridge built in the year 1907 was materially to narrow the stream; and that such narrowing and the closing up at the same time of the opening at the westerly end of the former bridge, through which a large portion of the water flowing in the stream had for years escaped, had caused the flooding of which the plaintiff complains. And the evidence, in my opinion, amply justifies these findings, although it is quite probable that the extent of the flooding, which it is sought to attribute wholly to the defendants' acts, is considerably exaggerated.

No by-law for the erection of the bridge was proved, and no expert or other evidence was given to shew any necessity for so constructing a bridge as that its solid approaches should narrow the channel, as this bridge undoubtedly does, from about 100 feet to about 65 feet.

The new bridge was, no doubt, required for the purposes of the highway; and, if it had been so constructed as to leave open the full width of the natural channel—less, of course, any necessary piers placed in it for the support of the bridge, including even the closing up of the westerly opening—the plaintiff could not, I think, have successfully complained. What he does complain of, and with justice under the circumstances, is the combination of the two things.

Mr. Rodd contended that the bridge, as it is, is sufficient for all the water which would naturally flow in the stream, and that the flooding of which the plaintiff complains was really due to

ONT.

C. A.

1912

WIGLE v. TOWNSHIP OF GOSFIELD SOUTH.

GARROW, J.A.

other water brought into it by a series of artificial ditches and drains up-stream from the bridge, which use the stream as their outlet. And there is no doubt, upon the evidence, that the water which, in a state of nature, would naturally flow in the stream, has been substantially increased by these drainage works. The whole neighbouring territory is very low and flat. A large part of the plaintiff's lands was a marsh, in part below lake level, until reclaimed as far as it has been by his extensive drainage works, which necessarily included an embankment to keep the water out and a pumping arrangement in addition. A running stream is, up to its carrying capacity, a natural outlet for drainage water, and there is, I think, no reliable evidence, that, if the whole natural width of the banks had been maintained, they could not have contained and carried even those additional waters. But, however that may be, it seems to be not a good answer to the plaintiff's complaint to say, "Our narrowing of the channel would have been quite harmless but for such additional water." These drainage works had all, or nearly all, been established before the last bridge was built, and their waters were then being carried in the stream past the plaintiff's lands without injury escaping in part under the old bridge, and in part through the westerly opening before mentioned. The place of the latter as an escape is by no means supplied by the opening at the east side of the new bridge; among other reasons, because, before the water reaches it, it must all pass through the bridge; whereas the opening at the west end permitted water to escape before it reached the bridge. In the absence of any satisfactory explanation, it seems to me to have been a great mistake to close that opening, even to save the expense of maintaining an additional bridge over it, which was, I suppose, the real reason for doing so. But, as I have said, in effect, the defendants might have been blameless if, in, closing it, they had not also narrowed the channel.

As to the damages, I am inclined to agree with Mr. Rodd that the case is not one in which there should be a recovery as for a permanent injury. The erection complained of is upon the highway, and is wholly under the control of the defendants, and may at any time be so modified or changed as to remove all just cause of complaint. It is not, under the circumstances, the erection of the bridge which alone gives a cause of action to the plaintiff, but the flooding. And the flooding is not continuous, but only occasional. And for each occasion a new right of action would accrue. If there had been a by-law authorising the erection of the bridge, the plaintiff's proper remedy would, I suppose, have been under the arbitration clauses of the Municipal Act, in which case his damages would have been ascertained and fixed once for all. But, there being no by-law, and the defendants objecting, doubtless for good reasons, I think the sum ($2,000) allowed by the learned Referee under this head cannot stand. See *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127; *West Leigh*

Colliery Co. v. *Tunnicliffe & Hampson Limited*, [1908] A.C. 27. *Arthur* v. *Grand Trunk R.W. Co.* (1895), 22 A.R. 89, in which a contrary conclusion was reached in the case of a railway company permanently interfering with a watercourse by the construction of their line, is, I think, distinguishable. See also *McGillivray* v. *Great Western R.W. Co.* (1865), 25 U.C.R. 69.

The other items of damages all appear to me more or less excessive. The learned Referee made a considerable reduction, but, in my opinion, by no means enough, especially in the case of two items which I will presently deal with. He assumed to reduce a total of $4,690 by $1,690. But the correct total is only $4,184.90. Included in this is an item in the particulars of $2,200, which the plaintiff himself says was only intended to be $1,700. So that, making the correction, the total of these items would stand at $3,684.90. And deducting the $1,690 taken off by the learned Referee, the result would be $1,994.90. But the $2,200 item for loss of 17 acres of tobacco land in 1909, and the one next of loss of 15 acres in the previous year, which is put at $692, both of which are clearly for estimated future profits upon crops which were never even sown, are quite too remote, and cannot be allowed. Unfortunately, the learned Referee has not, in his judgment, discussed this question, although the foundation for what, in my opinion, is the proper measure of such damages is given in the evidence, namely, the annual value of the land. This is placed by the plaintiff himself at the highest at $10 per acre, for what is called "tobacco land," and for ordinary land $3 to $3.50 per acre. The total loss on those two items at $10 per acre would be only $320, instead of the enormous sums which the plaintiff claims; and at that sum, I think, they may, with justice to the plaintiff, stand.

The other items in the particulars not before dealt with amount in all to $1,291.90. I do not propose to deal with each of them in detail. I do not, of course, know how much of the total deduction of $1,690 which the learned Referee made he intended to ascribe to the two items with which I have just dealt. But, from what is said in the judgment, it may, I think, be assumed that he did not intend the reduction to be wholly confined to them. With this idea, I think a proper and indeed a liberal sum to allow in respect of all the remaining items which make up the $1,291.90 would be $1,000, or in all, with the $320 for the tobacco lands, $1,320, to which sum the judgment should, in my opinion, be reduced.

And, in view of the very substantial relief so afforded to the defendants, to obtain which an appeal was necessary, I think the plaintiff should pay the costs of the appeal; and that the cross-appeal should be dismissed with costs.

MACLAREN, J.A., concurred.

ONT.

C. A.
1912

WIGLE
v.
TOWNSHIP
OF GOSFIELD
SOUTH.

Magee, J.A.

MAGEE, J.A.:—It is manifest that the matters involved are not such as under the Municipal Drainage Act (9 Edw. VII. ch. 78, sec. 1) or 10 Edw. VII. ch. 90, sec. 98, should have been brought in the first place before the Referee appointed under that Act. No petition, report, resolution, or by-law relative to drainage is attacked, nor is there any claim or dispute in respect of anything done or required to be done under that Act or consequent thereon or by reason of negligence in any such regard, nor was any mandamus or injunction asked in respect of any such matter.

The defendants, however, set up that, because, as they alleged, the damage, if any, had in part resulted from the drainage works of other municipalities, the High Court of Justice had no jurisdiction to try the issues. The plaintiff seems to have acquiesced in the propriety of transferring the case to the Drainage Referee; and, on his application, an order was made, evidently by consent, as is stated and appears from the correspondence. That order, dated the 18th May, 1910, recites that it appears that this action involves the question of drainage, and it directs that the matters in dispute between the parties be transferred for trial by the Referee appointed under the Municipal Drainage Act, to be tried pursuant to the provisions of that Act, and all proceedings might be had and taken as if the action had originally been brought under and by virtue of the said Act, and that all costs, including the extra costs, if any, occasioned by not bringing the action originally under the provisions of that Act, should be in the discretion of the Referee.

Although not properly a claim which should have been brought before the Drainage Referee, there is also power under sec. 99 of the Municipal Drainage Act, 10 Edw. VII. ch. 90 (formerly sec. 93A, as enacted in 9 Edw. VII. ch. 78, sec. 2) to transfer an action to the Referee if the Court or Judge is of opinion that the same may be more conveniently tried before and disposed of by the Referee. That section provides that the Referee shall thereafter give directions for the continuance of the action before him, which shall be as far as practicable in conformity with the provisions of that Act; and, subject to the order, all costs shall be in his discretion. There is nothing to shew that this power of transference for more convenient trial was not intended to be exercised. The order must now be taken to have been properly made.

If the defendants had merely maintained the bridge and embankments, which were contributed to if not constructed by them in 1892, or had merely replaced the bridge with another having as wide an opening for the water, I do not think the evidence would have established that any injury would have been caused to the plaintiff's land by obstruction therefrom to the flow of waters naturally passing down Cedar creek or coming from lands naturally or actually draining into it at the time that bridge was built.

If there would have been any flooding over his dyke, it would have been owing to what the witnesses call an immense body of water poured into the creek by artificial drains constructed after 1892 from lands some of which at least did not naturally belong to its watershed and were not riparian to it.

Whether that artificial increase of the waters was rightful or wrongful, the township corporation, knowing of it when building the new bridge in 1907, chose to narrow the passage still further; and, whereas the old bridge had an opening of 70 feet, less the width of four or five piles, that of the new one was only 62 to 66 feet. Thus, except possibly as to ice and logs, they aggravated the condition of probable danger to the plaintiff, and made themselves parties to the injury which subsequently resulted to him from the combination, and rendered themselves liable to him therefor.

The plaintiff had no right to have the passage across the intervening strip of land to the lake, which the creek had in 1897 forced for itself below his land and above the bridge, kept open by the owner of that strip of land or by the defendants. And although, when the defendants closed that passage in 1907, the natural bed of the stream had to some extent filled up with silt, owing probably, in part at least, to the current being diminished by that forced passage, and was in consequence less able to carry off the water, yet the other cut to the lake, which was opened in 1908, immediately below the bridge, seems to have fully made up for that, and afforded sufficiently free course for the water when once it had passed the bridge. But the real trouble was at the bridge itself, and for that the defendants had made themselves liable.

I agree that the plaintiff was not entitled to damages as for permanent injury to or supposed reduction in value of his lands from possible future recurrence of floods or the danger of them from this preventable cause. Indeed, the danger of flood from Lake Erie itself during its periods of high water would sufficiently account for any reduced value. I also agree that the other damage assessed should be reduced as indicated by my brother Garrow, and that the judgment should be varied accordingly.

Judgment below varied.

FENSKE v. FARBACHER.

SASK.

S. C.
1912

April 17.

Saskatchewan Supreme Court, Johnstone, J. April 17, 1912.

1. SPECIFIC PERFORMANCE (§ I A—3)—RIGHT OF PURCHASER TO ENFORCE LAND CONTRACT—UNCERTAINTY AS TO PAYMENT.

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.

[*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, and *Fowle* v. *Freeman*, 9 Ves. 351, specially referred to; see also Annotation to this case.]

THIS is an action for specific performance of a contract to sell lands in the Yorkton district. No claim is made in the statement of claim for damages in the alternative.

Judgment was given for the defendant.

J. A. M. Patrick, for plaintiff.
C. D. Livingstone, for defendant.

JOHNSTONE, J.:—The plaintiff says that the defendant, by agreement in writing, signed by him dated July 7th, 1911, agreed to sell to the plaintiff the lands in question for the sum of twenty-seven hundred dollars, payable three hundred dollars in cash and the balance in six equal annual instalments of four hundred dollars each, with interest at six per cent. per annum payable annually from the 7th of July, 1912.

It was further verbally agreed that a more formal agreement should be prepared and signed.

This formal agreement was prepared at the instance of the plaintiff within the time prescribed in that behalf, and with the $300 cash payment was tendered to the defendant by the plaintiff for execution.

The defences raised on behalf of the defendant by defence filed and in pursuance of leave given at the trial were:—

(1) Denial of the agreement;

(2) In the alternative, if there was the alleged agreement, the plaintiff was never ready and willing to carry it out;

(3) Further alternative, that if there was an agreement to sell it was to sell at $17 an acre, $300 cash, balance in six equal annual payments of $400 each with interest at seven per cent. from the 7th day of July, 1911.

(4) That the plaintiff drew an agreement which he represented to the defendant, who was unable to read English, as containing all the terms set out in the said last-mentioned paragraph, and relying on which representation of the plaintiff the defendant signed the same.

(5) That the agreement so drawn by the plaintiff did not set

forth the terms agreed upon and as represented to the defendant it did contain, and that the defendant on the 10th of July repudiated it.

(6) No contract to satisfy the Statute of Frauds.

(7) Further alternative, as to the agreement mentioned in the statement of claim—that the agreement should not be completed or binding on either the plaintiff or the defendant until the former should have an opportunity of consulting his father, and the defendant his wife; that the wife of the defendant was unwilling; and that, on the 10th of July, the defendant gave notice to the plaintiff of such unwillingness.

I think the trouble between the parties was the result in the first place of the intervention of the defendant's wife, who objected to the carrying out of the sale by the defendant; and just about this time the defendant had a better offer, an offer of $3 an acre more than that got from the plaintiff. These two circumstances were instrumental in inducing the defendant to act as he did in refusing to deal with the plaintiff.

The only defence, in view of the result of this action, which I need discuss is that paragraph of the defence setting up that there was no note or memorandum to satisfy the requirements of sec. 4 of the Statute of Frauds; all the other issues I find in favour of the plaintiff.

The memorandum on which the plaintiff relied (in fact, the only writing between the parties) as supplying sufficient evidence under the statute of a concluded agreement for the sale of the land in question to him, is as follows:—

Springside, Sask., July 7th, 1911.

I sold to Mr. Adolph Fenske the farm south-east quarter of section 30, township 28, range 5, 2 meridian, for the sum of twenty-seven ($2,700.00) hundred dollars straight. Interest from July 7th, 1912, no interest for one year, 1911. Interest at 6 per cent., taxes all paid for 1911 in full. Six year payments $400.00 and interest a year. No interest from July, 1911, till July, 1912.

CHARLES FARBACHER.

As stated by Lord Cairns in *Hussey* v. *Horne-Payne*, 4 A.C. 311, at p. 316:—

This is an action for specific performance of a contract. It is a contract for the sale of land, and the plaintiff must shew two things: he must shew that there is a contract concluded between the parties, and that there is a note, a memorandum in writing, of that contract sufficient to satisfy the requirements of the Statute of Frauds.

See also remarks of Lord Westbury in *Chinnock* v. *The Marchioness of Ely*, 4 DeG. J. & S. 638, at p. 646.

As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract.

SASK.

S. C.
1912

FENSKE
v.
FARBACHER.

Johnstone, J.

The memorandum in question does not contain all the terms of the concluded contract between the parties. The contract price to be paid by the plaintiff for the land is stated to be $2,700.00 to be made in "six year payments $400.00," which I construe to mean six yearly payments of four hundred dollars each. This makes provision for the payment of $2,400 in all. As to when or how the remaining $300 of the $2,700 is to be paid, the memorandum is silent, and as pointed out, there is no writing from which the omission to state this term, or that the sum of $300 should be in cash, can be supplied. At first I was disposed to think, in the absence of provision in the agreement as to when the difference between $2,400 and $2,700 should be paid, its payment could be construed as payable in cash, but on looking into the authorities already referred to, as well as *Munday* v. *Asprey*, 13 Ch. D. 855; Sugden's Vendors and Purchasers, 14 ed. 134; *Fowle* v. *Freeman*, 9 Ves. 351, and cases there cited, I have had to take a different view, and to find that the requirements of the statute have not been carried out.

There will be judgment for the defendant, with general costs occasioned by the action: costs of the trial of issues on which the plaintiff succeeds to be taxed to the plaintiff, and set off against the defendant's costs: one taxation: defendant to have judgment for balance.

Judgment for defendant.

Annotation

Oral contracts as affected by admissions in pleadings

Annotation—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

The principle underlying the doctrine which Courts of equity maintain and apply in cases where verbal contracts, such as the Statute of Frauds, require to be put in writing, is shortly stated as follows: "Equity will at all times lend its aid to defeat a fraud, notwithstanding the Statute of Frauds" or as Lord Macclesfield, Chancellor, has said in the case of *Montacute* v. *Maxwell*, 1 P. Wms. 618, 620, "In cases of fraud, equity should relieve, even against the words of the statute . . . but where there is no fraud only relying on the honour, word, or promise of the defendant the statute making those promises void, equity will not interfere."

In Fry's Specific Performance of Contracts, 5th ed., p. 313, the following statement is made: "An admission of the contract in the pleadings of course precludes the necessity of further proof; and the fact that the defence claims the benefit of the Statute of Frauds is immaterial in case of part performance, for that excludes the operation of the statute."

The rule may be now taken as well established that a defendant may admit the oral contract in the action, and yet, by denying all liability thereunder, or by setting up the Statute of Frauds, obtain the benefit of the latter. The growth of this doctrine has been a gradual one in England, and some of the earlier Judges were of the opinion that where the contract was admitted the Statute of Frauds no longer had application. The rules of pleading in equity tended to compel an answer of some

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

Annotation *(continued)*—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

kind from the defendant; the latter was thus obliged either to make untrue statements and render himself liable to an indictment for perjury, or, on the other hand, to admit the oral contract. Unless, therefore, he could couple this admission with a claim of the benefit of the Statute of Frauds, the effect of the latter was excluded from all equitable proceedings.

The rule as now established can best be shewn by a consideration of the earlier cases.

Popham v. *Eyre*, Tofft 808; in this case Lord Bathurst said that it was enough to do away with the Statute of Frauds that the oral agreement is sufficiently shewn the Court even by answer.

In *Attorney-General* v. *Day*, 1 Ves. 221, Lord Hardwicke held that where the party admits the agreement, he shall be compelled to perform it, because there is no danger of perjury. This same principle is laid down by Sir John Strange in *Potter* v. *Potter*, 1 Ves. 441.

In *Symondson* v. *Tweed*, Pre. Ch. 374, a parol agreement admitted was ordered to be performed. In *Whitbread* v. *Brockhurst*, 1 Bro. C.C. 404, and *Whitchurch* v. *Bevis*, 2 Bro. C.C. 559, Lord Thurlow expressed great doubt upon this subject, the question in these cases seemed to be whether the defendant could be compelled to answer. In the case of *Whitbread* v. *Brockhurst*, a plea of the Statute of Frauds averring first that there was no contract in writing, secondly that there had been no acts done in part performance, this was overruled as double and ordered to stand for an answer with liberty to except. In the *Whitchurch* v. *Bevis* case the plea of the Statute of Frauds was allowed, the agreement not being in writing though a parol agreement was confessed by the answer.

Rondeau v. *Wyatt*, 2 Hy. Bl. 63. This was a case where two parties entered into a contract for the sale of goods to be delivered at a future date, there was no earnest paid nor no note or memorandum in writing signed, nor any part of the goods delivered; the contract is void being within the Statute of Frauds though it is executory and though it has been admitted by the seller in his answer to a bill in Chancery filed by the buyer.

Lord Eldon in *Taylor* v. *Beech*, 1 Ves. Sr., said that a plea of the Statute of Frauds is a bar to discovery of an oral contract, but that the rule does not extend to facts subsequent, such as part performance. *Moore* v. *Edwards*, 4 Ves. 23, is authority for the same principle. See also *Mucklestone* v. *Brown*, 6 Ves. 68.

In *Mortimer* v. *Orchard*, 2 Ves. Jr. 243, the bill alleged a certain agreement, the witnesses proved a different one, and the two defendants by their answers set up an agreement different from both. Lord Loughborough thought the bill should, in strictness, be dismissed, but as there had been a part performance of some agreement between the parties, he decreed specific performance of the agreement confessed by the defendant's answers. His Lordship did not come to that conclusion without difficulty, and the doctrine of the case appears to conflict with the established rule in regard to part performance, that it must appear to be in pursuance of the contract upon which relief is to be granted: Browne's Statute of Frauds, 5th ed., sec. 501.

In *Lindsay* v. *Lynch*, 2 Schoales & L. 1, Lord Redesdale did not follow the judgment in *Mortimer* v. *Orchard*. In this case the plaintiff who had

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

Annotation (*continued*)—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

previously been in possession of certain premises alleged a parol agreement by the lessor to give him a further lease for three lives; the lessor by his answer admitted an agreement to give him a further lease for one life, whereupon the plaintiff amended his bill, claiming still the lease for three lives, but in the alternative, for the lease for one life, the plaintiff shewed payment of rent after the agreement made. Lord Redesdale said that if there had been acts of considerable expenditure, he could do no more than was done by Lord Loughborough in *Mortimer* v. *Orchard*, 2 Ves. Jr. 243, case. He then observed that as the payment of rent was an act which might be in part execution of a lease for one life, as well as of a lease for three lives, there was no ground for admitting parol evidence of the latter, the agreement charged in the bill; and he refused, in view of the course the plaintiff had taken in pleading, to allow him to amend so as to obtain a decree for a lease for one life, but dismissed the bill without prejudice to his filing a new one for that purpose. Although Lord Loughborough's decision is not in terms questioned by Lord Redesdale, yet he seems to speak of it with some uncertainty as to its correctness, and it will be observed here that the payment of rent was there admitted to be an act of part execution of some agreement, as in the case before Lord Loughborough.

The doctrine has been laid down that equity will enforce a verbal agreement, notwithstanding the Statute of Frauds where the agreement, fully set forth in the bill, is confessed by the answer. The reasoning upon which this statement is based is not at all clear.

The general rule seems to be that the statute is only intended to prevent fraud and perjury the danger of which is wholly removed by the defendant's admissions, but the defendant, notwithstanding this admission, may insist upon the statute and thus defeat any recovery upon the agreement, a rule with which the reason just alluded to does not seem to be altogether consistent. For if the removing of all danger of perjury, by having the defendant admit the agreement does in fact take the agreement out of the intent of the statute, his subsequent reliance upon the statute of course cannot avail him, and it may have been with this view that Lord Bathurst held, in the case of *Popham* v. *Eyre*, Lofft 786, that, though admitted by the defendant, a verbal agreement within the statute could not be enforced, and that to do so would be to repeal the statute.

Mr. Justice Story in his Equity Jurisprudence, sec. 755, has suggested as a reason, that after admission by the defendant, the agreement, though originally by parol, was now in part evidenced by writing under the signature of the party, which was a complete compliance with the terms of the statute.

In *Winn* v. *Albert*, 2 Md. Ch. 169, affirmed on appeal *sub nom. Albert* v. *Winn*, 5 Md. 66, the suggestion of Mr. Justice Story was strongly dissented from by the Chancellor who decided the case.

The soundest reason which can be assigned for this rule, impregnably settled as it is by authority seems to be that the defendant having admitted the agreement charged if he does not insist upon the statute, is taken to renounce the benefit of it; the maxim *quisque renuntiare potest*

Annotation (*continued*)—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

SASK.

Annotation

juri pro se introducto being applicable to such a case. See Browne on Statute of Frauds, 5th ed., sec. 498.

Oral contracts as affected by admissions in pleadings

Where the defendant has once admitted the contract as charged, he cannot afterwards, where the plaintiff has amended his bill in a matter not going to the substance of the contract, retract his admission: *Spurrier* v. *Fitzgerald*, 6 Ves. 548, and if the defendant, after having admitted the agreement, should die before a decree, upon a bill of revivor against the heir, a specific performance by him would be decreed, for the principle goes throughout, and binds the representative as well as the ancestor. *Attorney-General* v. *Day*, 1 Ves. Sr. 218; *Lacon* v. *Mertins*, 3 Atk. 1. The same rule seems to hold, where the plaintiff afterwards comes in for a decree upon a bill amended by leave so as to cover an agreement which the defendant in his defence had confessed: *Paterson* v. *Ware*, 10 Ala. 444. And where a defendant having appeared in an action, makes default in filing his answer, and the bill is taken *pro confesso* it would seem that this amounted to an admission of the contract charged so as to entitle the plaintiff to a decree. *Newton* v. *Swazey*, 8 N.H. 9. See also *James* v. *Rice*, Kay, ch. 231; *Esmay* v. *Groton*, 18 Ill. 483; *Angel* v. *Simpson*, 85 Ala. 53. Browne on the Statute of Frauds, 5th ed., sec. 499.

In *McNabb* v. *Nicholl*, 3 U.C.L.J. (N.S.) 21, Vankoughnet, C., where the defendant suffered the bill to be taken *pro confesso* against him, stated as follows:—

"I entertain no doubt that it was not necessary that the bill should contain an allegation that the trust was evidenced by writing. The plaintiff states the trust in his bill, and this is all that is necessary for the purposes of pleading. He has then to prove the trust by proper evidence, the question here is, whether any evidence is necessary, the bill not having alleged the trust to be in writing, and the defendant having allowed it to be taken *pro confesso*—or as confessed—or having thus confessed it—though not in writing, as he might have done in an answer. There is no admission in writing here by the defendant, nor is any evidence in writing shewn. Following the reasoning laid down in *Davies* v. *Otty*, 33 Beav. 540, it at least amounts to this, that the defendant waives all proof by the plaintiff.

It is undoubtedly the rule that in order to entitle the plaintiff to the benefit of the oral agreement admitted by the defendant, that it must appear to be in all its essential terms the same as alleged by the plaintiff: *Legal* v. *Miller*, 2 Ves. Sr. 299; *Willis* v. *Evans*, 2 Ball & B. 225; *Lindsay* v. *Lynch*, 2 Schoales & L. 1, and *Harris* v. *Knickerbocker*, 5 Wend. 638.

An immaterial variation will not be considered as being fatal to the plaintiff's case, and in some cases the plaintiff may be allowed to amend his bill after answer, in order to avail himself of the agreement admitted by it, or at least may have his bill dismissed without prejudice to his right to file a new bill framed so as to cover the admitted agreement: *Lindsay* v. *Lynch*, 2 Schoales & L. 1; *Willis* v. *Evans*, 2 Ball. & B. 225, and *Deniston* v. *Little*, 2 Schoales & L. 11 *note*.

Sheriffs were recommended to take precise written engagements from attorneys when they mean to hold them liable, in cases they have nothing to do with except professionally, though where the attorney has orally agreed

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

Annotation (*continued*)—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

to indemnify, the Court, if the agreement is admitted, will enforce it: *In re Corbett* v. *O'Reilly, Macdonell* v. *Grainger*, 8 U.C.R. 130.

When the plaintiff, by his bill, sought to compel specific performance of a contract, which plainly appeared from the bill to have been created by parol, and relied on acts of part performance to take the case out of the statute:—Held, that the defendant need only claim the benefit of the statute, without alleging that there had not been a note in writing: *Townsley* v. *Charles*, 2 Gr. 313.

Butler v. *Church*, 16 Grant 205. In this case it was held, that where a defendant denies an alleged agreement of which a plaintiff seeks specific performance, the defendant should claim the benefit of the Statute of Frauds in order to exclude parol evidence of the contract. This judgment was affirmed on appeal, 18 Grant 190, Draper, C.J., Gwynne and Galt, J.J., dissenting.

In *Wilde* v. *Wilde*, 20 Grant 521, Strong, V.-C., in giving judgment says as follows: "As a result of the authorities, I am prepared to decide that the Statute of Frauds, is open to the defendant as a defence . . . though he has not pleaded it, upon the principle that the plaintiff being put to prove the special trust which he alleges, is bound to prove it by evidence sufficient according to the requirements of the statute. Then as I have already said, there is no written evidence signed by the defendant implying the slightest recognition of a trust of this land.

In *Ridgway* v. *Wharton*, 3 DeG. M. & G., Lord Cranworth lays down the rule that if a party in a suit in equity is put to proof of an agreement to which the Statute of Frauds applies, he must establish his case by evidence sufficient within the statute. This case went to the House of Lords, and was there the subject of much discussion, but the rule of pleading it laid down seems to have received the silent acquiescence of the Lords who heard it, for no objection is raised to that part of Lord Cranworth's decision in the Court of Chancery. In *Heys* v. *Astley*, 4 DeG. J. & S. 34, Sir George Turner, L.J., approves of what Lord Cranworth decided in *Ridgway* v. *Wharton* on the point of pleading, and in *Butler* v. *Church*, 18 Gr. 190 (Ont.), the Court of Appeal, the Chief Justice and the learned Judges who concurred with him were of the same opinion. The analogy of pleading at law is also in favour of the defendant, since it was there determined soon after the pleading rules of 1834 were established, that a party who put his adversary to proof of a contract which happened to be within the Statute of Frauds, did not forego the right to insist on the statute because he did not plead it specially: *Buttermere* v. *Hayes*, 10 M. & W. 397; *Leaf* v. *Tuton*, 5 M. & W. 460. The case of *Davies* v. *Otty*, 33 Beav. 540, also supports this principle. The bill of complaint whereby it was sought to enforce a trust of lands did not allege that such trust was in writing. It was held on demurrer, that this was sufficient for the Statute of Frauds only refers to the proof of a trust by some writing. See also *Smith* v. *Matthews*, 3 DeG.F. & J. 139, and *Wood* v. *Midgley*, 5 DeG. M. & G. 41.

Heys v. *Astley*, 4 DeG.J. & S. 34, held that in a suit for specific performance of an agreement for the sale and purchase of land if the defendant means to set up the Statute of Frauds, as a defence, he must do so before the hearing, at which time the defence is not open to him, although

Annotation (*continued*)—**Contracts** (§ I E—65)—**Statute of Frauds—Oral contract—Admission in pleading.**

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

he has denied the existence of the agreement altogether: *per* Lord Justice Knight-Bruce.

The following are examples of sufficient confession to satisfy the Statute of Frauds. Where the answer to a bill for specific performance acknowledges the receipt of fines for a lease, and readiness at one time to lease, and refers to a written memorandum (a letter to a third party), stating the contract, the Statute of Frauds is satisfied: *Hartley* v. *Wilkinson*, Ridg. L. & S. (1 Ir. Term.) Rep. 357. Although the 4th section of the Statute of Frauds requires any agreement for the purchase or sale of land to be evidenced by a note or memorandum thereof to be signed by the party sought to be charged, yet where lands were sold by a trading corporation, under a power of sale contained in a mortgage, and the purchaser at such sale signed an agreement to purchase, and afterwards filed a bill seeking specific performance with compensation for the loss of crops which were advertised with the land, but actually belonged to third parties, and the defendants (the corporation) answered the bill admitting the fact of their being mortgagees, and proceeded with sundry statements such as, "when the plaintiff bid for and was declared the purchaser of the lands . . . the sum bid by the plaintiff was a low price . . . that the plaintiff was not in fact the real purchaser of the lands at the said sale . . . that the company was not bound to put the plaintiff in possession, but never did any act to prevent her taking possession, and . . . that possession was taken by the plaintiff," and the answer claimed no benefit from the statute, and did not deny having made the contract; neither did it raise any objection to the want of the corporate seal:—Held, that this sufficiently admitted the agreement to sell, and, no protection of the statute having been claimed, that the plaintiff was entitled to a decree, with compensation for the loss of the crops, and with costs: *Cleaver* v. *North of Scotland Canadian Mortgage Co.*, 27 Gr. 508. Where the memorandum of sale of land, described the latter no further than by saying "the money to be paid as soon as the deeds can be had from Mr. Deane," the Court held that a reference to Mr. Deane would ascertain the house, and adding that the defendant by declining an inquiry before a Master, had waived the uncertainty, decreed specific performance: *Owen* v. *Thomas*, 3 M. & K. 353; see *Clarkson* v. *Noble*, 2 U.C.Q.B. 364.

An uncertainty in a memorandum may be removed by the defendant's answer: *Connell* v. *Mulligan*, 13 Sm. & M. 390. An allegation in a complaint, not denied, satisfies the Statute of Frauds: *Denison* v. *Carnahan*, 1 E.D. Sm. 146; see also, *Muller* v. *Maxwell*, 2 Bosw. 559; *Chicester* v. *Cobb*, 14 L.T.N.S. 433; *Mills* v. *Mills*, 3 Head. 710; and the Scotch case of *Porteous* v. *McBeath*, Hume 98; Reed on the Statute of Frauds, secs. 532 and 533.

The law may be considered as settled since 1801, when the much considered case of *Cooth* v. *Jackson*, 6 Ves. 11, was decided. In this case when it was before him, Lord Loughborough at p. 16(*a*) overruled a plea of the statute, coupled with an answer to the merits as being double, but allowed the defendant the benefit of the statute at the hearing. When the matter came before Lord Eldon, he held, at p. 37, that specific performance of a parol agreement cannot be decreed though the agreement is admitted by the answer if the defendant insists upon the Statute of Frauds; if he does

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

Annotation (*continued*)—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

not, he must be taken to renounce the benefit of it. The reasoning of Lord Eldon in this case, at p. 38, is as follows: "The Court is to see if there is anything in the answer about a parol agreement, and so connected with the acts of part performance as to make one whole, upon which the Court will decree. But as there is no admission or denial of the agreement in the answer, the justice of the case requires that there should be some method of examining whether there was a parol agreement or not. I wish to know, whether there is any instance; has the Court ever adopted any means of satisfying itself as to that? Then the most rational way seems to me to be, that if the defendant admits the agreement, but insists upon the benefit of the statute, the statute protects him, if he doesn't say anything about the statute then he must be taken to have renounced the benefit of it, and there is no occasion to inquire about the part performance. This leads me to the conclusion, which appears in those two cases in the Court of Exchequer and the inclination of Lord Thurlow's opinion in *Whitchurch* v. *Bevis*, 2 Bro. C.C. 559, and *Whitbread* v. *Brockhurst*, 1 Bro. C.C. 404, and also more than an inclination of Lord Loughborough in *Rondeau* v. *Wyatt*, 2 Hy. Blac. 63, which I have reason to think would induce him with much greater experience to state himself more strongly in the same way upon this part of the case." The learned Judge then points out the distinction between the administration of law and equity in different Courts, pointing out that in equity the denial of a parol agreement within the Statute of Frauds by the answer is conclusive, and in equity there can be no decree, against the answer upon the testimony of a single witness unless supported by special circumstances. In dismissing the bill the Judge in conclusion states: "This case affords another striking instance of the danger of departing from the statute, because the parties differ as to the species of the agreement and the witnesses differ as much as the parties do."

This case was followed in *Rowe* v. *Leed*, 15 Ves. 372, and was approved of in *Johnson* v. *Johnson* (1802), 3 Bos. & P. 162.

It is perhaps not quite clearly decided whether the Court can, in any case, direct an inquiry into the terms of a contract, when it has not been sufficiently proved to enable the Court to pronounce a final judgment upon the evidence before it. Lord Manners, *Savage* v. *Carroll*, 2 Ball & B. 451, strongly expressed an opinion that the Court has no such jurisdiction, a view which seems to have met with the approval of the highest authorities, St. Leon. Vend. 126; Story, Eq. Jur. 764; cf. *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57. And in the case of *Crook* v. *Corporation of Seaford*, L.R. 10 Eq. 678, 6 Ch. 551, where Stuart, V.-C., had made an order giving the parties liberty to apply in chambers in reference to the performance of the contract, Lord Hatherley said that he felt some difficulty about the decree, for it was the duty of the Court to ascertain whether there was a contract, and if not to dismiss the bill; but being himself of opinion that a contract had been made out, his Lordship varied the order by striking out the reference to Chambers, and declaring what the contract between the parties was, and ordering specific performance of it.

The authorities upon the point now under discussion, to which reference has been made, were all under the old practice, and were greatly in-

Annotation *(continued)*—Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

fluenced by the incapacity of the Court of Chancery, except under very unusual circumstances, to permit an amendment of the record at the hearing. The High Court may be expected to feel itself freed from some of the difficulties which arose under the old practice in dealing with cases where one contract was alleged and another proved: it will probably, for the most part, feel it possible to deal with the matter once for all, and not to postpone the real discussion till a further proceeding shall have been taken: it is probable that the main question will always appear to be, Was there really and in truth a contract or not? That if there was, the Court will generally allow the needful amendment to put that contract in issue: that if there was not, it will generally give judgment for the defendant, without reserving any right to the plaintiff to institute fresh proceedings. But the circumstances will govern the discretion of the Court in each case which may arise: Fry's Specific Performance, 5th ed., p. 316 et seq.

In Quebec under 10 & 11 Vict. (Que.) ch. 11, a contract within the Statute of Frauds may be proved by the defendant's answers to interrogatories; whether the contract is admitted in the plea or oath or in answer to interrogatories, is immaterial: see *Baylis* v. *Ryland*, 15 L.C.R. 94. In a commercial case a party can put his antagonist upon interrogatories: *Oakley* v. *Morrough*, Pyke's R. 19; *Trudeau* v. *Leblanc*, 4 R.L. 560.

In commercial cases answers to interrogatories *sur faits et articles* or refusal to answer is equivalent to the memorandum required by the Statute of Frauds, the right to these interrogatories being saved by 12 Vict. (Que.) ch. 38: see *Levey* v. *Sponza*, 6 L.C.J. 183 (Q.B.).

Under the old French law, a defendant interrogated *sur faites et articles* who refused to answer was considered as confessing the claim: *Douglas* v. *Ritchie*, 18 L.C.J. 274; *Reeves* v. *Malhiot*, 8 L.C.J. 84.

The doctrine as laid down in *Levey* v. *Sponza* has been affirmed in the cases of *Fry* v. *The Richelieu Co.*, 9 L.C.R. 406; *Baylis* v. *Ryland*, Court of Review, 15 L.C.R. 94. It has also been said that an admission by special plea binds, though the general issue be also pleaded: *Viger* v. *Belliveau*, 7 L.C.J. 199.

Pothier in his Treatise upon Obligations, puts this case: By the French law an agreement was not binding for any sum exceeding 100 livres, unless it was in writing, but this did not apply where the party admits the agreement and the other has the right to make him give his oath whether he did enter into such agreement or not.

It may be stated that in the United States, Courts have generally followed the English doctrine, although not entirely, in some cases doubt has been expressed: see *Auter* v. *Miller*, 18 Ia. 410, citing authorities as to the common law, apart from the statutes. In *Harris* v. *Knickerbacker*, 5 Wendell's R. 638, it is decided that specific performance will not be decreed where there is a variation between the terms of the contract as set forth in the bill, and as admitted by the answer essentially effecting the contract; as where the bill alleges that the purchase money was to be paid in seven annual instalments, with interest annually from the date of the contract, and the answer wholly denies that interest was reserved by the contract, although it admits that the purchase-money was

SASK.

Annotation

Oral contracts as affected by admissions in pleadings

Annotation (*continued*)—**Contracts (§ I E—65)—Statute of Frauds—Oral contract—Admission in pleading.**

to be paid in seven annual instalments, but if the variation in the terms does not enter into the substance of the contract a decree will be made. The contract admitted by the answer or proved by the testimony must correspond with the contract set forth in the bill, or a specific performance will not be decreed; see also, *Argenbright* v. *Campbell*, 3 Hen. & M. (Va.) 144; *Hollingshead* v. *McKenzie*, 8 Ga. 457; *Ellis* v. *Ellis*, 1 Dev. (N.C.), Eq. 341; *Switzer* v. *Skiles*, 13 Gelin (Ill.) 529; *Ryer* v. *Martin*, 4 Scam. (Ill.) 146; *Woods* v. *Dille*, 11 Ohio 455; *McGowen* v. *West*, 7 Mo. 569; *Artz* v. *Grove*, 21 Mo. 456; *Burt* v. *Wilson*, 28 Cal. 632; Browne on the Statute of Frauds, 5th ed., p. 616.

A former petition filed in Court in other proceedings setting up the contract fully without pleading the Statute of Frauds, may be sufficient memorandum to satisfy the statute: *Jones* v. *Lloyd*, 117 Ill. 597.

A deposition of defendant taken in a former suit, not being voluntary, should not be received as taking the case out of the statute: *Cash* v. *Clark*, 61 Mo. at p. 636; see, however, *Westheimer* v. *Peacock*, 2 Iowa 528, holding that the testimony of the party to be charged may be used to prove a contract within the Statute of Frauds.

In Pennsylvania it has been held on the strength of the principle of the rule, that a mortgagee could not in an action at law avail himself of the Statute of Frauds, to resist the enforcement of a prior trust agreement, concerning the land, which was acknowledged by the owner of the reversion: see *Houser* v. *Lamont*, 55 Pa. St. 311.

In Scotland, it has been held that a guaranty must, by the Act of 1681, be a holograph and have witnesses; and a guarantor who has signed an informal instrument, cannot be called upon to say whether his signature is genuine or not: *Edmonton* v. *Laing*, 38 Morr. Dec. 17057, but this ruling has been questioned. So it was said that a guaranty not in proper form, under the Act of 1681 is not validated by an acknowledgment in the pleadings by the defendants, that they had signed the paper: *Church of England Ass. Co.* v. *Hodges*, Sess. Cas. 19 D. 421.

ONT.

C. A. 1912

Feb. 22.

Re RISPIN.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith and Magee, JJ.A. February 22, 1912.

1. WILLS (§ III G—145)—CONDITIONAL LIMITATION—DEVISE OF WITH ABSOLUTE DISCRETION—DEATH OF BENEFICIARY—DISPOSITION OF RESIDUE IN HANDS OF EXECUTOR.

Where by will securities were bequeathed to an executor with an absolute discretion to apply as he thought fit for the benefit of a named beneficiary, there is no power of disposition by will in such beneficiary of what remains in the hands of the executor on the death of the beneficiary; but it passes to the next of kin of the testator as at the time of his death.

[*Bain* v. *Mearns*, 25 Gr. 450; *Lewis* v. *Lewis*, 1 Cox Eq. 162; *Re Eddowes*, 1 Dr. & Sm. 395, and *Re Johnston*, [1894] 3 Ch. 204, specially referred to; *Gude* v. *Worthington* (1849), 3 DeG. & Sm. 389, distinguished.]

ONT.

H. C. J.

RE RISPIN.

Boyd, C.

Appeal by special leave from the following decision of BOYD, C. upon a motion by the executor of the will of Richard Rispin, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the will as to the disposition of the estate.

May 3, 1911. BOYD, C.:—Will made 10th July, 1893, by which testator gave to his son all his real estate and all the goods, chattels, and live stock now in his possession. After payment of all debts and funeral expenses, the rest of his cash and securities he gives to his executor—"And I authorise and request him to pay the interest in whole or in part to my son Luke Rispin and the principal in whole or in part to my son Luke Rispin as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withold the payment altogether."

The testator died in September, 1895; the son received various payments from the executor, and died in November, 1910, leaving a will in which he assumed to dispose of the estate in the hands of the executor, amounting to about $15,000. The executor disclaims all interest beneficially, and asks to whom the fund should be paid—under the will of the son, or to the next of kin of the testator as an undisposed of residue?

In *Gude* v. *Worthington* (1849), 3 DeG. & Sm. 389, the fund was set apart upon very much the same trusts as are found in this case, for the benefit of Mary Ann Seaman during her life, and, should there be any of the fund at her death undisposed of, upon trust for other persons. In this case there is no gift over, and the trustee is living, and the beneficiary is dead. In *Gude* v. *Worthington*, the trustees were dead and the beneficiary was alive, and it was held by the Vice-Chancellor, Knight Bruce, that Mary Ann Seaman was absolutely entitled to the whole fund. It was contended that the discretionary power given by the will was at an end with the death of the trustees, being of a personal nature. The Court gave no reasons, but intimated that it was to be taken that the discretionary power had been waived or had been declined to be exercised, and in either view the result was the same, *i.e.*, as I understand, that the primary intention of the testator was to benefit the person named, and that the death of the trustees, without having disposed of the fund for her benefit, was not to frustrate the manifest wish of the testator.

This decision has not been received with favour and has received various explanations, and it is certainly one that has gone to the verge of the law—particularly where the testator had made a gift over of the undisposed of residue. It has been spoken of by Stuart, V.-C., in *Rose* v. *Rowe* (1869), 21 L.T.R. 349, as a very remarkable decision and one which was not very elaborately argued.

ONT.

H. C. J.

RE RISPIN.

Boyd, C.

Upon the language of this will, it is plain that the testator gave no property in this fund to his son, but only a direction to the executor to apply such part as he thought fit for the benefit of the son. Now, at the death of the testator, or at any other time, had the son a right to call upon the executor to pay him anything out of the fund? Manifestly, no. The whole benefit was contingent on the *bonâ fide* judgment and volition of the executor. The son had no interest in the fund to assign or to deal with by testamentary gift. See *The Queen* v. *Judge of County Court of Lincolnshire* (1887), 20 Q.B.D. 167, which was followed in the case of a will like this in *Re McInnes* v. *McGaw* (1898), 30 O.R. 38.

Chitty, J., comments on *Gude* v. *Worthington*, 3 DeG. & Sm. 389, in *In re Stanger* (1891), 60 L.J.N.S. Ch. 326, and says that it proceeded upon the construction that the beneficiary took under the earlier part of the will an absolute interest with a subsequent discretionary power in the trustees which they had either waived or declined to exercise. I cannot read this will as shewing that the fund or any part of it was to pass to the son unless as a consequence of the action of the executor so to dispose of it.

The effect of *Gude* v. *Worthington* is somewhat considered in Sweet's edition of Jarman on Wills, 6th ed., vol. 1, p. 887: the trustees had paid part of the fund to the beneficiary, and died without any other exercise of their powers. The Vice-Chancellor held that the living beneficiary was entitled to the whole fund, but directed a reference to approve of a settlement (the beneficiary having married), "from which it would appear" (says the author) "that the Court undertook to exercise the discretion given to the trustees." But (he adds) "if the beneficiary had died before the trustees, it seems clear that her representatives would have had no claim to the fund." That is in truth the present case: the beneficiary dead, and the trustee having during the life exercised his powers only as to the payment of certain amounts, and now having in his hands the undisposed of surplus now in question.

To the present will I think the true rule of decision is suggested by Lord Thurlow in *Lewis* v. *Lewis* (1785), 1 Cox Eq. 162. This is not the case of a gift by the testator, but a power to others to give, and that confined to answer a particular purpose. Here the particular purpose has been fully answered by the provision made by the trustee during the life of the testator's son; and what remains at his death does not belong to his estate, but to that of the father.

The subject was discussed by Romilly, M.R., in *Cowper* v. *Mantell* (No. 2), (1856), 22 Beav. 231, 233, who marks the distinction between the cases where a legacy is given to a person for a particular purpose, which fails, and yet he has been held entitled to the legacy, and those in which there is no gift of a legacy, but only a

discretion is confided in trustees, which not having been exercised, the possible legacy fails altogether. The case before him was one in which the testator authorised his trustees to apply any sum not exceeding £600 in the purchase of a church preferment for A. A. died before any sum had been so applied, and it was held that the gift wholly failed. The reasons in the last words (at p. 237) apply to the case in hand: "I am of opinion that A. could not himself have acquired payment of the sum of money, and therefore, that it falls into the residue."

I do not think that *Gude* v. *Worthington* 3 DeG. & Sm. 389, should be extended, and I prefer to adopt as correct and applicable to this will the dictum of a master of equity, Stirling, J., in *In re Johnston*, [1894] 3 Ch. 204. A sum was there given absolutely, but coupled with a direction that the trustees in whom it was vested should so deal with and husband it as to prevent it falling into unworthy hands. The like provision is contained in this will, just as it was in the will under consideration in *Bain* v. *Mearns* (1878), 25 Gr. 450. Stirling, J., held that the condition was repugnant to the gift, and then proceeded to point out that "the testator might (if he had been well advised) have effectually provided for the same object by making the gifts entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustee, in the absolute exercise of his discretion, thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make in some shape or form a gift over, so as to benefit other persons besides the sons," etc.

This will is drawn with apt words to carry out the first method pointed out by Stirling, J., and in this respect the testator was well advised. *Re Eddowes* (1861), 1 Dr. & Sm. 395, supports the conclusion that there is an intestacy as to the undisposed-of part of the fund in the hands of the executor.

My conclusion is, that the undisposed of residue in the hands of the executor should be paid into Court for the benefit of the next of kin of the testator, and that it be referred to the Master at London to ascertain who they are and to distribute the fund accordingly. The executor to pass his accounts and receive his costs and commission and be discharged.

Costs of this application out of the estate.

The solicitor appointed to represent the unascertained next of kin to have the carriage of the matter in the Master's office.

By order of Moss, C.J.O., of the 12th May, 1911, the executors of Luke Rispin were allowed to appeal from the judgment of the Chancellor directly to the Court of Appeal.

C. A. Moss, for the appellants, argued that the primary object of the testator, Richard Rispin, was to benefit Luke Rispin, his son, and the discretion given to the executor was for the purpose merely of regulating the mode of enjoyment by the legatee. The case is similar to *Gude* v. *Worthington*, 3 DeG. & Sm. 389, and that

ONT.
C. A.
1912
RE RISPIN.
Argument

authority should be followed in the case at bar. Reference was also made to *Gough* v. *Bult* (1847), 16 Sim. 45; *Hancock* v. *Watson*, [1902] A.C. 14; Theobald on Wills, 7th ed., p. 495, and cases there cited; *Presant* v. *Goodwin* (1860), 29 L.J. P. & M. 115; *In re Coleman* (1888), 39 Ch.D. 443; *Younghusband* v. *Gisborne* (1844), 1 Coll. 400; *Kearsley* v. *Woodcock* (1843), 3 Hare 185; *Green* v. *Spicer* (1830), 1 R. & M. 395; *Rippon* v. *Norton* (1839), 2 Beav. 63; *Lewes* v. *Lewes* (1848), 16 Sim. 266. *Lewis* v. *Lewis*, 1 Cox Eq. 162, cited by the Chancellor and in the reasons against appeal, is distinguishable.

F. P. Betts, K.C., for the executor of Richard Rispin, submitted the rights and interests of his client to the direction of the Court, as he was not a contentious party to the proceedings. He referred to Williams on Executors, 10th ed., p. 884, as to the determination of the next of kin, in case the Court found that there had been an intestacy.

W. R. Meredith, for the Official Guardian, argued that the judgment of the learned Chancellor was right and should not be disturbed. The words of the will itself shewed that there was no direct gift to Luke, and the gift to the executor was one under which he had full discretion, both as to principal and interest, whether he should give or withhold the benefit. All the cases cited on behalf of the appellants, with the exception of the *Gude* case, are cases where there was no power of withholding the benefit. He referred to *Re Skinner's Trusts* (1860), 1 J. & H. 102; *Re Eddowes*, 1 Dr. & Sm. 395; *In re Stanger*, 60 L.J.N.S. Ch. 326. The *Stanger* case is a very strong one for the respondents, and discusses the *Gude* and *Gough* cases, which are relied on by the appellants. The *Gude* case is essentially different from the present one, as there the trustees were dead, and the prospective beneficiary was living. No new trustee could be appointed to carry out the trust, and it was held that the beneficiary could not be deprived of his rights by reason of the death of the trustee. Reference was also made to *In re Murphy's Trusts*, [1900] 1 I.R. 145; Lewin on Trusts, 12th ed., p. 1075; *In re Johnston*, [1894] 3 Ch. 204; *In re Miller*, [1897] 1 I.R. 290.

Moss, in reply, referred to Jarman on Wills, 6th ed., pp. 885, 888, where the *Johnston* and *Miller* cases are cited, and argued that the cases cited on behalf of the respondents were distinguishable from this case at bar. The respondents have to read the word "pay" in the will as "give," but the will speaks of payment all the way through—a distinction on which the *Eddowes* case depended. In *In re Murphy's Trusts* [1900] 1 Ir. R. 145, there was a gift over, and *Re McInnes* v. *McGaw*, 30 O.R. 38, cited in the Chancellor's judgment, was a case dealing with income only.

February 22, 1912. MOSS, C.J.O.:—The question submitted for solution in this appeal is, whether, upon the true construction

of the 4th clause of the will of the late Richard Rispin, the cash and securities therein designated were so disposed of as that, upon the testator's death, they became the property of his son Luke Rispin, so that his personal representatives are now entitled to them, or whether, as determined by the learned Chancellor, they are now subject to distribution among the next of kin of the testator as upon intestacy.

There is no direct gift to Luke Rispin of the property in question or any part of it. In terms it is given to the executor, in trust it is true, but not expressly to hold for Luke Rispin. If in the testamentary disposition in question a gift to Luke Rispin is to be found, it is only to be gathered from the whole clause. It contains words indicative, perhaps, of an idea in the mind of the testator that his son's position was to be as owner with his right of complete enjoyment of it or its fruits controlled by the exercise of the prudent and discreet judgment of the executor, to be interposed if and when necessity required. The use by the testator of the expressions "pay" and "payment," contained in the authority and request to the trustee, which in the primary sense imply an antecedent obligation, instead of the word "give," which implies voluntary action, may be said to afford some indication of an intention that the property, though held by the trustee, was beneficially the property of the son.

But, in view of the other language, it is scarcely to be supposed that the testator was intending to use these words in their strictest sense, but simply as terms convenient to express the transfer of money. They are not the controlling words of the clause. Greater force is found in the injunctions laid upon the trustee and the declaration of the testator's will and intention that it was to be wholly in the discretion of the trustee to pay or withhold payment altogether of principal or interest.

The property was thus left wholly subject to the trustee's action, and whether Luke Rispin got any or all of it depended wholly upon the trustee. It is plain that the testator was very desirous of withholding from his son any control over the property and any right to demand or receive it or any part of it from the trustee except with his consent.

It was placed beyond the son's power to make any disposition of it which would take effect either during his lifetime or after his death. To have left it otherwise would have frustrated the testator's main design by enabling it to be assigned or pledged and the proceeds improperly spent.

The matter being entirely within the power and discretion of the trustee as regards what Luke Rispin should receive, only that which he received up to the time of his death became his or belonged to him. The remainder, being undisposed of in the hands of the trustee—who, of course, lays no claim to it on his own behalf—is, therefore, subject to distribution as upon intestacy.

ONT.
C. A.
1912
RE RISPIN.
MOSS, C.J.O.

There appears to be no question as to the date of the intestacy being as of the date of the testator's death.

There does not appear to be any good ground for further inquiry as to the oral directions said to have been given by the trustee to the manager of the loan company. The fact remains that the property never was received by or placed in the control of Luke Rispin, but continued in the possession and subject to the actions of the trustee.

The appeal fails and must be dismissed; but, under the circumstances, the costs of all parties may be properly borne by the estate—the trustee's costs as usual.

GARROW, J.A.:—Appeal by the plaintiffs from the judgment of the Chancellor upon the construction of the will of the late Richard Rispin.

Richard Rispin, market-gardener, of the city of London, Ontario, who died on the 20th September, 1895, made his will on the 10th July, 1893, whereby he appointed the respondent Davis to be his executor. His only near relations at the time of his death were his son, Luke Rispin, and a grandson, Charles Rowe, who had not been heard from for some years.

By the will, the testator's real estate and his goods, chattels, and live stock were devised and bequeathed to his son Luke Rispin. Then followed the bequest which gives cause for this application, which is as follows:—

"4. After the payment of all my debts and funeral expenses I give the rest of my cash and securities in bank or in my possession in trust to my executor the Reverend Evans Davis and I authorise and request him to pay the interest in whole or in part to my son Luke Rispin and the principal in whole or in part to my son Luke Rispin as in the judgment of my executor may be prudent with reference to the habits and conduct of my son my will and intention being that it shall be wholly in the discretion of my said executor to pay the interest and principal in such amounts and at such times as he may think right or to withhold the payment altogether and I appoint the said Reverend Evans Davis to be executor of this my will. In testimony whereof I have hereunto set my hand this tenth day of July, 1893."

Luke Rispin died on the 2nd November, 1910, having also made his will, whereby he appointed the appellants to be his executors.

The respondent Davis received the bequest, and out of it paid certain sums, the amounts of which are of no consequence, to Luke Rispin in his lifetime; but at his death a considerable sum, some $14,600, remained, and the question is as to the proper disposition of this sum.

The learned Chancellor was of the opinion that, under the bequest, Luke Rispin took nothing but what the respondent Davis as trustee chose to give; and that, consequently, as to

what remained at Luke Rispin's death, there was an intestacy on the part of Richard Rispin.

I agree with the conclusion of the learned Chancellor, and would have been content simply to assent without more, but for the earnestness with which the case for the appellants was presented to us by counsel, and the number of cases which were cited in support of his contention.

The question is, of course, simply one of construction, and therefore depends upon a proper consideration of the exact language used.

The testator's good intention towards his son, although apparent, is not alone sufficient. There must be found in the language either an express or at least an implied gift of the property in question; otherwise there is no will as to it, and it must pass as the law directs in the case of intestacy.

The cases bearing upon similar questions arising under other wills are numerous, and one might even say sometimes embarrassing, if not conflicting. Several of them are referred to by the learned Chancellor. But no case is, after all, particularly useful, unless, as seldom happens, it arose upon similar language and under similar circumstances, or has laid down some general principle of construction applicable to all such questions.

Instances of the former class are, *In re Stanger*, 60 L.J. N.S. Ch. 326, and *Bain* v. *Mearns*, 25 Gr. 450.

And of the latter, I refer to *Lassence* v. *Tierney* (1849), 1 Macn. & G. 551, where Lord Cottenham said:

> If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee,—upon failure of such objects, the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. . . . In every case, therefore, the question must be one of construction; and, except for the purposes of such construction, very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate, is, as in all cases of construction, to be collected from the whole of the will, and not from there being words which, standing alone, would constitute an absolute gift.

In *In re Johnston*, [1894] 3 Ch. 204, referred to in the judgment of the learned Chancellor, there were what were held to be gifts to the sons, which makes all the difference, for, if once the conclusion is arrived at that there is a gift, the Court will enforce the trust.

The circumstance that here the property is expressly given to the defendant "in trust" is not, I think, of controlling im-

ONT.

C. A.
1912

RE RISPIN.

GARROW, J.A.

portance, having regard to the whole language of the bequest, which must of course be looked at.

In *Eaton* v. *Watts* (1867), L.R. 4 Eq. 151, the testatrix had given her property to her husband, "hoping he will leave it after his death to my son . . . if he is worthy of it . . ." The testatrix then explained her reasons for leaving the property in the entire power of her husband, namely, that the son was already certain of a handsome fortune independent of his father, and that she could not then feel certain what sort of character he might become, and therefore left it to the husband, "in whose honour, justice, and parental affection I have the fullest confidence." She then provided for the case which actually occurred, of the son predeceasing the father, by repeating that she left the property to her dear husband "to dispose of it as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice." Vice-Chancellor Stuart held that no trust was created in favour of the son, saying:

> The words of confidence are weaker than in most of the cases, while the expressions giving control to the object of the gift are extremely strong, so strong that, in my opinion, they bring this case within the observation of Lord Alvaney, that the subject of the gift was placed so completely in the power of the object of the gift, as that the testator left to him the option to defeat the wish or hope expressed.

The reference to Lord Alvaney's observation is to his judgment in *Malim* v. *Keighley* (1794), 2 Ves. Jr. 333, where he says that "wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it."

See also *Knight* v. *Boughton* (1844), 11 Cl. & F. 513.

These are, it is true, instances of precatory trusts; but a precatory trust, once established, is just like any other trust, and in the process of establishing such a trust, it is, I think, quite permissible to look at what prerequisites the authoritative cases have determined must exist. And one of the prerequisites is, that the existence of an option in the trustee will usually be fatal to the trust. See further *per* Lord Truro in *Briggs* v. *Penny* (1851), 3 Macn. & G. 546.

And for an instructive discussion by Romer, J., of the circumstances under which a power to appoint will be held to create a trust in favour of a class, see *In re Weeke's Settlement*, [1897] 1 Ch. 289. There the alleged trust failed, because, although the testator's good intention was, as here, apparent, no gift had actually been made. And I may note that there was in that case the circumstance, so much relied on here, of no gift over, a cir-

cumstance always of importance if the language of the testator can be said to be doubtful, which cannot I think be said in this case.

For these reasons, as well as for those given by the learned Chancellor, I am of the opinion that his judgment should be affirmed and the appeal dismissed.

The intestacy, it is not disputed, as I understood counsel, is to be as of the date of the death of Richard Rispin.

The costs of all parties may, I think, come out of the fund.

MACLAREN, J.A., concurred.

MEREDITH, J.A.:—I agree with the learned Chancellor in his conclusion and in his reasoning.

If the gift in question were made *inter vivos*, it would hardly be contended that that part of the fund which remained at the death of the son would not be, beneficially, the property of the surviving father; and I can find nothing in the mere fact that the gift was by will, nor anything in the will itself, to alter the case. There is certainly nothing in the grammatical construction of the words in question which warrants, or supports, the contention that the whole fund passed to the son, with only a restraint upon his control over it during his lifetime. The word "withhold" in no sense implies any right in the son which might be withdrawn from him; on the contrary, it indicates an absence of any right in him, except to that which was not withheld—that which was paid to him; whilst the other bequests of the will—one to the son himself—shew plainly the character of the language the testator would have used if he had meant that which the appellants here contend for.

The leaning against an intestacy has no great weight in such a case as this, in view of the character of the statutory distribution of the estates of intestate persons in this Province—the statutory will, as it is sometimes called: the residue would go to the testator's children share and share alike.

Decisions in other cases are not very helpful in such a case as this: and no two cases are quite alike. We are not confronted, in this case, with the great difficulty which was involved in the case of *Gude* v. *Worthington*, 3 DeG. & Sm. 389. That case cannot rule this case, much less can all that might be thought to flow logically from the decision in it.

A great difficulty that would be met if, in this case, the appellants' contention were given effect to, is this: the very purpose of the father to prevent the son wasting any part of the testator's estate in dissipation or improvidence would be frustrated: if the son took a vested interest in the whole fund under the will, whatever might have been his exact rights as to possession of it, his powers of disposition over it would have been enough to frustrate his father's provident attempt to save it.

ONT.

C. A.
1912

RE RISPIN.

Magee, J.A.

The additional evidence, sought to be adduced here, would not alter the case, even if taken most favourably for the appellants: there would be no payment, within the meaning of the will, beyond the sums actually received by the son.

I would dismiss the appeal.

MAGEE, J.A.:—I agree that the judgment appealed from should be affirmed, and for the reasons given. It is not necessary to consider what would have been the rights of the testator's son Luke Rispin in case there were any withholding by the executor in bad faith, without having any reason in his own mind for doubting the propriety of paying the fund over on account of what the testator called "the habits and conduct of my son." No such case is made here; and, in the absence of such bad faith, it is clear that the son could not in his lifetime have compelled the payment over to him of any part of the fund. That being so, it seems to follow that the present case turns on whether the executor could, after the death of Luke Rispin, have exercised the discretion in his favour. It is not a trust for Luke Rispin and his executors, with power to withhold during Luke Rispin's life on account of his habits. The executors would only take because there was an absolute interest given to Luke Rispin or because a life interest was given him which at law would imply the absolute interest. But he took neither. There was a power to give him the fund held in trust for some person or persons. As was said in *Duke of Marlborough* v. *Lord Godolphin* (1750), 2 Ves. Sr. 61, "it would be absurd that powers of this kind should be executed for benefit of a person dead at the time of executing." If, then, the executor could not now exercise his discretion, he has not waived any right, or refused to exercise it by submitting the matter to the Court, so as to entitle the Court to do so.

Appeal dismissed

N.B.

S. C.
1912

Feb. 23.

GUIMOND et al. v. FIDELITY PHOENIX FIRE INSURANCE CO.

New Brunswick Supreme Court, Barker, C.J., Landry, White and McKeown, JJ. February 23, 1912.

1. EVIDENCE (§ X B—693)—CONVERSATIONS WITHOUT PREJUDICE.

In an action on a policy of fire insurance it was error to admit evidence on the part of plaintiff that the defendants had through their agents denied liability altogether, the same being offered by the plaintiff because of his contention that the requirement in the policy as to arbitration did not apply if the insured denied any liability whatever, where the defendants objected to such evidence on the ground that the denial had been made during negotiations looking to a compromise of the plaintiff's claim and that the negotiations were without prejudice and that it had been so stated at the time, without first hearing the evidence tendered in support of the objection to prove that the statement was made without prejudice in settlement negotiations.

2. INSURANCE (§ III D—65)—FIRE POLICY—MEANING OF "RAILWAY."

The word "railway" as used in a warranty by the insured in a policy of fire insurance covering lumber, that no railway ran within a specified distance of the insured property, is not limited to railways opened and used for general public traffic but also embraces railways in course of building upon whose tracks construction trains only are running.

3. PRINCIPAL AND AGENT (§ I—1)—FIRE INSURANCE—KNOWLEDGE OF AGENT.

The relationship of principal and agent is not established between an insurance company and a person not in its employ who upon being requested to procure insurance on certain property by the owner sent the application to a general agent in another place who placed a portion of the insurance applied for with the said company and therefore the company could not be charged with any information acquired by such person as to the nature of the risk or value of the property insured.

4. INSURANCE (§ III E—80)—WARRANTY—SOLE AND UNCONDITIONAL OWNERSHIP.

A mortgagor of insured property is the sole and unconditional owner thereof within the meaning of a provision of a policy of insurance avoiding the same if the insured is not such owner.

[*Western Assurance Co.* v. *Temple*, 31 Can. S.C.R. 373, affirming 35 N.B.R. 171, followed.]

5. INSURANCE (§ III E—80)—WARRANTIES—TITLE AND ENCUMBRANCES—TRANSFER AS SECURITY.

A transfer of insured property as security for a debt is a violation of provisions in the policy avoiding it if the subject of the insurance be personal property and be or become encumbered by a chattel mortgage or if any change take place in the title or interest of the property otherwise than by the insured's death.

6. INSURANCE (§ VI A—247)—PROOFS OF LOSS—INSURED'S KNOWLEDGE OF TIME AND PLACE OF FIRE.

A mere statement by the insured in the proofs of loss furnished the insurer that the origin of the fire was unknown to him is not a compliance with the requirement of the policy that the insured in his proofs of loss "shall render a statement to this company signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire."

7. INSURANCE (§ VI A—247)—PROOFS OF LOSS—STATEMENT OF INTEREST OF INSURED AND OTHERS.

A statement by the insured in the proofs of loss furnished the insurer that the insured property at the time of its destruction belonged to the insured and no other person had any interest in it except a specified bank for advances, but which failed to state the nature of the bank's interest or the amount of the advances and made no mention of a transfer given the bank as security, is not a compliance with the provision of the policy that the proofs of loss shall state the interest of the insured and all others in the insured property.

8. INSURANCE (§ VI A—247)—PROOFS OF LOSS—CONTENTS—WAIVER BY INSURER.

No waiver by the insurer of the provisions of a policy as to what the proofs of loss must contain is shewn by the fact that its adjuster went to the place of fire to ascertain its cause and the amount of loss caused by it and that while there he made enquiries of the insured as to his knowledge of the origin of the fire, the quantity of the goods destroyed, what books or paper he still had and other insurance, and had measurements made for the purpose of estimating the quantity of the goods destroyed.

N.B.

S. C.

1912

GUIMOND v. FIDELITY PHOENIX FIRE INSURANCE CO.

9. INSURANCE (§ VI A—247)—PROOFS OF LOSS—RETENTION BY INSURER—WAIVER OF FURTHER PROOF.

The mere fact that an insurer retained the proofs of loss furnished by the insured for a long time without objection cannot be held to constitute a waiver of fuller or further proof.

[*McManus* v. *Aetna Insurance Co.*, 11 N.B.R. 314, followed; *Imperial Fire Insurance Co.* v. *Bull*, 18 Can. S.C.R. 697, 1 S.C. Cas. 1, affirming 15 Ont. App. 421, distinguished.]

10. NEW TRIAL (§ II—8)—NON-DIRECTION.

When the facts are such that in order to guide the jury properly there should be a direction of law given, the omission to give such direction of law is a ground for a new trial.

[*Prudential Assurance Co.* v. *Edmonds*, 2 A.C. 487.]

APPEAL by the defendants from the judgment at the trial before Barry, J., and a jury of an action on a fire insurance policy.

The appeal was allowed and judgment entered for the defendants.

Verdict had been entered for the plaintiffs for $3,875.06 and interest at the trial. The policy sued on was for $4,000 upon a quantity of sawn lumber lying in the town of Campbellton, N.B. There was other concurrent insurance on the lumber making a total of $51,000.00. Fire occurred August 21, 1910. Proofs of loss were filed October 7, 1910. The plaintiffs claimed a loss of $49,407.01 and the jury upon answers to questions found the loss as claimed and that the defendants' share was $3,875.06. The facts and such of the questions and answers to the jury as are material for the decision of the Court are set out in the judgment of the Court delivered by Barker, C.J.

J. H. A. L. Fairweather, for the defendants, now moved to set aside the verdict for the plaintiffs and to enter a verdict for the defendants or for a new trial. (He first stated the facts.)

There is a clause in the policy requiring disputed claims to be arbitrated. The plaintiffs should have offered to arbitrate: *Scott* v. *Avery* (1856), 5 H.L.C. 811; *Caledonian Insurance Co.* v. *Gilmour*, [1893] A.C. 85; *Hamlyn and Co.* v. *Talisker Distillery Co.*, [1894] A.C. 202; *Spurrier* v. *La Cloche*, [1902] A.C. 446.

(Mr. *Taylor*, counsel for the plaintiffs, took the objection that he had not been furnished with a list of the authorities but the objection was overruled.)

Fairweather:—In regard to waiver of the conditions of the policy, we claim that neither Fairweather nor Frink had authority to waive, and a condition in the policy requires that such waiver should be in writing. See *Atlas Insurance Co.* v. *Brownell*, 29 Can. S.C.R. 537, *Commercial Union Insurance Co.* v. *Margeson*, 29 Can. S.C.R. 601; *Logan* v. *Commercial Union Insurance Co.*, 13 Can. S.C.R. 270. Neither a local agent nor an adjuster has the right to waive conditions precedent in an insur-

ance policy: *Western Insurance Co.* v. *Doull*, 12 Can. S.C.R. 446, at p. 454; *Imperial Bank* v. *Royal Insurance Co.*, 12 O.L.R. 519; *McKean* v. *Commercial Union Insurance Co.*, 21 N.B.R. 583; *Hyde, Liquidator* v. *Lefaivre*, 32 Can. S.C.R. 474.

Teed, K.C., on same side, discussed the evidence as to amount of lumber destroyed and claimed the quantity was fraudulently over-estimated. The plaintiff's wife was allowed to testify to statements made by Mr. Shannon. Shannon was an insurance agent, but he was not even the local agent of the defendant company. Messrs. Fairweather and Frink were adjusters and as such went to Campbellton to arrange the fire loss. They had no authority to waive any conditions. The Judge admitted in evidence a conversation with the adjusters which we claimed was without prejudice and refused to allow us to shew the circumstances but left the matter to the jury. This was improper. The question was for the Judge to decide and the evidence was wrongly admitted: Taylor on Evidence, 8th ed., p. 35, sec. 23; *Cleave* v. *Jones*, 7 Ex. 421; *Bartlett* v. *Smith*, 11 M. & W. 483; *Boyle* v. *Wiseman*, 11 Ex. 360. The Judge improperly charged the jury that the company by making inquiry for itself waived further proofs of loss, and the jury found that the fact of the adjusters coming up to make further inquiries was a ground of waiver. There is a warranty in the policy that no railway ran within 200 feet of the lumber. Mr. Frink knew the railway ran within 200 feet when he sent in an application for insurance to the Western Company and the Western Company placed part of their insurance in the Fidelity-Phœnix. The plaintiffs claim estoppel. They should have asked to have the contract reformed, but in fact Frink did not purport to act for the defendants and the defendant company knew nothing of the railway. The plaintiffs are, therefore, bound by their express warranty. The Judge told the jury to read the conditions and put their own construction upon them.

[BARKER, C.J.:—The construction of written documents is for the Judge.]

Teed, K.C.:—There was no evidence to support the jury in finding that the plaintiffs offered to arbitrate. The Judge gave no directions as to fraud except to tell the jury, to find if there was any. He should have instructed them as to what constituted fraud under the particular circumstances. The plaintiffs are seeking to get double insurance on this lumber. There is $15,000 more on it taken out by a man named Goulette, loss payable to the plaintiffs, but they suppressed this fact. The claim as to the amount of lumber burned is entirely fraudulent, and the findings of the jury in that regard are against evidence. One of the plaintiffs swore that they were the sole owners of this lumber in spite of the fact that they entered into an agreement

N.B.

S. C.

1912

GUIMOND v. FIDELITY PHOENIX FIRE INSURANCE CO.

Argument

to sell 1,000,000 feet to Goulette. The proofs of loss should have been signed and sworn to by all the plaintiffs.

F. R. Taylor, for the plaintiffs, *contra*:—We had this insurance previously in other companies. The main defence in the case was arson, but that was abandoned before the jury, and then the company fell back on technical defences. Guimond was persuaded to change his insurance to the present companies by Shannon. The first companies were charging premiums for lumber lying near a railway track, but on Shannon's representation they cut the premium in two, on the ground that the railway was not running and therefore the risk was not serious. This railway was not opened for regular use and is not a railway within the meaning of the clause in the policy. The railway did not go into operation until the October following. This was understood between the parties and if necessary the contract could be reformed to meet the facts under the authority of *McKean* v. *Dalhousie Lumber Co.*, 40 N.B.R. 218. The arbitration clause applies only where there is a disagreement as to the value. There was no such disagreement here, but the company denied all liability, claiming arson. The burden is on the defendant to shew that there was a disagreement as to value. The letter from the defendants' agents in Saint John stating that matter was in adjuster's hands proves that Messrs. Fairweather and Frink were agents of the defendant. (He next discussed the evidence as to damages). Objection is taken that the plaintiffs were not the sole and unconditional owners as required by the policy, but this was thoroughly understood by the defendant. They drew on the Banque Nationale for the premiums and the loss was made payable to them. See *Hazzard* v. *Canada Agricultural Insurance Co.*, 39 U.C.Q.B. 419. Cameron's Law of Fire Insurance in Canada, p. 289. In regard to putting in evidence the survey bills of Chouinard, I cite *The Sussex Peerage Case*, 11 C. & F. 85, at p. 113; *Reg.* v. *Buckley*, 13 Cox. C.C. 293. In regard to the Judge's charge it is very full on the question of agency.

[BARKER, C.J.:—The criticism of the charge is that it is too general and does not give specific directions to the jury that they could understand.]

Taylor:—The practice seems to be to give a general charge.

[WHITE, J.:—I do not think that is the practice. The better practice is to apply the law to the facts in question.]

Taylor:—There is no condition in the policy requiring proofs of loss to be sworn to by all members of the firm.

[BARKER, C.J.:—One man could not swear to the belief of his partners.]

Taylor:—The ordinary course of business would be for one partner to swear to a proof of loss. The defendants cannot now

object to the sufficiency of the proofs of loss because they were delivered on October 7th, and no objection was made to them until action brought: Bunyan on Fire Insurance, 5th ed., p. 219. *Bull* v. *North British Investment Co.*, 15 A.R. (Ont.) 421.

McKEOWN, J., referred to *LeBlanc* v. *Commercial Union Insurance Company*, 35 N.B.R. 665.

Taylor:—The company is bound by the acts of its adjusters where they are the means of communication between the insured and the company: *Guardian Assurance Co.* v. *Connely*, 20 Can. S.C.R. 208, *People's Life Insurance Co.* v. *Tattersall*, 37 Can. S.C.R. 690; *Lyon* v. *Stadacona Insurance Co.*, 44 U.C.Q.B. 472. Order 39, rule 6, provides that there shall be no new trial for misdirection unless there is a substantial wrong or miscarriage of justice. See *Floyd* v. *Gibson*, 100 L.T.N.S. 761; *Tait* v. *Beggs* (2), [1905] 2 Ir. L.R. 525.

Teed, K.C., in reply, cited *Atlas Insurance Co.* v. *Brownlee*, 29 Can. S.C.R. 537.

February 23, 1912. The following judgments were delivered.

BARKER, C.J.:—This is an action for the recovery of an insurance by the defendants on a quantity of sawn lumber, which was totally destroyed by fire which took place on the 21st August, 1910. The cause was tried at the last Restigouche circuit before Barry, J., and a jury, and resulted in a verdict being entered in the plaintiffs' favour for $3,875.06, the full amount claimed. The plaintiffs other than the Banque Nationale—which was added as a co-plaintiff after the action had been commenced are a firm carrying on a lumber manufacturing business at Campbellton or in that vicinity under the name of "Guimond Couillard Frères et Cie." In July, 1910, some two or three weeks after the great fire had occurred, which destroyed the town of Campbellton and which, to avoid confusion, I shall speak of as the Campbellton fire—the plaintiffs Guimond Couillard & Co. had a large quantity of sawn lumber piled in their yard at Campbellton, which the defendants insured for $4,000. The policy is dated July 25 and was for one month, expiring at noon on August 26. There were other policies with other companies which made the total insurance on the lumber at the time of the fire to be $51,000 exclusive of the Goulette insurance, the particulars of which I shall give later on. The jury found the value of the lumber to be $53,000, when the insurance was effected and $49,407.01 at the time of the fire, and on that basis of valuation the defendant's share of the loss was the amount for which the verdict was entered. By the proofs of loss which were furnished on the 7th October, the loss was stated to be $49,407.01, the amount found by the jury and the total insurance to be $51,000, as to which there is no question. The prop-

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

erty insured, the amount and certain special conditions of the risk are described in the following typewritten passage taken from the policy:—

> Four thousand dollars on sawn lumber piled and lying on north west side of Tobique road in the town of Campbellton, N.B. Other concurrent insurance permitted without notice, until requested. Loss, if any, payable to La Banque Nationale. Subject to conditions of average hereto annexed. It is warranted by the assured in accepting this policy that a clear space of 300 feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any stream or water power, saw mill, planing mill or other special hazard, and that no railway passes through the lot on which said lumber is piled or within 200 feet.

The point to which much the greater portion of the evidence was directed was the question of damages. There were difficulties in the way of proving the exact quantity of lumber destroyed by reason of the plaintiffs having lost books and papers at the Campbellton fire a few weeks before. All parties were therefore compelled to resort to estimates based on data not very exact and as to which there was a substantial difference of opinion among the witnesses. The defendants contended that apart altogether from any intentional over-valuation by the plaintiffs, the lumber destroyed must have been much less in quantity and value than the plaintiffs claimed, and the jury found. Under these circumstances, I should myself have felt bound in the absence of all questions as to misdirection or admission of improper evidence to accept the jury's estimate of the damages, although their unanimous adoption of the amount, even to the odd cent stated in the proofs of loss, looks very much as though they had accepted these figures without giving the evidence much consideration, as an easy solution of an important point at issue.

Thirty-four questions were submitted to the jury; 28 by the Judge, 3 by the plaintiff's counsel and 3 by the defendants' They answered all except three in favour of the plaintiffs; two they did not answer at all, and one, in reference to the railway being within the 200 feet of the lumber, about which there was no dispute, they found in favour of the defendants. They found that the plaintiffs stated the true value of the property, gave all the proofs of loss in accordance with the policy, and stated the truth as to the ownership of the property, and at the same time they found that the conditions of the policy in reference to these and other matters had been waived. It is not my intention to go into all the matters to which these questions relate, for I have arrived at the conclusion that the plaintiffs cannot sustain this action and I shall only discuss the more important points upon which I base this conclusion. This policy contains a provision for determining the amount of the liability in case of disagreement by reference to arbitrators.

The plaintiffs' construction of the policy is that this condition has no reference to cases where all liability is denied; and in order to prove that the defendants denied all liability in this case and therefore the condition to arbitrate was not a condition precedent to the right to maintain this action, they gave evidence of a conversation between Lavoie the general manager of the Banque Nationale, to whom the money was payable, and E. H. Fairweather and H. H. Frink, which took place on the 15th December at St. John some three weeks before proofs of loss were given. Objection was taken to this evidence on the ground that the conversation had taken place on the distinct understanding that it was without prejudice and it was so stated at the time. Lavoie said he did not remember that the conversation was without prejudice, though he would not say it was not. Mr. Teed, the defendant's counsel, then offered to give evidence of the fact that the conversation had been without prejudice and asserted his right to do so. The Judge refused to allow that evidence and though he expressed the opinion that evidence of a conversation without prejudice was not admissible, he said it was a question for the jury and that the only way to determine the question was to have the jury find whether or not the conference was without prejudice, and if it was, that any evidence given he would instruct the jury to exclude from their minds. The witness then gave the following evidence:—

> They (that is, Fairweather and Frink) began by disclaiming any liability in the matter, but they said as the bank had given its money, they would be ready to entertain a composition and when it came to the facts on what we could settle they were claiming a quantity below a million feet, and as we were claiming over two millions, we saw at once that we couldn't come to any agreement; the difference was too wide; we saw there couldn't be any arbitration so we went home.

Later on, when Fairweather was on his cross-examination as to the same interview, he said it was without prejudice and the Judge excluded his evidence. It never was in any way withdrawn from the jury. They found in answer to question 20, "that the defendant company absolutely denied or repudiated the plaintiffs' claim and refused to submit the same to arbitration as provided by the condition of the policy." In *Bartlett* v. *Smith*, 11 M. & W. 483, Anderson, B., says at p. 406:—

> Where a question arises as to the admissibility of evidence the facts upon which its admissibility depends are to be determined by the Judge, and not by the jury. If the opposite course were adopted, it would be equivalent to leaving it to the jury to say whether a particular thing were evidence or not. It might as well be contended that a Judge ought to leave to the jury the question, whether sufficient search had been made for a document so as to admit secondary evidence of its contents.

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

Assuming that the plaintiffs' contention is right, and that this condition as to arbitration is, under the particular language of this policy, a condition precedent to the right to recover only where the amount is the sole question in dispute, and on this point, I express no opinion—it is clear that this evidence on which the defendant's repudiation of all liability rests was erroneously admitted. Apart, however, altogether from this it is evident that interviews and negotiations with a view to a settlement of dispute, especially where they are expressly stated to be without prejudice are inadmissible in evidence on well-known principles. Juries, especially in cases like the present are not slow in seeing the almost irreparable injury done to a company's defence by evidence of its responsible agents having in one breath asserted its entire freedom from liability, and in the next expressed a willingness to settle by paying 50c. on the dollar.

There are three questions upon which I think this case must be decided, and I shall confine my remarks to them. First, was there a breach of warranty as to the railway track? Second, was there a failure to perform conditions precedent to the right to maintain the action and if so, were they waived? and third, the alleged misdirection by the learned Judge in failing to instruct the jury sufficiently as to the application of the law to the particular facts in evidence. As to the warranty—By the extract from the policy which I have already given, it will be seen that by the terms of the policy itself the plaintiffs by accepting the policy warranted that no railway passed through the lot on which the lumber was piled or within two hundred feet. This is a substantial objection going directly to the nature and extent of the risk the company was taking and on which the rate of premium was fixed. It is admitted that the track of the International Railway was within the prohibited distance when the policy was accepted and so continued. What is the answer set up? First, it is said the word "railway" means a railway opened and used for general public traffic and therefore does not apply to the International Railway then in course of construction. I do not agree in this. The danger of fire from the use of locomotives was the risk from which the warranty was intended to protect the company. Locomotives on construction trains are as likely to cause fires as those on public trains. It was also put forward that the defendants had knowledge when they accepted the risk and issued the policy that this railway was within the two hundred feet and therefore they were estopped in some way from setting up the warranty. It was not contended that the warranty was inserted by mutual mistake so that it might be reformed, or for the purposes of this case treated as reformed on that ground. There is really no evidence whatever to sustain any such conten-

tion. It is true that the jury found that the company had waived this clause by inspecting the property and then issuing a policy and taking the premium. They also found that the company or its agents were aware at the time of insuring the lumber that it was within 100 feet of the International Railway and that the railway was not open for general business when the insurance was effected or the lumber destroyed. In his charge, the learned Judge told the jury that in applying for insurance, it was the applicant's duty to give full and accurate information as to material matters; but if nothing is said about a fact which the insurer knows all about himself, the fact that the insured said nothing about it does not prejudice his right to recover. He illustrated that doctrine in this way:—

> If an agent, clothed with the proper authority, comes to the town of Campbellton and insures a building of mine next adjoining a mill, I don't think it is necessary for me to say there is a mill adjoining my property because it is an open and notorious fact; and as I have said in the authorities I have read, it would be a fraud for them to afterwards set up a claim against something they might have seen and which their agent did see at the time the insurance was accepted. So, in the case of the International Railway, I think if this railway was there when Mr. Frink went there, assuming that Mr. Frink was authorized to deal as the agent of the company, and that Mr. Shannon also had authority to accept proposals for the company it does not lie in their mouths to come forward now and raise that defence as to why the plaintiffs' should not recover.

If the case, put by way of illustration had been that the Judge had accepted and was seeking to enforce a contract in which he had expressly warranted that there was no mill adjoining his property the two cases would have been more nearly alike. Assuming that the Judge was right as to the case he put, there is in my opinion no analogy between that case and the present. There is a distinction between the non-communication of a material state of facts which the insurer knows all about and an express warranty by the insured in the policy itself that a certain state of facts exists. The Judge refers especially to Mr. Frink and Mr. Shannon as the agents of the company. Let us see what the facts are on this point, because, as I view them, there is no evidence of agency at all. In the first place, Frink—H. H. Frink—the person referred to by the learned Judge, had no connection, official or otherwise with the defendants in this suit. His father, R. W. W. Frink, was the general agent at Saint John of two insurance companies, the Western and the London. H. H. Frink at the time in question, was at Campbellton and had been there for some time, adjusting losses in the Campbellton fire for the Western, the London and the Royal Exchange. Shannon who is an insurance agent and solicitor living at Dalhousie with an office at Campbellton, came to Frink, and said that he had some insurance in view

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

on lumber, and asked if we—that is the Western and London, would care to have a share of it, if it was desirable. I quote from Frink's evidence.

> Q. What companies were you representing? A. The Western and London Assurance at that time. He (that is Shannon) asked me if we would take some. I said, Yes, if it was desirable. Then he suggested that I go and look at it. I went up with him. I was about to go to Metapedia on the "Limited," and I went up there for a few minutes and was introduced to Mr. Guimond, and then I had some talk with him through Mr. Shannon. (Guimond, it seems, did not speak English sufficiently well to carry on a conversation.) Q. You said you went up to the yard and met Mr. Guimond? A. Yes. Q. This was about what time? A. Well, it must have been about the 18th or 19th of July. I don't know the exact date. Q. What took place between you and him?

The witness, Frink, said that the companies represented by Shannon were the Yorkshire, The Pacific Coast, the German & American, the Western and he thought the Fidelity Underwriters. Up to this point, it will be seen that neither Shannon nor Frink had any connection whatever with the defendants; they were not acting for them, they had no authority to act for them, and they did not in any way profess to act for them. They were not in Campbellton on any business of the defendants, directly or indirectly. His examination continued:—

> Q. What took place between Mr. Guimond and you two gentlemen as translated by Shannon on that occasion? A. It was explained to me through Shannon that Mr. Guimond had insurance in the vicinity of $50,000 on the lumber in the yard, which would be running out in a few days; that it was placed through a man named Alphonse LeBlanc, but that he would place it with Mr. Shannon. Q. Place it through Mr. Shannon? A. Yes, with whom he had been doing other insurance; so I said we would like a share of the insurance for the Western and London and he said he would give it to us. He said he wanted to place $37,000 insurance at that time.

Frink goes on to state how he made some enquiry as to the quantity and value of the lumber there; he also stated how the rates were arranged for risks of this kind and explained how they varied on property of this nature according to the season of the year, August being the most dangerous month. After Frink had the conversation with Guimond above mentioned he visited the yard. He says:—

> My train was about leaving for Metapedia where I was staying and I had about ten minutes and I walked up through the yard to see the condition of the yard, whether it was clean, and so on, and I saw a tent in the yard and told them that they had better move it out, as we didn't like fellows sleeping in a lumber yard. Then I went away. The next day Mr. Shannon brought Mr. Guimond down to the Royal Bank where I had a temporary office, adjusting fire losses, and told me he wanted $37,000 insurance; so I filled out a form which he signed, in which he said he wanted $37,000 insurance

and his value was $37,000. Then, about two days afterwards, Mr. Shannon came to me at Campbellton and said there had been a misunderstanding about the insurance required; that there was $51,000 in these companies—I think it was $51,000 about expiring and Mr. Guimond had thought it was $37,000 now and the balance expiring in a few days, but really it was the whole $50,000 or so coming due and he wanted $14,000 more than $37,000; so I telegraphed to Mr. Frink in Saint John asking him to place that additional $14,000.

This was the witness's father, as I have already mentioned who was the general agent of the Western & London, at St. John. The first application for the $37,000 had been forwarded by telegram before this. The $14,000 was taken up at St. John; $4,000 by the defendant company and $10,000 in the Commercial Union. The first $37,000 was distributed as follows:—Manitoba, $2,250, Norwich Union, $7,250, Liverpool and Globe, $5,000, Western, $15,000, and London, $7,500. I am altogether unable to find in all this evidence anything to sustain the argument that Frink acted as, or in fact was, the defendant's agent. The evidence is all the other way—neither he nor Shannon had any connection, direct or indirect, that I can see, with the defendant. To attempt under such circumstances to fix the defendant with knowledge of facts which they had as in any way affecting this insurance seems to me altogether useless. No case is much stronger than *McLachlan* v. *Ætna Insurance Co.*, 9 N.B.R. 173, where it was held that notice of a prior insurance to a broker was not notice to the company. This is sufficient to dispose of the plaintiff's contention as to this part of the case, but let us go a little further. What was the knowledge of Frink which is imputed to the company? It is true that he visited the yard and possibly saw the railway track there, though I have not found any evidence that he did. His attention was not turned to it. There was nothing to suggest to him that its being there was of any importance. He did not know, or, at all events there is nothing to suggest that he had any reason for supposing that this special warranty would be inserted in the policy. There is nothing to shew that it was in any of the other policies, and it is not in the two Goulette policies afterwards referred to on the same property. Whatever information he did acquire as to the nature of the risk or the value of the property, he acquired not as the agent of the defendant, or for it, but for his own companies. He owed the defendant no duty and it is impossible for a company to have an agent for whose acts it is liable without having appointed him or in some way recognized him as its agent. The plaintiffs' case was not a difficult one. They through one of the partners applied for insurance and the company say we will insure at such a rate subject to the terms of this policy which by accepting it you agree to. He need not have accepted the policy unless he liked. If there was a provision in it which

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

he was unable to observe or which he was unwilling to accept, his plain course was either to return the policy for alteration to meet his views or refuse it altogether. It was his duty to read his policy and ascertain whether it was what he wanted or what he was willing to accept. If he chose not to do so and a loss occurs, it is, I think, in the absence of fraud or mutual mistake —and there is nothing in the evidence to suggest either—too late when he has brought an action to enforce the contract as it is, to expect to expunge from it a warranty like that in question, thus not only making an entirely new contract, but one which it is fair to assume the company never would have made at all: *Provident Assurance Co.* v. *Mowat* (1902), 32 Can. S. C.R. 147; *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K.B. 516; *New York Life Insurance Co.* v. *Fletcher*, 117 U.S. 519; *Richardson* v. *Maine Ins. Co.*, 46 Maine 394, 74 Am. Dec. 459.

This point in my opinion involves no question of estoppel. It lacks all the essential elements of that doctrine. Neither is it a question of waiver. That occurs when by some act or agreement subsequent to the making of the contract, the performance or observance of some condition or warranty in the contract is waived by the person for whose benefit the condition or warranty was inserted—and in that case under the terms of this policy, no part of the policy could be expunged except by agreement endorsed on the policy or attached thereto. The clause referred to is as follows:—

> This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provision, or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

I come now to certain conditions and provisions in the policy to which the doctrine of waiver is applicable. It will be convenient at the outset to point out a distinction which has been made between those provisions which, if disregarded, create a forfeiture of the policy itself, and those conditions which if unperformed, are a bar to the right to maintain an action. This policy contains provisions by which it becomes void in certain specified cases some of which are as follows:—

> (1) If the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not on property covered by this policy; (2) If the interest of the insured be other than unconditional and sole ownership; (3) If the subject of insurance be

personal property and be or become incumbered by a chattel mortgage, and (4) If any change take place in the title, interest or possession of the property otherwise than by the insured's death; (5) The concealment of any material fact or circumstance concerning the insurance or the subject thereof.

The conditions which relate to the maintenance of an action are the usual ones as to proof of loss and the adjustment of the loss by arbitration. The distinction between the two classes was pointed out by this Court in *Bowes* v. *National Insurance Co.*, 20 N.B.R. 437. It was also discussed by the Court of King's Bench in Ontario in *Mason* v. *Hartford Insurance Co.*, 37 U.C.Q.B. 437, and by Strong, J., in *Western Assurance Co.* v. *Doull*, 12 Can. S.C.R. 446 at p. 454. Let us first see whether there has been any breach of these conditions, for if there has not, the question of waiver is immaterial. The circumstances relied on as shewing a breach of the conditions which I have mentioned first are these. It appears that the plaintiffs Guimond & Co., on the 12th May, 1910, entered into a contract under seal with one Phillip Goulette, by which the one agreed to sell and the other to buy two million feet of pine lumber, a part of the lumber which was destroyed, at the rate of $20.00 per M., $500 to be paid on signing the contract and the balance in sums of $500 on the 15th of each month. Goulette insured this pine lumber for $15,000 by two policies, one for $10,000 with the Yorkshire Insurance Co., dated May 14th, 1910, and the other of the same date for $5,000 with the Pacific Coast Company. Both policies were for three months from May 20th to August 20th and the loss in both policies is made payable to Guimond & Co., as interest may appear. The plaintiffs say that this agreement of May 12, was terminated a day or two after it was made and a verbal agreement substituted in its place, by which Goulette was to sell the lumber for the plaintiffs on commission. The evidence, however, shews that so late as July 10, only a fortnight before the defendants issued their policy, a change was made in the agreement made with Goulette two months previous by striking out the word two and inserting one, making it a contract for one million instead of two. This alteration is dated in the margin and initialed by the witness. Besides this, Goulette has actions pending on the policies or renewals of them. In either version it is clear that when the defendants entered into this insurance policy, the plaintiffs Guimond & Co., in addition to the $51,000 procured by themselves and in their name were interested in $15,000 more on the same property, making a total of $66,000 of insurance on property which according to the plaintiffs' own valuation was only worth $53,000 when the present insurance was effected. The jury in reference to this branch of the case said in answer to question 5 that at the time this present insurance was applied for, none of the lumber covered by this policy had been sold, and none of the property transferred to

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

Goulette; and in answer to questions 2 and 3 submitted by defendants' counsel they found that the Goulette insurance was on the same lumber, but they did not know whether or not the Goulette policies had been obtained with the knowledge and consent of the plaintiffs Guimond & Co. In view of this, it is impossible to tell whether the plaintiffs procured this Goulette insurance or not. There does not seem to be any dispute as to the nature of the dealings between the plaintiffs Guimond & Co. and the Banque Nationale. On the 5th October, 1909, Guimond & Co., (acting by the plaintiff Amedie Guimond who made the proof of loss) entered into a written agreement with the bank by which the bank was to make the plaintiffs Guimond & Co., advances for which they were to get security from time to time "by means of warehouse receipts, bills of lading and transfers made by virtue of the Banking Act, including all the merchandise belonging to the undersigned (the plaintiffs) of the nature and following description that is to say" etc. Then follows a description of lumber admittedly including the lumber in question.

The agreement authorized the manager of the bank at Montmagny as the attorney of the plaintiffs to give the bank as often as requested and to sign the said securities or transfers. The agreement was to secure advances to be made for the season of 1909-1910. Hypothecations seem to have been executed from time to time. The last one was by way of mortgage or bill of sale, made on the 15th August, 1910, for $29,133.00 upon lumber described as follows:—

> On all the lumber made during the season of 1909-1910 on our lumber lots on the river Upsalquitch, in the county of Restigouche, and on all places where it is now situated, whether manufactured or not, and specially in the yard of our mill and in our lumber yard at Campbellton, N.B., and the lumber manufactured into cedar, spruce, pine, birch and all other kinds of lumber, and other lumber manufactured out of said lumber, and especially 4,600,000 feet, more or less, in our lumber yard at Campbellton.

This assignment was executed by Mr. Moisant the bank's manager at Montmagny, acting under the power contained in the agreement.

At the time of the fire Guimond & Co., owed the bank $42,000, of which the $29,133 was secured by the lien on this lumber. At page 211 of the record, I see Mr. Hazen the plaintiff's counsel in reply to an inquiry by the Judge whether this included all the plaintiff's liability said, "All the liability for which a lien was given on the lumber." It is, therefore, not in dispute that when the insurance was procured on the 25th July, 1910, there was in the hands of the bank an irrevocable power of attorney from the plaintiffs, by which in consideration of advances to be made from time to time to enable them to carry on the season's operations, the lumber could be encum-

bered or hypothecated by way of security. It is also not in dispute that on the 15th of August, 1910, three weeks after this policy was issued and less than a week before the fire, a transfer of this specific lumber was made to the bank to secure $29,133 of indebtedness, and which according to the plaintiffs is the only security on this property. The precise position of the plaintiffs as to the title to this property when this insurance was effected is not made very clear by the evidence. But if the bank was at that time a mortgagee, it might be that the plaintiffs could properly describe themselves as sole and unconditional owners. *Temple* v. *Western Assurance Co.*, 35 N. B.R. 171 affirmed on appeal *Western Assurance Co.* v. *Temple*, 31 Can. S.C.R. 373, and cases there cited, support that view. But that does not get rid of the other two provisions by which the policy becomes void when the property becomes incumbered by a chattel mortgage or a change takes place in the title. The jury found that the defendants knew when they issued the policy that the lumber was mortgaged to the bank. Beyond the fact that the loss is payable to the bank, there is no evidence to support the finding. They could not have known and there is no pretence that they ever had any notice of the mortgage made on the 15th August, which in my opinion was a clear violation of the provisions of the policy and rendered it void. No answer has been made to this objection, and it would seem from the provision as to waiver incorporated into the policy itself no answer could be of any avail except a written agreement endorsed on the policy itself or attached thereto.

In reference to proofs of loss the policy provides that in case of a fire occurring "the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damages, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by the company, shall render a statement to this company signed and sworn to by the said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cost value of each item thereof and the amount of loss thereon" and various other facts not in dispute here. It is also provided that the company may require further information, may examine the insured on oath and inspect their books and papers and require the certificate of a notary public or a magistrate, etc. Then follows a provision that in the event of disagreement as to the amount of loss the same shall as above provided be ascertained by two competent and disinterested appraisers, the insured and company each selecting one and the two so chosen shall first select a competent

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

and disinterested umpire; the appraisers together shall then estimate the loss, or in case they disagree, the umpire shall act and the award in writing of any two of the three shall determine the amount of such loss. Then follows this clause:—

> This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until 60 days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by the company including an award by appraisers when appraisement has been required.

It is then provided as follows:—

> No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire.

It is, I think, clear that it was the intention of the parties to this contract that the amount of the loss was in the case of the parties disagreeing to be determined by appraisers to be selected as provided by the policy. It is, I think, equally clear that the effect of the clauses I have quoted was to make it a condition precedent to the insured's right to maintain an action that the amount of the loss should first be ascertained in the way I have mentioned, just in the same way that the delivery of proofs of loss as required by the policy is a condition precedent to the right to maintain an action. See *Guerin* v. *Manchester Ass. Co.*, 29 Can. S.C.R. 139 and *Lantalum* v. *Anchor Ins. Co.*, 22 N.B.R. 14.

It is expressly provided that no action shall be maintained until all these requirements as to ascertaining the amount of the loss and delivery of proofs (which are to include a copy of the award of the appraisers) shall have been fully complied with. Admittedly they have not been complied with so far as the appraisement of the loss is concerned. Have they been in regard to the proofs of loss? The policy allows sixty days within which the proofs are to be furnished. The plaintiffs took over three-quarters of that period and therefore had ample time to acquire all the information necessary for the purpose. Several objections were taken to the sufficiency of the proofs, but I shall only notice three. The policy requires the proofs to state among other things, the knowledge and belief of the insured as to the time and origin of the fire, any changes in the title since issuing the policy and all incumbrances. The proofs state that the origin of the fire was unknown to the insured, but they entirely ignore the requirement as to their belief and say nothing whatever about it. Neither do they mention the incumbrance given to the bank on the 15th August. The proof used was a blank printed form, and in it, it is stated that the

property at the time of the fire belonged to the insured and no other person had any interest in it, except the Banque Nationale for advances. They do not state the nature of the interest or the amount of advances. The clause in the form of proof relating to a statement of the "nature and amount of incumbrance at the time of the fire, if any" gives no information of any kind. Two questions, 12 and 14, were answered by the jury and relate to the proofs of loss. In answer to the 12th, they found that those proofs were in substantial compliance with the conditions of the policy. And in answer to question 14 they found that the plaintiffs did within sixty days after the fire render to the defendants a signed and sworn statement stating the knowledge and belief of the plaintiffs as to the origin of the fire, the interest of the insured and all others in the property, the cash value of each item, the amount of the loss and the nature of the incumbrances (if any) upon the insured property. As to the second of these questions, the document itself shews how inaccurate the answer is. And as to the other, there are some observations by the learned Judge which might more properly be introduced later on, but which I shall refer to here. In presenting question 12 to the jury, the learned Judge said:—

> Well, the proofs of loss were delivered and as far as I can see—at all events, I so direct you—they appear to be in substantial compliance with the conditions of the policy. There is a question of law raised by Mr. Teed here as to whether or not there should not have been something done in addition to what has been done to prove these documents, but that is a matter of law. For the purposes of this case, at all events, I direct you that these proofs, because they appear to have been written by some person versed in the subject and upon blank forms from the insurance office that they are in substantial compliance with the requirements of the insurance laws, and were delivered within sixty days.

If by the term substantial compliance, the Judge meant that there had been an actual compliance, I cannot agree with him, even then, if it was a question of fact to be left to the jury, the Judge I think erred in telling the jury how to find it. If for instance, the plaintiffs in their proof of loss had given certain details as to the origin of the fire which the company thought were not as fully and circumstantially set out as they should be, it might then be a question for the jury to say whether the account given was such as ought to satisfy the company as reasonable men. But where, as in this case, the requirement of the policy has been ignored altogether, there cannot be a substantial compliance where there was no compliance at all. The policy requires certain proofs to be given within a certain time. It is not for the jury to say that the company ought to be satisfied with other proofs at a later date. This brings us to the question of waiver as applicable to these proofs of loss for the jury have found not only that the proofs were

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

Barker, C.J.

good and sufficient, but that all defects in them, if there were any, have been waived. I have given my reasons for thinking them insufficient and I shall now endeavour to shew that there has been no waiver. I find I must make a more particular reference to question 21 and its answer. The question reads thus:—

> Did the defendant company either by itself or its duly authorised agent waive the performance of any and all of the conditions of the policy in regard to the following matters: (*a*) As to the value of the property insured; (*b*) In regard to notice of loss; (*c*) In regard to proofs of loss; (*d*) In regard to the time when proofs of loss were to be delivered; (*e*) In regard to there being a railway running through the yard where the lumber was piled; (*f*) In regard to arbitration of the amount of loss; (*g*) In regard to the unconditional and sole ownership of the insured property by the plaintiff.

To each one of these the jury answered, "Yes." In answer to a question submitted by the Judge on the suggestion of the defendant's counsel, the jury said the waiver was made "by defendant inspecting property before issuing policy and appraisers inspecting after fire and issuing policy and receiving premium." The only ground which can possibly have any reference to proofs of loss is that the company's appraisers inspected the property after the fire. We must therefore examine the evidence upon which the jury have come to this conclusion because, I think it is the duty of this Court, if possible, to give effect to the answers of jurors to questions of fact properly submitted to them and upon which they have been properly instructed. It appears from the evidence that the plaintiffs, immediately on the fire occurring, communicated the fact by telegram to the Banque Nationale at Montmagny and they, on the 22nd of August, the day after the fire wrote the defendants' agents at St. John a letter which is as follows:—

> Montmagny, Que., 22nd August, 1910.
>
> Messrs. A. C. Fairweather & Sons,
> General Agents, Fidelity Phœnix Fire Company and
> Commercial Union Assurance Company, Limited,
> St. John, N.B.
>
> Gentlemen,—As we just had a message stating that the lumber belonging to Guimond, Couillard, Frere & Co., at Campbellton, N.B., is all burnt out, please note that the policies on this lumber have been transferred to us and all losses are payable to La Banque Nationale, Montmagny, Quebec. We hold policy No. 204, $4,000 in the Fidelity Phœnix Fire Insurance Company of New York and policy No. 8964139, $10,000 in the Commercial Union Assurance Company, Limited, and you will please communcate with us directly in settlement of same.
>
> Yours truly,
> ARTHUR MOISANT, Manager.

In reply, Messrs. Fairweather wrote the bank on the 31st August as follows:—

> Gentlemen,—In reply to telegram, matter is in adjuster's hands.

Mr. Edgar Fairweather, who described himself as an adjuster and agent went to Campbellton on the 24th of August. He said his duties and instructions as an adjuster were "to go and ascertain the amount of loss caused by fire and to ascertain the cause of the fire, if possible, make inquiries and get information in regard to it and report." He says that in company with Mr. Murray of Campbellton, he went and looked over the lumber yard in order to form some opinion as to the lumber that had been piled there. He then made inquiries of some people and later on went to see Amedee Guimond, one of the plaintiffs, who at that time seems to have been living in a shack at the lumber yard. He met Guimond there and also Spearin, one of his surveyors. He made enquiries as to their knowledge of the origin of the fire, the quantity of lumber destroyed, what books or papers they had and the other insurances. He does not seem to have got any very definite information. He went back to the town and procured the services of Anderson, a surveyor, and these two went back to the yard again. Anderson made some measurements of the yard where the wood had been piled, with a view of estimating the quantity destroyed. The next day Mr. Frink, another adjuster, arrived, and the two of them had an interview with Guimond, much the same as the first.. They made some measurements at the yard, inquired of the I.C.R. officials as to lumber hauled by them for Guimond and returned to St. John. The accuracy of Mr. Fairweather's account is not questioned. This is the only evidence except that which was given as to the interview without prejudice, relied on as establishing a waiver. In my opinion it is altogether insufficient for that purpose. In *Western Assurance Company* v. *Doull*, 12 Can. S.C.R. 446, already referred to, the circumstances were very similar. Strong, J., in speaking of Corey the adjuster, says at p. 458:—

> But even if Corey had had authority to waive, it is plain, on the evidence, he never assumed to exercise it. All he did was to ascertain the circumstances attending the loss, and the amount which the appellants would have had to contribute to it in case they had been liable to pay; he did not assume to waive any rights of the appellants, and nothing of the kind could be implied from the investigation and valuation which he made or caused to be made.

In the present case it is clear that Fairweather had no authority to waive proofs of loss, neither did he assume to exercise any such authority. His examination was made many weeks before the proofs were furnished and it is clear that the plaintiffs never acted upon the idea and never entertained any notion that the defendants had waived their right to have the

N.B.

S. C. 1912

GUIMOND v. FIDELITY PHOENIX FIRE INSURANCE CO.

Barker, C.J.

proofs according to the terms of the policy. To hold that such an examination or investigation as these officers of the company, by whatever name you choose to call them, made, establishes a waiver of proof of loss would be to hold that companies in such cases are powerless to make inquiry as to a loss except at the risk of waiving all right to the insured's statement of the nature and origin of the loss and other facts which the contract of insurance had made a condition precedent to the right to sustain an action. This present policy, I think in effect, if not in terms provides against any such result from an investigation. By the clauses which I have already quoted, provision is made for an appraisement of the loss either by agreement between the insured and the company or, in case of their disagreement, by arbitration. How can there be a disagreement as to the amount of a loss until the company has some information as to the quantity and value of the property destroyed. The proofs of loss are required in case of appraisement to include the award, and yet it is agreed that the very acts necessary to getting the award operate as a waiver of the right to get the proofs at all. The provisions in the policy requiring prompt notice of a loss—requiring the insured to protect the property from further damage, to separate the damaged goods, make an inventory and statement of claim are all for the protection of the company and to afford facilities for an early examination of the nature and extent of the loss and of themselves, have no bearing on the question of waiver. In addition to all of this, the present policy provides "that no act, requirement or proceeding relating to the appraisement or to any examinations provided for in the policy shall be held to be a waiver of any condition or any forfeiture."

If the contract by express terms provides that an examination of the insured under oath shall not operate as a waiver of conditions, an ordinary enquiry by the company as to the nature and extent of a loss such as any prudent ordinary business man would make, ought not to have that effect by implication.

There is one other piece of evidence which must not be overlooked, because it was referred to as establishing either a waiver or estoppel, though there does not seem to have been any question submitted to the jury on the point. The plaintiff Amedee Guimond after stating what took place between Frink and Fairweather, as I have already described, gave the following testimony:—

> Q. Was anything said by Mr. Frink or Mr. Fairweather with reference to anything more for you to do? A. Mr. Fairweather got up closed his books and papers and told us the reclamation was made; that he would see we were all well treated.
>
> Q. Did he say anything else? A. I don't remember.

Q. In consequence of what Mr. Frink and Mr. Fairweather said, did you do or not do anything? A. I depended on what he said and didn't do any more, expecting yet to get settled. On his cross-examination he was asked as follows: "Q. You told Mr. Taylor to this effect, that from what Mr. Fairweather and Mr. Frink had said you thought there was nothing further for you to do, that you would be settled with? A. Yes. Q. That was within how long after the lumber fire that they were up there? A. At most three days after the fire. Q. When did you get notice or become satisfied that the companies were not going to settle with you and that you had to do something else? A. When we saw we were getting no news of anything we decided to act. Q. And then you put in the proofs of loss that you did put in? A. Mr. Mauricet came down and took charge of the claim. Q. Who is Mr. Mauricet? A. He is an insurance adjuster or appraiser. He might be an insurance agent, I don't know exactly. Q. Did you send for Mr. Mauricet or how did he happen to come? A. It was the bank that sent down Mr. Mauricet. Q. Then you had the proofs of loss made up and put in? A. Yes.

I do not see how anything Frink did or said could affect the defendants, for he did not represent them in any way, but was there for other companies altogether. The jury do not seem to have relied on this evidence as establishing waiver and I think it is clear that there was nothing in the way of estoppel. There was nothing, according to Guimond's own account, which prejudiced the plaintiffs or lulled them into inaction in any way. Under these circumstances, it is unnecessary to refer to Fairweather's evidence on that point. I notice that the Judge told the jury that the retention by the company for a long time without objection of proofs of loss had been held to constitute a waiver of fuller or further proof. This is not in accordance with the opinion of this Court in *McManus* v. *Etna Insurance Co.*, 11 N.B.R. 314, where Carter, C.J., says at p. 315:—

> We do not feel inclined to adopt the doctrine which has been cited, with some appearance of authority, from some of the Courts of the United States, that the mere fact of an insurance company stating no objections to the preliminary proof given of a loss, is alone sufficient to shew that they waive any objection to such preliminary proof. Joined to other circumstances, it may be of some import, as where other objections are made, and no objection is raised as to the sufficiency of the preliminary proof, when it may be inferred that when the company state their objections, they state all on which they mean to rely. But we cannot think that total silence and inaction can fairly be taken as proof of abandoning all objections to the adverse claim of the other party.

In *Hyde* v. *Lefaivre*, 32 Can. S.C.R. 474, Taschereau, J., in delivering the opinion of a majority of the Court says:—(p. 478) "Waiver cannot be implied from mere silence." *Bull* v. *North British Co.*, 15 Ont. App. 421 and affirmed by the Supreme Court of Canada, *Imperial Fire Ins. Co.* v. *Bull*,

N.B.
S. C.
1912
GUIMOND v. FIDELITY PHOENIX FIRE INSURANCE CO.
Barker, C.J.

18 Can. S.C.R. 697, was cited as sustaining the Judge's view. In that case the company had actually paid the loss to the mortgagees to whom it was made payable and were seeking to be subrogated to the mortgagees' rights. The Court held that the company had waived all objection to the proofs of loss, that they had made no objection to the proofs until after the expiration of about nine months and had paid the money to the mortgagees. The real question involved there was the right of subrogation. In the report of the case in the C.P. division, *Bull* v. *North British Co.*, 14 Ont. R. 322, it will be found that the whole question as to the sufficiency of the proof of loss was made to depend upon the payment of the loss to the mortgagee and the provision of a statute cited in full at page 328 and commented upon at pages 330 and 331. That case has no bearing on this. The jury did not base the waiver on any such ground, and I am unable to see how any such question arises here. In my opinion the proof of loss is defective in the way I have mentioned, and there was no evidence of waiver to leave to the jury and that the ground upon which the jury base their finding is not sustained by the evidence. See *Nixon* v. *Queen Ins. Co.*, 23 Can. S.C.R. 26; *Employers' Liability Ass. Co.* v. *Taylor*, 29 Can. S.C.R. 104; *Logan* v. *Commercial Union Ins. Co.*, 13 Can. S.C.R. 270; *Atlas Ass. Co.* v. *Brownell*, 29 Can. S.C.R. 537; *Commercial Ass. Co.* v. *Margeson*, 29 Can. S.C.R. 601; *Western Ass. Co.* v. *Doull*, 12 Can. S.C.R. 446; *McKean* v. *Commercial Union Ass. Co.*, 21 N.B.R. 583.

There are other points involved in this case, some of them of considerable importance, but as I think, for the reasons I have expressed that the plaintiffs' action must fail, it is not necessary that I should further prolong my remarks. If I should prove wrong in the views I have put forward, I should think that the defendants are entitled to a new trial on the ground of misdirection. In cases like these it is useless to ignore the fact that there exists in the mind of the ordinary juror a disposition to find questions of fact in favour of plaintiffs and against the companies. Recognizing this, as anyone of judicial experience must, it is important that the greatest care and clearness should be exercised by Judges in their instructions so as to enable jurors to understand fully and appreciate precisely the nature of the questions they are called upon to answer and the law as it bears upon them. A general statement of the law without pointing out its application to the facts of the particular case must in a great majority of cases embarrass rather than aid a jury in their deliberations. This question is discussed in *Spencer* v. *Alaska Packers' Association*, 35 Can. S.C.R. 362 on appeal from a judgment of the Supreme Court of British Columbia. The principle involved is thus stated by Lord Black-

burn in *Prudential Assurance Co.* v. *Edmonds*, 2 A.C. 487 at p. 507:—

> I take it that when there is a case tried before a Judge sitting with a jury, and there arises any question of law mixed up with the facts, the duty of the Judge is to give a direction upon the law to the jury, so far as is necessary to make them understand the law as bearing upon the facts before them. Farther than that, it is not necessary to go. It is a mistake in practice, and an inconvenient one, which very learned Judges have fallen into, of thinking it necessary to lay down the law generally, and to embarrass the case by stating to the jury exceptions and matters of law which do not arise from the case. That is not the duty of the Judge at all, and I think it is better not to do it. So far as a statement of the law is necessary to give a proper guide to the jury upon the case, the Judge should state it; and although it is generally said, and said truly, that non-direction is not a subject of a bill of exceptions, yet when the facts are such that in order to guide the jury properly there should be a direction of law given, the not giving that direction of law would be a subject for a bill of exceptions and would be a ground for a *venire de novo*. When once it is established that a direction was not proper, either wrong in giving the wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the Judge to give a guide, we cannot enquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must have been a *venire de novo*.

I have read the report of the Judge's charge several times and I cannot but think that he has fallen into the error, if I may be allowed to say so, pointed out by Lord Blackburn in the passage I have just quoted. Extracts from text-books, however accurate they may be, are necessarily general in their character, and without reference to any special statement of facts, unless these extracts are accompanied by special instructions to the jury as to their bearing and application to the particular facts of the case before them, the result must be to confuse rather than aid them in discharging their duty. I think there were no such instructions in this case, and the jury therefore reached their conclusions without the benefit of a guide, which it was the right of the parties they should have.

There are other questions involved in the case to which I have not thought it necessary to refer. Judgment entered for defendants.

LANDRY, J.:—I agree with the Chief Justice.

WHITE, J.:—Having reached the conclusion that the verdict should be entered for the defendant, upon the grounds on which the Chief Justice rests the judgment he has just delivered, other than the question as to the sufficiency of the proofs of loss, or, if they are insufficient, as to whether or not the de-

N.B.

S. C.
1912

GUIMOND
v.
FIDELITY
PHOENIX
FIRE
INSURANCE
CO.

fendants have waived, or are estopped from objecting to, such insufficiency, I have not considered these last mentioned questions as fully as I would wish to do if I had not reached the conclusion that the verdict should be entered for the defendant upon the other grounds, upon which the learned Chief Justice rests his judgment. I therefore, express no opinion as to the sufficiency of the proofs of loss, or as to the questions of waiver or estoppel in respect to the same.

McKEOWN, J.:—I agree with the Chief Justice.

Judgment for defendants.

ONT.

C. A.
1912

March 19.

THE KING v. WRIGHT.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. March 19, 1912.

1. SHIPPING (§ IV—20)—OFFENCES—FALSE STATEMENT OF SERVICE ON APPLICATION FOR MASTER'S CERTIFICATE.

The offence of making a false representation for the purpose of obtaining a certificate of competency as master of a passenger steamer under the Canada Shipping Act, R.S.C. 1906, ch. 113, is negatived if it appears that there was no guilty knowledge or intent on the part of the accused and that the only error in his application papers was that believing that service as second mate counted in like manner as would service as first mate, he represented that he had served as mate "on a certain boat for a year whereas a part of the time had been served as second mate and the remainder as mate (*i.e.*, first mate), particularly where the examining officer when called as a witness testified that he would have passed the applicant's papers had the actual facts been shewn.

2. SHIPPING (§ IV—20)—OFFENCES—CERTIFICATE OF SERVICE—INCORRECT STATEMENT IN CERTIFICATE OF DISCHARGE.

A certificate of discharge furnished by the master of a ship to the second officer under sec. 176 of the Canada Shipping Act, R.S.C. 1906, ch. 113 (Form K.) is not a certificate of service within section 123 of that Act making it an offence for a person to fraudulently make use of a certificate of service to which he was not entitled.

CASE stated by the Senior Judge of the County Court of the County of York upon the acquittal of the defendant after trial upon a charge of offences against the Canada Shipping Act.

Both questions submitted were answered in the affirmative.

Messrs. *J. Jennings*, and *H. C. Macdonald*, for the Crown.

H. H. Dewart, K.C., for the defendant.

MOSS, C.J.O.:—The defendant, having been committed for trial by the Police Magistrate for the City of Toronto upon charges preferred against him in the Police Court, and being in close custody, duly elected to be tried by a Judge without a jury, pursuant to the provisions of the Criminal Code in that behalf. He was thereupon tried by His Honour Judge Win-

ONT.

C. A.

1912

THE KING v. WRIGHT.

MOSS, C.J.O.

chester, Senior Judge of the County Court of York, presiding in the County Court Judge's Criminal Court, upon a charge-sheet containing two counts: first, that he fraudulently made use of a certificate of service to which he was not justly entitled, contrary to the Canada Shipping Act, R.S.C. 1906 ch. 113; and, second, that he made a false representation for the purpose of obtaining for himself a certificate of competency, contrary to the Canada Shipping Act. The date of the commission of the alleged offences was stated to be the 12th March, 1910.

The learnd Judge found the defendant "not guilty" of either of the offences charged; but, at the request of counsel for the prosecution, stated a case under the provisions of the Criminal Code in that behalf, reserving two questions, viz.: "1st. Upon the evidence, was I right in holding that the use made by the defendant of the document which he presented to the examiner of masters and mates at Windsor was not an offence under the first count above set out? 2nd. Upon the evidence, was I right in law in holding that the defendant did not make such a false representation as to constitute an offence under the second count above set out?"

These charges were laid under sec. 123 of the Canada Shipping Act, the first charge having relation to sub-head (*d*) and the second to sub-head (*a*). The effect of these is to declare guilty of an indictable offence any person who—(*a*) makes, procures to be made, or assists in making, any false representation for the purpose of obtaining for himself or for any other person any certificate of competency or of service; or—(*d*) fraudulently makes use of any such certificate which is forged, altered, cancelled, or suspended, or to which he is not justly entitled.

It would have been more convenient if the order in which the counts are set out in the charge-sheet had been reversed so as to correspond with the order of the sub-heads of sec. 123 under which they are framed. And, inasmuch as the second count charges a violation of the provisions of sub-head (*a*), it is convenient to consider it first and to deal with the first count last.

The defendant, a sailor on the inland waters of Canada and the holder of a certificate of competency to act as mate on a ship trading on the inland waters of Canada, made application to Mr. W. F. McGregor, the official examiner at Windsor for the Department of Marine and Fisheries, to be examined for a certificate of competency as master of a passenger steamer on inland waters. A printed form of application issued by the Department was furnished him by the examiner, who filled in some of the particulars. The defendant filled in the remainder,

ONT.
C. A.
1912
THE KING
v.
WRIGHT.
Moss, C.J.O.

signed it, and returned it to the examiner on the 12th March, 1910.

Accompanying the application were three other documents:—

(*a*) A certificate of discharge for seamen according to form K in the schedule to the Act, signed by the master of the steamer "Iroquois," stating, among other particulars, the following:—

CAPACITY.	DATE OF ENTRY.	DATE OF DISCHARGE.
1st Mate.	April 25th, 1908.	December 8th, 1908.

(*b*) A testimonial dated the 9th December, 1909, signed by the master of the steamer "W. D. Matthews," stating that the defendant was second mate on the "W. D. Matthews" from the 26th April to the 14th August, and first mate from the 15th August to the 9th December, 1909.

(*c*) A testimonial dated the 8th March, 1910, signed by the master of the steamer "Stormount," stating that he knew the defendant for the past few years as second mate of the steamer "Algonquin" and as mate of the "Iroquois" and the "Matthews." All these documents give him a good character for ability, conduct, sobriety, trustworthiness, and competence. In setting out the application the particulars of testimonials of service he gave the following:—

SHIP'S NAME.	RANK.	DATE OF COMMENCEMENT.	DATE OF TERMINATION.	TIME IN SUCH SHIP.
1. Iroquois.	Mate.	April 25, 1908.	Dec. 8, 1908.	7 months, 13 days.
2. W. D. Matthews	2nd Mate	April 26, 1909.	Aug. 14, 1909.	3 months, 18 days.
3. " "	Mate.	August 15, 1909.	Dec. 9, 1909.	3 months, 24 days.

The defendant was duly examined by the examiner, as required by the Shipping Act, and obtained a certificate of competence as a master.

The charge against him on the second count is, that, in the application and papers produced by him, he made a false representation for the purpose of obtaining the certificate. The gravamen of the charge is, that he represented that he had served as mate for a year, when in fact he had not served for that length of time, and that he made the representation knowing it to be false and for the purpose of deceiving the Department into granting him a certificate of competency. The

learned Judge, who heard the testimony of the witnesses, including that of the examiner and of the defendant, completely exonerated the latter from the charge of fraudulently or knowingly making any false representations; and, upon the whole evidence, he was justified in coming to that conclusion. There is no doubt that in one sense the statement in the certificate of discharge as to the capacity in which the defendant served on the "Iroquois" is not strictly correct. It represents the defendant as serving as first mate during the whole season of 1908, whereas during the greater portion of the time he was serving in the capacity of second mate. But, at the time the discharge was given and for some time before, he was the first mate of the "Iroquois." According to a literal construction of the Shipping Act, only one officer known as a mate is recognised on inland vessels. But, as the evidence shews and the learned Judge found, in actual practice there are officers serving under and next to mates who are called second mates, or probably in the passenger steamers second officers, as distinguished from mates or first officers. These persons not infrequently perform the duties or some of the duties of the mate or first officer. This appears to have been recognised by the examiner, who testified that, if the certificate had shewn the period of service on the "Iroquois" to be partly as first mate and partly as second mate, but covering the period stated, he would have accepted it. It is to be borne in mind, also, that, before shipping on the "Iroquois" for the season of 1908, the defendant had obtained and was the holder of a certificate of competence as mate, so that during that season he was actually qualified to perform, and to a considerable extent throughout the season did perform, the duties of a mate. The defendant, who seems to have given his testimony in a fair and straightforward manner, swore that the certificate of discharge was drawn up, signed, and handed to him by the master of the "Iroquois" without any request or suggestion as to its contents; that, when he read it, he saw it was incorrect, because he was not first mate all the time, but he did not know that there was only one person recognised under the law in Canada on the inland waters as mate—in other words, none but first mate—and that he considered that second mate's service under a certificate of competency as mate counted. In this view he appears to be supported by the examiner.

Upon all the facts, the learned Judge found that the defendant was not guilty of falsely intending to misrepresent the facts, and that there was no intent on his part to make use of the certificate of discharge as a false representation.

It is, of course, a matter of public importance and concern that there should be no evasion of the provisions of the

ONT.
C. A.
1912
THE KING
v.
WRIGHT.
MOSS, C.J.O.

Shipping Act in regard to any of its particulars, and especially so in regard to the competency and skill of those to whom the safety of lives and property are intrusted; and that, where wilful fraud and misrepresentation are proved to have been practised, punishment should follow.

But where, as here, even the examiner, to whose judgment the question of proper service was committed by the Department, was unable to see any infraction of the law in what was done in this case, it could hardly be expected that the learned Judge should decide otherwise than he did.

The second question should, therefore, be answered in the affirmative.

The first question is readily answered. The first count charges the defendant with fraudulently making use of a certificate of service to which he was not justly entitled, and is laid under sub-head (*d*) of sec. 123. The certificate there referred to is plainly either the certificate of competency or of service referred to in sub-head (*a*).

The certificate of discharge under sec. 176, form K, is an entirely different document from the certificate of service referred to in sub-head (*a*) of sec. 123.

The certificate of competency there spoken of is plainly the document provided for by secs. 82-84, inclusive; and the connection renders it equally plain that the certificate of service spoken of is the document provided for by secs 85-91, inclusive.

It is against the fraudulent use of "such certificate" that sub-head (*d*) is directed. The production to the examiner of the certificate of discharge was, therefore, no offence against this provision of the Shipping Act; and there was no proof of the first count in the charge-sheet.

The first question should also be answered in the affirmative.

GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A., for reasons stated in writing, agreed in the result. He said that the defendant obtained a master's certificate to which he was not entitled, and obtained it upon untrue statements in writing given by him for the purpose of obtaining such a certificate. But, by reason of the finding of fact exculpating him from a guilty knowledge of the wrong which he perpetrated, he must go free of the criminal law, however he might fare elsewhere.

MAGEE, J.A., wrote an opinion in which he stated that he fully agreed that the questions should both be answered in the affirmative, and for the reasons above given. He added that he had been unable to find anything in the Canada Shipping Act, or the Regulations thereunder, to indicate that, for the purpose

of obtaining a certificate of competency as master for inland waters, service in the capacity of second mate, by a person having a certificate of competency as mate, is not as effective as service in the capacity of first mate. This view was enforced by references to the Act and the Regulations.

Questions answered in the affirmative, and Crown's appeal dismissed.

ROGERS v. GRAND TRUNK PACIFIC RAILWAY CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. April 29, 1912.

1. RAILWAYS (§ II D 6—70)—LIABILITY OF RAILWAYS FOR DAMAGES—KILLING HORSES ON TRACK—FAILURE TO PROVE STATUTORY REQUIREMENTS.

A railway company operating under and subject to the Railway Act of Canada is liable for killing horses at large upon the railway line, unless the railway company establishes under R.S.C. 1906, ch. 37, sec. 294 (4), that the animals got at large through the negligence or wilful act of the owner or his agent or the custodian of such animals or his agent, or unless the circumstances as to the manner in which the horses came to be at large are within the special exceptions from liability stated in secs. 294 and 295 of the Railway Act.

APPEAL from decision of Macdonald, J., in favour of the plaintiff at the trial.

The Court dismissed the appeal with costs, RICHARDS, J.A., dissenting.

The plaintiff occupied the east half of section 10, township 12, range 19, west of the first principal meridian, and the line of the defendant company runs through it.

On the 12th or 13th day of December, 1911, five horses, the property of the plaintiff, strayed on to the defendant company's track, and on the 13th December they were found on the side of the defendant company's track, one dead and three others so injured that it became necessary to destroy them, the fifth escaped, and the plaintiff brings this action claiming damages for the loss of the four horses.

The judgment of Macdonald, J., affirmed on this appeal was as follows:—

MACDONALD, J.:—Although there was no eye-witness to the running down of the horses by the defendant company, yet I have no hesitation in finding that the injuries sustained, with the results that followed, are attributable to the animals being struck by an engine of the defendant company's and running on their line of railway.

MAN.

C. A.
1912

ROGERS
v.
GRAND
TRUNK
PACIFIC
RAILWAY
CO.

Macdonald, J.

One of the defendant's witnesses says that the 7.30 train was the one that did the damage.

Sec. 294, sub-sec. 4, of ch. 37 R.S.C. 1906, provides that:—

> When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company and are killed or injured by a train, the owner of any such animal so killed or injured shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such loss or injury against the company in any action in any Court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act of the owner or his agent or of the custodian of such animal or his agent.

The exception in the cases otherwise provided for by the next following section referred to in the above section has no application here.

It is conceded by counsel for the railway company that to entitle them to succeed the onus is upon them of proving that the animals got at large through the negligence or wilful act or omission of the owner or his agent. The question is, therefore, one purely of fact.

The plaintiff kept the horses in an enclosure surrounded by a wire fence four feet high, this enclosure is about one-half a mile from the railway company's track. The horses escaped from this enclosure, and it is claimed by the defendant company that such escape was through the negligence or wilful act or omission of the plaintiff in not having his fences in proper condition or repair, and in such a condition as to be unfit to hold within its enclosure any animal.

Now what is the evidence of negligence against the plaintiff? His own evidence is that on the evening of Saturday, December 11th, the horses were placed within this enclosure, where they had been for three weeks previous to this date; a poultry house stands at a point about the centre of the south fence of the enclosure; to the east of this poultry house stands a tree a few feet distant, and between this house and tree is the gap through which ingress and egress could be had to the enclosed field. When the horses were placed within the enclosure this gap was closed up by boards to the height of fifty inches. On the evening of the 11th December, the plaintiff says that about dark he fed the horses in this enclosure and the gap between the house and the tree was closed. In the morning he discovered the boards closing the gap broken down and the horses gone. That the plaintiff and his family made diligent search immediately there is no doubt.

The animals wandered in different directions, finally getting on to the railway track at a crossing of the road allowance northwest of the plaintiff's farm, and at this crossing there were no

cattle guards as required by the Railway Act. A short distance west of this point on the track the horses were found in the condition mentioned.

For the defence William D. Hayes is the principal witness. He was engaged by the plaintiff as a farm labourer, taking care of the horses, cattle, etc. He went to the plaintiff's place on the 10th December, 1910, but he says he never saw the horses in question there. In referring to the fence surrounding the enclosure where the horses had been kept, he says there was an opening and that during the three months he was there he never saw it closed, and there was no gate through which the cattle passed. There also was an opening at the poultry house where he was told the horses had broken through and this also he says was down all the time he was there. These were the only openings in the enclosure, and, although he says this was the condition of the fence during all the time that he was there, I am satisfied that he knows nothing of the conditions prior to the horses breaking through, and although he went to the plaintiff's on the evening of Saturday the 10th, it seems to me unreasonable that he would take such note of the fence and its openings on the day following, which would be Sunday and the ordinary routine of work not followed as would enable him to speak with any degree of certainty of conditions on the 11th and on the evening of that day the horses escaped.

The only other witness for the defence was Robert W. Adams, and although he condemns the plaintiff's fences, I am not quite satisfied with his testimony. On December 5th he called at plaintiff's in search of a missing horse and went to the south boundary of the fifty-acre enclosure and there were no horses within the enclosure, but he says he would not expect them there at that hour in the morning. In describing the condition of the fence he says his heifer one day went through the fence, but on cross-examination he admitted that he did not see the animal go through and the plaintiff's evidence that this heifer followed his herd seems the more reasonable.

I realize how difficult it is for the railway company to satisfy the onus cast upon it, but I do not think that the plaintiff here was negligent, or, at any rate, if he were, the evidence does not, to my mind, sufficiently establish that fact.

There will be judgment for the plaintiff for six hundred dollars, with costs.

The defendant appealed.

J. Auld, for defendants.

W. H. Trueman, for plaintiff.

April 29, 1912. The Court of Appeal by an oral judgment dismissed the appeal, with costs, RICHARDS, J.A., dissenting.

Judgment for plaintiff affirmed.

SASK.

S. C.
1912

Mar. 9.

RICHARDSON (plaintiff, respondent) v. **RAMSAY** (defendant, appellant).

Saskatchewan Supreme Court, Wetmore, C.J., Newlands, Lamont and Brown, JJ. March 9, 1912.

1. EVIDENCE (§ IV G—420)—DOCUMENT IDENTIFIED ON EXAMINATION FOR DISCOVERY—DEPOSITION PUT IN AS EVIDENCE WITHOUT OBJECTION.

Marking a letter as an exhibit to a party's deposition on discovery examination does not make the letter evidence, even when all the depositions are put in as evidence; but when both parties conduct their case before the trial Judge on the assumption that the letter so marked was in evidence, and no objection is made at the trial that it was not properly put in, an objection raised in appeal that it was not before the Court will not be entertained.

2. CONTRACTS (§ I D—62)—OFFER TO PURCHASE LAND—SUFFICIENCY OF ACCEPTANCE.

Where a written offer to purchase land purported to be made pursuant to conditions imposed by the owner and set out in the offer, to the effect that no application would be considered by the owner unless accompanied by a cash payment of a certain amount, and the prospective purchaser forwarded with it a lesser sum than was called for by the terms of the offer, the fact that the owner replied, acknowledging receipt of the offer and stating that a sight draft would be made for the balance of the first payment does not constitute an acceptance of the offer where such balance represented by the draft was not in fact paid.

AN appeal by the defendant from the judgment of the Judge of the District Court of the judicial district of Regina in favour of the plaintiff, in an action for the balance of the purchase price of certain land.

The appeal was allowed and judgment entered for the defendant.

F. L. Bastedo, for defendant, appellant.

P. H. Gordon, for plaintiff, respondent.

LAMONT, J.:—This is an action for the balance of the purchase price of lots six (6) to ten (10) inclusive in block fourteen (14) in the townsite of Reliance. On October 12th, 1907, the defendant made an application to the Imperial Development Company, through their agent, Samuel Couch, to purchase said lots, which application was as follows:—

Imperial Development Co., Limited,
Empire Block. 254 Main St., Winnipeg.

APPLICATION FOR PURCHASE.

This application is made subject to the following conditions:

1. Applicant should be particular to give full name, address and occupation, as the contracts will be made out from this form.

2. If the applicant does not receive acknowledgment from head office of amount forwarded within ten days from date of sending, we should be notified immediately.

3. No application will be considered by the vendors unless properly signed by the applicant and accompanied by the cash payment mentioned below, nor will the vendors guarantee to hold lots for applicant unless such cash payment is made therewith.

4. The company does not hold itself responsible for promises made by its agents outside of the conditions herein contained.

Qu'Appelle, Oct. 12th, 1907.

Imperial Development Co., Limited,
354 Main Street, Winnipeg, Man.

Gentlemen,—I hereby offer to purchase, subject to the above conditions, five lots in the townsite of Reliance townsite subdivision, legal description of the lots so applied for being lots Nos. 6, 7, 8, 9, 10 in block No. 14, at or for the price of $40 each, and enclose herewith $20 to be applied as deposit on first payment of $50 on purchase. I agree to pay the balance as follows: Six and twelve months with interest at 6% payable with the said several instalments of principal on all unpaid accounts, and to execute the usual contracts of the company.

If for any reason this contract cannot be accepted, please advise me of the fact and return the amount remitted or hold it pending my further instructions.

$20.00. Oct. 12th, 1907. .....Applicant.
Name in full.

Received on account of this application, subject to conditions set forth in same, $20 dollars.

Farmer.....Occupation.
J. W. RAMSAY.....Address.

Memo.—$20 deposit on 1st payment of $50.

IMPERIAL DEVELOPMENT CO., LTD.,
Per SAMUEL COUCH.

This application to purchase, the plaintiff stated in his particulars of claim, was accepted by the Imperial Development Company by letter dated October 29th, 1907. By an assignment in writing bearing date August 5th, 1910, and endorsed on the above application, the said company assigned to the plaintiff all their interest "in the within-written instrument and every covenant article or thing therein contained." The defendant disputes the plaintiff's right to recover on two grounds: (1) On the ground that his application to purchase was never accepted by the Imperial Development Company, and, (2) if it was accepted, the said company were a foreign company not registered under the Foreign Companies Act, and that therefore neither the company itself nor its assignee had any status to maintain the action. The action came on for hearing before the Judge of the District Court of the judicial district of Regina, who gave judgment for the plaintiff. From that judgment the defendant now appeals to this Court.

At the trial no oral testimony was given for either party. All the evidence put in is set forth in the learned Judge's notes as follows:—

P. H. Gordon for plaintiff.

A. D. Dickson for defendant.

Mr. Dickson puts in four plans, making complete plan of townsite in question. Exhibits 1, 2, 3 and 4, and elects to go on.

Mr. Gordon puts in examination for discovery of the defendant. 1st page, questions 10, 11-17, 158-161, 166-173; page 15, questions 220-228.

SASK.

S. C.
1912

RICHARDSON
v.
RAMSAY.

Lamont, J.

Puts in letter of the Imp. Dev. Co. dated 28th March, exhibit A, and letter dated 6th December, 1907, of Imp. Dev. Co., exhibit B.

Mr. Dickson puts in copy of letter of December 30th, 1907, of Imp. Dev. Co. as exhibit No. 5, and asks that the whole examination of defendant for discovery be read.

In printing the appeal book, counsel for the defendant set out the entire examination for discovery with all exhibits and letters therein referred to, and not simply those portions put in evidence at the trial by counsel for the plaintiff. A perusal of the questions and answers of the defendant in his examination which were put in evidence on behalf of the plaintiff reveals the fact that the only reference contained there is to the letter of October 29th, which, the particulars set out, constituted the acceptance of the plaintiff's offer to purchase, is to be found on p. 15, where a copy of the letter is produced and marked for identification. Marking a letter for identification does not make it evidence. Its only purpose is to put the identity of the document beyond dispute when it is subsequently tendered in evidence. In this case not even the letter itself was marked for identification, but only a copy thereof. On the argument before us, it was contended that the letter, not having been put in evidence on the examination or at the trial, was not before the Court at all. In my opinion this contention, strictly speaking, is right. The letter not being put in, but being marked for identification only, would not be in evidence. I notice, however, in the learned Judge's notes on the argument before him, that Mr. Dickson argued that the letter of October 29th was not an acceptance, while Mr. Gordon argued that it was. No question is raised as to its not being in evidence. Counsel for both parties evidently treated it as an evidence, and advanced an argument which could only be made on the assumption that the letter formed part of the evidence before the Court. Besides, it was stated to us on the argument in appeal that there was an agreement between Mr. Gordon and Mr. Dickson at the trial that the copy should be used as the original, the original having been sent to Winnipeg for the purpose of being used on an examination of witnesses under a commission, which evidence was to be used at the trial. Where both parties to an action conduct their case before the trial Judge on the assumption that a certain document was put in evidence, and make no objection before him that it was not properly put in, I am of opinion that they cannot be heard in appeal to say that it was not before the Court.

Considering, then, that the letter is in evidence, the next question is, does it constitute an acceptance of the plaintiff's offer sufficient to form a binding contract? I am of opinion that it does not. The letter is in the following language:—

October 29th, 1907.

J. W. Ramsay, Esq.,
Qu'Appelle, Sask.

Dear Sir,—We beg to acknowledge receipt of your application for five lots in the townsite of Reliance through our Mr. Couch, for which we thank you.

Agreements will go forward to you for signature in the course of a few days, as owing to exceptionally heavy sales of this property we have been somewhat overworked, hence delay. We will, however, have your papers forwarded to you as soon as possible, which kindly sign, having your signature witnessed, and return one copy to us.

We are sure that you will be satisfied with your investment, and we hope that our business transactions are only commencing. As per request of Mr. Couch, we are making sight draft on you for $30, balance of first payment, which we hope you will see fit to protect at your convenience.

Sincerely yours,

IMPERIAL DEVELOPMENT COMPANY, LIMITED.

To my mind this letter contains merely an acknowledgment of the receipt of the defendant's application, and intimation that agreements will be forwarded to the defendant for signature, and a further intimation that the company are drawing on the defendant for the balance of the first payment. If the application had not been made subject to the express condition that no application would be considered by the vendors unless accompanied by the cash payment, there might be ground for argument that an acceptance could be spelled out of the letter of October 29th—that the intimation that agreements were being forwarded necessarily implied acceptance on part of the company. But where the application contains the stipulation that the vendors will not consider it unless accompanied by the cash payment, and the cash payment does not accompany it, there must be found, it seems to me, in the letter constituting an acceptance language which leaves no room for doubt that the vendors were accepting the offer without a compliance with that condition. The condition is in their favour, and may be waived by them; but I cannot find in the letter of October 29th anything to indicate that the company were willing to enter into the contract except on the basis of the full cash payment being made. They evidently expected that the deal would go through, but they do not, to my mind, put themselves in the position of being bound or of being willing to be bound without the cash payment being made. If the defendant had brought an action for specific performance of a contract alleged to have been made by virtue of his application and the letter of October 29th, and the company had set up that the condition referred to had not been complied with and had not been waived, I can see nothing in their letter which would justify the Court in holding that they

SASK.

S. C.
1912

RICHARDSON
v.
RAMSAY.

were bound to convey. The full cash payment was never made, and so far as I can see the company never waived the condition.

The appeal, in my opinion, should be allowed the judgment of the trial Judge reversed, and judgment entered for the defendant with costs.

WETMORE, C.J., NEWLANDS and BROWN, JJ., concurred.

Appeal allowed.

MUNICIPAL CONSTRUCTION CO. v. CITY OF REGINA.

SASK.

S. C.
1912

Mar. 1.

Saskatchewan Supreme Court. Trial before Lamont, J. March 1, 1912.

1. CONTRACTS (§ II B—135)—SEVERABILITY.

Where tenders of the same contractor for two independent construction works for a municipality are accepted by separate resolutions of the Council of the municipal corporation, the subsequent execution, under the corporate seal, of one indenture of agreement embodying the two contracts formed by the separate resolutions, which were not under seal, whereby the tenders were accepted will not destroy the separate identity of each contract embodied in the one indenture if there was no consensus of intention of the parties that both should constitute one entire contract.

2. CONTRACTS (§ IV F—371)—TIME OF THE ESSENCE—NOTICE FIXING TIME TO COMPLETE.

Where a contract calls for performance within a given period, and time is not made of the essence, or where although originally made of the essence, the time fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer must by notice fix a reasonable time for completion and allow the contractor an opportunity to complete within the so extended period before he can dismiss the contractor.

[Halsbury's Laws of England, vol. 3, p. 191, approved; *Taylor* v. *Brown*, 9 L.J.Ch. 14; *Lowther* v. *Heaver*, 41 Ch.D. 268, specially referred to.]

3. DAMAGES (§ III P—344)—MEASURE OF COMPENSATION—UNAUTHORIZED DISMISSAL OF CONTRACTOR DOING WORK.

Where a contractor claims damages for being prevented from completing his contract where time is not of the essence, after being in default for not completing within the contract time, and without being allowed a reasonable time within which to complete subsequent to notice fixing a fresh date for completion, the measure of damages is the difference between the contract price of the unfinished portion of the work, and the cost of completing it within the period of time which would have been a reasonable time for completion after default.

4. DAMAGES (§ III A 7—97)—CONSTRUCTION OF WORKS—LIQUIDATED DAMAGES FOR DELAY.

A contractor for the construction of a work cannot be held liable under a contract for a penalty thereby provided for delay in finishing the work, if a settlement has already been made with him in full for the work as far as it has proceeded, without deduction for the delay, as the failure to deduct this penalty operates as a waiver of the right to the same.

[Halsbury's Laws of England, vol. 3, p. 246, *Duckworth* v. *Alison* (1836), 1 M. & W. 412, and *Clydebank Engineering and Shipbuilding Co.* v. *Castaneda*, [1905] A.C. 6, specially referred to.]

5. SET-OFF AND COUNTERCLAIM (§ II—40)—JUDGMENT FOR DAMAGES—COUNTERCLAIM FOR DAMAGES.

Where damages have been awarded in respect of part of the plaintiffs' claim and the defendants succeed in part on their counterclaim for damages for breach of contract, the Court may direct a set-off of the damages *pro tanto*.

AN action for damages for the cancellation of two contracts for certain works, the defendants counterclaiming for damages for breach of one of the contracts.

The plaintiffs succeed in respect to one of the contracts and the counterclaim of defendants is allowed in part.

Messrs. *C. E. D. Wood* and *R. E. Turnbull*, for plaintiffs.

Messrs. *J. F. Frame* and *S. P. Grosch*, for defendants.

LAMONT, J.:—In this action the plaintiffs claim damages for breach of contract by the defendant city in refusing to allow them to finish the construction of certain works for which they had received the contract. In the spring of 1907, the defendants, being desirous of constructing certain sewers and waterworks, drew up specifications of the desired works and asked for tenders in reference thereto. The specifications for the sewers were separate from the specifications for the waterworks. The plaintiff company tendered for all the work to be done. On June 15th, 1907, the city council, adopting a report of the works committee, passed the following resolution:—

> That the tender of the Municipal Construction Company be accepted for sewer constructions according to the city engineer's plans and specifications and in accordance with his report to the amount of about $24,890, subject to any changes that may be found necessary upon further examination of the area to be drained.

And on June 26th the city clerk notified the plaintiff company that their tender for sewer construction had been accepted. On July 2nd the city council, adopting a recommendation of the waterworks committee, enacted as follows:—

> That the tender of the Municipal Construction Company be accepted for sewer trenching and laying all sizes of water-pipe for 57 cents per lineal foot, and that the mayor and city clerk be authorized to execute a contract when prepared by the city solicitor.

And on July 5th the city clerk notified the plaintiff company that the council had accepted their tender for trenching and laying water-pipes, and that a contract therefor would be prepared immediately. A contract was drawn up dated June 15th, 1907, and was executed under the seal and on behalf of the city by the mayor and the clerk, and by the plaintiffs also under their corporate seal. That contract embodied not only the plaintiffs' tender and the city's acceptance as of the trenching and laying of the water-pipes, but covered their tender and the city's acceptance in reference to the sewers as well. No authority was given to the mayor and city clerk to execute any contract other

SASK.

S. C.
1912

MUNICIPAL CONSTRUCTION CO.
v.
CITY OF REGINA.

Lamont, J.

than as set out in the resolution of July 2nd above referred to. That resolution was not under the seal of the city. The specifications for both sewers and water mains contained the following clause:—

> The following specifications shall be taken in conjunction with the general conditions and regarded as one specification.

The general conditions which were embodied in the contract contained a clause that the work must be started not later than ten days after a written order had been given by the engineer to the contractor to begin work, and that the work must be completed within two months after such order had been sent.

On July 18th the city engineer notified the plaintiffs to proceed with the work of laying sewer pipe as per their contract, and on July 22nd he notified them to begin laying the water-pipes.

The plaintiffs began the work specified, but did not finish it within the two months stipulated in the agreement. At the expiration of the two months, no complaint, so far as the evidence shews, was made to the plaintiffs on account of their not having completed their work within the specified time. The city engineer continued laying out work for them until as late as December 2nd, when he furnished them with the Rose street cuttings. On the same day (December 2nd) the plaintiffs wrote to the engineer and asked permission to suspend operations until the following spring. No permission was given. The plaintiffs continued working until the end of December, when, without permission from the defendants, they suspended operations. They admit they could have continued with the work, but that owing to the cold weather it would not have been profitable so to do. When they suspended operations the plaintiffs had completed, roughly speaking, about one-half of the work covered by the contract; that is, one-half of the sewers and one-half of the work of laying the water mains. In addition to that there was a quantity of work of a similar kind done by them at the request of the city engineer on streets other than those set out in the contract. For all the work done by them, whether under their agreement or otherwise, the plaintiffs were fully paid by the city. On May 11th, 1908, the plaintiffs wrote to the city engineer asking for instructions to begin work. Not receiving any reply from him, they on May 23rd wrote the mayor and council stating that they were waiting for instructions to proceed with the work of their contract. On June 1st, 1908, the council adopted a report of the waterworks committee which recommended that the city engineer be instructed to notify the plaintiffs that owing to their failure to complete their work in 1907 it had been resolved to cancel the said contract "as regards the waterworks therein specified and unfinished." On June 5th the engineer notified the plaintiff company that the city had cancelled the contract

"as regards waterworks therein specified and unfinished." No further work was done by the plaintiffs under their contract. On May 30th, 1911, they commenced this action, in which they claim that the cancellation of the waterworks portion was a cancellation of the whole, and they claim as damages the profits which they would have made had they been allowed to complete the contract.

The first question is, was the contract an entire one? I am very clearly of opinion that it was not. The defendants' acceptance on June 15th of the plaintiffs' tender for the construction of the sewers and their acceptance on July 2nd of the plaintiffs' tender for trenching and laying the water mains shew that they were contracting for the construction of the sewers separate from the laying of the water mains. The embodying of these two separate contracts in one formal document by the city officials could not make them one entire contract with the rights and obligations of a single contract as distinct from the rights and obligations belonging to or devolving upon the parties under two separate contracts, unless it was the intention of the parties so to do. There is no evidence whatever that the defendant city ever contemplated any state of affairs different from what would flow from their separate acceptances of the plaintiffs' tender for the two separate pieces of work. No authority was given to the city officials to embody these two in one document; and they must therefore be considered in their legal effect as constituting two separate contracts. Consequently the cancellation by the defendants of the portion relating to the waterworks was not a cancellation of the remainder, and it was open for the plaintiffs to go on and complete the sewers. This they did not do. Their action, therefore, in so far as it relates to anything excepting the contract for trenching and laying water-pipes, must fail.

The next question is, were the defendants justified in cancelling the waterworks contract? For the plaintiffs it was contended that as the defendant city had continued after the time specified in the contract for the completion of the work to map out work for the plaintiffs and give them cuttings, the time for completion was therefore waived, and it was necessary for the city to fix a new time within which the plaintiffs could be called upon to finish the work before that work could be taken away from them. For the defendant city it was contended that the plaintiffs, by stopping work altogether at the end of 1907, had abandoned the contract. As to this contention, all I need say is that the defendants did not treat the suspension of operations by the plaintiffs as an abandonment of the contract. As to the plaintiffs' contention that they were entitled to have a new day fixed for completion, the general rule is laid down by Lord Halsbury in his "Laws of England," vol. 3, at p. 191, as follows:—

SASK.

S. C.
1912

MUNICIPAL CONSTRUCTION CO.
v.
CITY OF REGINA.

Lamont, J.

> In cases where time has not been made of the essence of the contract, or where, although time originally was of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and, in case the contractor does not complete by that time, to dismiss the contractor.

In *Taylor* v. *Brown*, 9 L.J. Ch. 14, the Master of the Rolls said:—

> Where the time is not of the essence of the contract, where the contract is to be performed within a time which is not defined, and there be any unnecessary delay by one party, the other has a right to limit the time.

See also remarks of Lindley, L.J., in *Lowther* v. *Heaver*, 41 Ch.D., at p. 268.

In the present case, if time ever was of the essence of the contract, it was clearly waived by the city. It was therefore the duty of the defendants to notify the plaintiffs that they must complete within a specified time (which must be a reasonable time), otherwise they would be dismissed, and their contract taken from them. Not having done so, the defendants are liable in damages for the loss sustained by the plaintiffs. The measure of such damages is the loss of profits they would have sustained in case they had completed the works upon notice from the city to complete within a reasonable time. In view of the fact that the plaintiffs undertook to complete both sewers and waterworks within two months, and that about one-half of the work still remained to be done, I am of opinion that one month would have been a reasonable time within which they might have been called upon to complete. The measure of damages to be allowed would therefore be the difference between the contract price for the unfinished portion of the work and the cost necessary to complete that work in one month. At the trial it was agreed between the parties that the question of the quantum of damages should stand over and be determined later, either by the local registrar or myself, in case that question became material.

The defendants counter-claimed for damages for the non-completion by the plaintiffs of the work they claimed under two separate items: (1) They claimed to be entitled to $10 per day as liquidated damages from the time the plaintiffs should have, according to the contract, completed the waterworks, until June 5th, 1908, when the plaintiffs were notified that their contract was cancelled; (2) they claimed general damages for the failure of the plaintiffs to complete the contract and the additional cost to the city rendered necessary by such failure.

As to the first of these claims, the general conditions in the contract include the following clause:—

(5) Should the contractor fail to complete the work within the specified time, the sum of $10 per day shall be deducted from any moneys which may be due him from the city, estimated as liquidated and fixed damages to the city of Regina, for each day that the work remains uncompleted after the specified time of completion, the time of completion being an essential element in consideration. The engineer's certificate as to such number of days shall be final between the parties.

At the time the defendants cancelled the plaintiffs' contract as to the waterworks there were certain moneys still owing to the plaintiffs by the city under the contract. On December 31st, 1908, the city engineer wrote the city treasurer enclosing his final certificate in reference to the work done by the plaintiffs. That certificate shews a balance of $1,796.45 due to the plaintiffs. Pencil computations on the letter itself shew that this sum was made up as follows:—$128.60 on account of sewer construction, and $1,667.85 on account of the trenching and laying of the water mains. On January 4th, 1909, cheques for these separate amounts were issued by the city treasurer in favour of the plaintiffs, and subsequently paid. No deduction was made for failure to complete within the specified time either from the progress estimates paid by the defendants during the course of construction or the final estimate of December 31st, 1908. On the question whether or not a failure to deduct a sum stipulated for as liquidated damages amounts to a waiver of the penalty clause in the contract, Lord Halsbury, in his "Laws of England" above referred to, vol. 3, at p. 246, states the rule as follows:—

Where it is merely provided that the employer shall be entitled to deduct or retain such liquidated damages as and when they become due from any payments to be made to the contractor, without any independent covenant on the part of the contractor to pay the liquidated damages, the employer will lose his right to claim the liquidated damages which have already accrued if he does not so deduct them. Where, however, the contract contains an independent covenant by the contractor to pay the damages, coupled with a right for the employer to deduct or retain them from payments to be made by him, the employer has a double remedy; and though he may have lost the right of deduction, he may still recover the liquidated damages against the contractor.

See also *Duckworth* v. *Alison* (1836), 1 M. and W. 412, and *Clydebank Engineering and Shipbuilding Company* v. *Castaneda* (1905), A.C. 6. As the contract makes provision only for the deduction of the penalty in case of non-completion, and as the same was not deducted, I am of opinion that the defendants have waived their right to collect it.

The defendants also counterclaim for general damages on the ground that the plaintiffs abandoned their contract and the work they had undertaken to do, thus necessitating to the defendants additional expense to get it completed. In so far as the construc-

SASK.

S. C. 1912

MUNICIPAL CONSTRUCTION CO. v. CITY OF REGINA.

Lamont, J.

tion of the sewers is concerned, the plaintiffs did abandon the work. For this breach the defendants are entitled to recover such damages as they have sustained thereby.

The result is, that the plaintiffs are entitled to recover such damages as they can shew they sustained by virtue of the improper cancellation by the defendants of the contract for the trenching and laying of the water mains, and the defendant city is entitled to recover from the plaintiffs the damages they sustained by reason of the failure of the plaintiffs to complete their contract for sewer construction. There will be a right of set-off. Upon application by either party I will fix a day for the hearing of evidence as to the quantum of damage.

Judgment for plaintiff for damages; counterclaim allowed in part.

RE EDDLES AND SCHOOL DISTRICT No. 1 OF WINNIPEG.

MAN.

C. A. 1912

Apr. 29.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. April 29, 1912.

1. MASTER AND SERVANT (§ II A 2—49)—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT.

Evidence that a workman went to his work in his usual good health and afterwards came from his place of employment with a hernia and the nature of his work was such as was specially likely to be the cause of hernia, is sufficient to establish that the hernia arose "out of and in the course of" his employment within section 4 of the Manitoba Workmen's Compensation Act of 1910 (Man.).

2. DEATH (§ II—6)—WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT.

Where a workman received an injury in the course of his employment which resulted in hernia and he underwent an operation therefor and at the same time he was operated on for an old hernia on the opposite side from the new one, which had nothing to do with the injury complained of or with the operation necessitated thereby, and after the operations had been apparently successfully performed blood poisoning was found in both wounds and caused death a few days later and there was nothing to shew where the infection originated, the operating surgeon being of the opinion that it began in both at the same time, a finding of the trial Judge under a Workmen's Compensation statute, that the death resulted from the injury received in the "course of employment," will not be disturbed.

[*Dunham* v. *Clare*, [1902] 2 K.B. 292, and *Ystradowen* v. *Griffiths*, [1909] 2 K.B. 533, followed.]

APPEAL from an award for compensation under the Workmen's Compensation Act (Man.), 1910, to the widow and child of William Henry Eddles.

The appeal was dismissed.

J. Auld, for plaintiff.

Messrs. *R. M. Dennistoun*, K.C., and *C. H. Lock*, for defendants.

RICHARDS, J.A.:—Eddles was in the board's service. He lived across the street from the school where he worked. It was

his duty to lift, carry and throw into furnaces, sticks of cordwood.

On the day of his injury, his wife saw him go from his house to the school building in his usual good health. Later in the morning she saw him come out of that building and return to their house. As he came out she noticed that he walked as if suffering pain and held his hand against his body. It was found that he was suffering from a fresh rupture, or hernia. By his physician's advice he went to a hospital to undergo an operation to cure the hernia.

When he was about to be operated on, the surgeon discovered that Eddles had an old hernia, on the opposite side from the new one, and advised him to be operated on for it at the same time as the operation was to be had for the new one. Eddles consented, and the double operation was had.

Within a day or two after the operation a virulent form of blood poisoning was found in both wounds. It caused his death a few days later.

Medical evidence shewed that hernia was an injury very likely to result from such work, in handling cordwood, as Eddles' duties in the board's service required of him.

It was impossible to shew, with certainty, in which of the wounds, caused by the double operation, the blood poisoning originated. The surgeon who operated thought it probably began in both at the same time. Apparently death would have resulted whether it began in both wounds simultaneously, or in one of them.

Evidence was allowed of what Eddles had stated to his family doctor as to the cause of the new hernia.

The learned County Court Judge found the board liable and assessed damages. It is argued on behalf of the board that the Judge misdirected himself in allowing the hearsay evidence of what Eddles had stated to his doctor. It seems to me that the unquestionably admissible evidence, other than hearsay, of the facts, which are stated above, was amply sufficient to justify the finding that the new hernia was a personal injury by accident arising out of and in the course of the employment. He went to the school building without the hernia. He emerged later with it, and the evidence shewed that his work was such as was specially likely to be the cause of hernia: *Mitchell* v. *Glamorgan Coal Company*, 23 T.L.R. 588.

That the blood poisoning and Eddles' death would be properly held to be the result of the injury if there had been only the operation for the new hernia, with the blood poisoning and death following it, is, I think, shewn by the decision of the English Court of Appeal in *Dunham* v. *Clare*, [1902] 2 K.B. 292.

The difficulty in this case arises from there being two operations, one for a hernia suffered by Eddles while in the board's

MAN.
C. A.
1912
RE EDDLES AND SCHOOL DISTRICT NO. 1 OF WINNIPEG.
Richards, J.A.

employment, the other for an old hernia, not shewn to have been in any way caused by his work in that employment, and from the doubt as to which wound admitted the virulent germs which caused the death.

The argument that the operation for the old hernia resulted from the injury, because of the surgeon discovering it, and advising that operation as a result of examining Eddles with a view to operating for the new hernia, does not appeal to me as sound. It is true that it was a similar operation to that resulting from the new injury, and one apparently very properly made under the circumstances. But if it is to be held to be an operation resulting from the injury received by Eddles in his employment, then any kind of operation which the surgeon might then have discovered the need of, no matter from what cause arising, would equally be one so resulting.

To illustrate. Suppose that the surgeon had found that Eddles was suffering from cataract, and threatened with blindness, and had advised, and, with Eddles' consent, carried out, an operation to remove the cataract, performing the operation at once after that for the new hernia. If blindness had resulted from unskilfulness in the eye operation or any other injury had in any way resulted therefrom, would it be possible to hold such blindness, or other injury, as resulting from the injury causing the new hernia, because if it had not been for the latter, the need for the eye operation would not have been seen by the surgeon and he would not have made it?

I have assumed, for the purpose of the above illustration, that an operation for hernia and one for cataract could be performed on the same person on the same day. Whether I am right in this or not does not interfere with the use of it as a hypothetical illustration to shew what seems to me the unreasonableness of the argument I am dealing with.

In *Pomfret* v. *Lancashire*, [1903] 2 K.B. 718, and in *Barnabas* v. *Bersham*, 23 T.L.R. 513, it was held that there is no liability where the injury is as likely to have happened from something arising outside of the employment as from the employment.

Those cases make me hesitate as to the finding that should have been made here. But the wounds were, from the very nature of the troubles, close to each other. The microbe that caused the death was a very virulent one, that would have caused death if it got into either wound. And if it was where it would have got into either it seems more than likely that it would have got into the other if that other had been the only wound. The surgeon's opinion was that it started in the two wounds at the same time. I think that if a jury had found that it got into Eddles through the wound caused by the operation for the new hernia their decision would not have been upset on appeal.

The learned County Court Judge has, in effect, so found. Can we say that he had no ground for so doing? The tendency of Courts, in cases under the similar law in England, is to strain the facts, as far as can be done, in favour of awarding compensation. If there is anything upon which the finding can be made, this Court is not at liberty to review the evidence and say whether it would have so found.

I think, though with some hesitation, that the findings appealed from should be affirmed and the appeal dismissed.

PERDUE, J. A.:—The first question to be considered is whether there was evidence upon which the Judge could find that the accident arose "out of and in the course of the employment" of the deceased: Work. Com. Act, 1910, sec. 4. The statements of Eddles, the deceased, made after the accident to his wife, or to the doctor who attended him, may not be evidence of how the accident actually occurred: *R.* v. *Gloster*, 16 Cox 471; *Gardner Peerage Case*, Le March 169; *R.* v. *Nicholas*, 2 C. & K. 246, 248. But the evidence does shew that the deceased went to his work in the morning apparently in good health. The schoolhouse where he worked was just across the street from the house in which he lived. His wife saw him leave and go to the schoolhouse and in a couple of hours she saw him returning therefrom holding his hand to his side and suffering from the injury.

I think the Judge might from the facts that were offered in evidence reasonably infer that the deceased received the injury in the course of his employment by the defendants: *Mitchell* v. *Glamorgan Coal Company*, 23 T.L.R. 588.

The next question is, did the death of the deceased result from the injury? The doctor who was called in found that the deceased was suffering from a hernia which appeared to have been recently caused. Deceased for some time had had a hernia on the opposite side and was at the time wearing a truss on account of this. He was advised by the doctor to submit to an operation for the injury in question. Eddles went to a hospital for the purpose of being operated upon in respect of the injury and when there decided to undergo an operation for both ruptures at the same time. Both operations were performed with apparent success, but forty-eight hours afterwards the wounds developed symptoms of malignant infection and five days after the operation Eddles died of blood poisoning. The medical testimony simply shewed that a virulent germ had by reason of the operation been introduced into the man's system and that this had produced the infection which caused his death. The germ may have obtained access through one or other of the incisions, or both incisions may at the same time have been infected by poisonous germs of the same nature.

If an accident necessitates an operation and death ensues,

MAN.

C. A.
1912

RE EDDLES AND SCHOOL DISTRICT No. 1 OF WINNIPEG.

Perdue, J.A.

even though it is not a natural or probable consequence, the death may, if the chain of causation is unbroken, be said to have in fact resulted from the injury. Thus, where a slight wound was caused and while it was healing it was accidentally re-opened, exposed to infection and infected, and the injured man died, his death was held to have resulted from the injury: *Dunham* v. *Clare*, [1902] 2 K.B. 292; *Ystradowen* v. *Griffiths*, [1909] 2 K.B. 533.

It is, no doubt, necessary in cases under the Act that the plaintiff should, as in other actions, prove her case. If the state of facts established is equally consistent with one or the other of two conclusions, one of which would establish her case and the other of which would disprove it, the applicant must fail in not having established her contention: *Barnabas* v. *Bersham Colliery Company*, 3 B.W.C.C. 216; confirmed in the House of Lords, 4 B.W.C.C. 119. It is urged that it has not been shewn in the present case which wound became infected and that it is quite as consistent with the evidence to hold that the germ of infection was introduced into the wound made in operating on the old hernia as to hold that it was introduced while operating in respect of the injury in question. I must confess that I have felt considerable doubt whether the applicant had sufficiently proved her case. The evidence, however, shews that an operation was advised as necessary for the injured man's well-being, that the operation took place and that as a result of it infection and death supervened. It is true that during the operation another incision was made which had nothing to do with the injury complained of or with the operation necessitated by it, and that the infection may have entered by this other incision. But I think it is not pressing conclusions too far to say that if the accident in question had not occurred, there would have been no operation, and that the immediate cause of death resulted from the accident through a regular chain of causation. I think the Judge would be justified in drawing the inference that both incisions were infected during the operation. There is nothing to shew that the virulent germ or germs effected an entrance through one of the incisions only, so as to put upon the applicant the burden of proving that the infection entered the wound made in operating in respect of the injury in question. It is a reasonable conclusion to draw that both incisions were infected during the operation and that the fatal blood poisoning would have taken place even if the injured man had only been operated upon for the injury arising from the accident.

I think the appeal should be dismissed with costs.

CAMERON, J.A.:—It is alleged in the application for arbitration under the provisions of the Workmen's Compensation Act, 1910, that William Henry Eddles, a workman employed by

School District No. 1, Winnipeg, on November 23rd, 1911, sustained an injury arising out of and in the course of his employment and that on December 1st, 1911, the death of the said Eddles resulted from the injury. It is alleged that the deceased while stoking a furnace sustained a strain causing a hernia. When aid was called it was discovered that he had previously sustained a rupture on the other, the left, side. The surgeon in attendance advised an operation and suggested to Eddles that in regard to the left side he could have that operated on also, leaving it wholly with Eddles to decide. Eddles adopted the suggestion and both operations were performed. Subsequently blood poisoning supervened and the unfortunate man died.

The County Court Judge to whom the matter was submitted under the Act, gave his award in favour of the applicants for $1,500. The matter now comes before us by way of appeal from, and to set aside, the award upon the grounds (1) that there was no evidence that the deceased sustained an injury arising out of and in the course of his employment, and (2) that, if the deceased sustained an injury arising out of and in the course of his employment, there was no evidence that such injury was the cause of his death.

As to the first ground, I am of opinion that there is evidence to support the finding of the County Court Judge, apart altogether from the statement made by the deceased to his physician. As to the admissibility of this evidence I do not need now to express an opinion.

As for the second ground, the injury received was the cause of the consultation and decision as to the necessity of the operation on the right side, and that consultation and that decision gave rise to the determination of the deceased as to the operation on the left side and, consequently, to that operation itself, and it was to one or the other or to both of these operations that the blood poisoning and resulting death were due. So that there was a direct causal relation extending from the original injury to each of the operations and the consequences thereof. The decisions on cases arising under the similar provisions of the English Act are far-reaching, but they are clear and cover this case. I refer particularly to *Dunham* v. *Clare*, [1902] 2 K.B. 292, and *Ystradowen* v. *Griffiths*, [1909] 2 K.B. 533. All the judgments in these cases seem to me much in point.

If you could say as a fact that the blood poisoning was due to the operation on the left side (the seat of the old hernia), nevertheless there would be applicable the words of Lord Justice Buckley in *Ystradowen* v. *Griffiths*, [1909] 2 K.B., p. 537, where he said of the facts in *Dunham* v. *Clare*, [1902] 2 K.B. 292: "There was there, therefore, a disease produced, not by the accident alone, but by something else which would not have existed but for the accident." It is plain, beyond peradventure, that

MAN.

C. A.
1912

RE EDDLES AND SCHOOL DISTRICT No. 1 OF WINNIPEG.

Cameron, J.A.

there would have been no operation on the left side had it not been for the operation necessitated by the injury in question, and it appears to me that the links in the chain of causation from injury to death are perfect. The words "resulting from the injury" mean not "the necessary or the natural or the probable consequences of the injury"; but the consequence in fact. And "it (the death or incapacity) need not be the consequence of the injury alone," *per* Lord Justice Buckley: *Ystradowen Colliery Company* v. *Griffiths*, [1909] 2 K.B. 533, at p. 537.

This case, the first to come before us under the Act, is one calling for careful consideration. Here we have a statute imposing a liability on employers who are in no default and are guilty of no negligence. It is not alleged or pretended that the school board was careless of its duties in any respect in this matter. The deceased was not engaged in an employment that could be considered at all hazardous. Yet the policy of the law is clear and the question of negligence on the part of the employer is immaterial. No such question is involved. The real question to be answered is, was the death in fact the result of the personal injury?

I think the award must be sustained and that the appeal must be dismissed.

HOWELL, C.J.M., concurred.

Appeal dismissed.

MAN.

C. A.
1912

Mar. 18.

MERRIAM v. PUBLIC PARKS BOARD of Portage la Prairie.

Manitoba Court of Appeal, Howell, C.J.M., Richards, and Cameron, JJ.A. March 18, 1912.

1. CONTRACTS (§ II D 4—192)—BUILDING CONTRACT—PAYMENT — CERTIFICATE OF ENGINEER—AUTHORITY TO GRANT FINAL CERTIFICATE.

Where provision is contained in a contract for the construction of certain works that payment is to be made on the completion of the work to the satisfaction of the engineer, the authority of the engineer is to be confined to what is specifically conferred on him by the contract including the specifications and while he may, pursuant to the provisions of the specifications, issue progress estimates from time to time, he has no authority to release the contractor from the performance of any essential part of the work, nor has he power to give a certificate, final in its nature, until the work is completed to his satisfaction.

[*Davidson* v. *Francis*, 14 Man. R. 141; *Canty* v. *Clark*, 44 U.C.R. 222, followed.]

2. CONTRACTS (§ IV D—362)—CONDITIONS PRECEDENT—STRICT COMPLIANCE.

Where payment under a building contract is conditioned on the completion of the work to the satisfaction of the engineer, and upon the strict compliance with all the provisions of the contract, the contractor cannot recover the contract-price without asserting and proving strict compliance with all conditions precedent.

[*Brydon* v. *Lutes*, 9 Man. R., at pp. 471, 472, followed.]

3. CONTRACTS (§ IV D—363)—ENGINEER'S CERTIFICATE—FINALITY OF.

A document signed by an engineer on the construction of works certifying to the correctness of a statement shewing the balance due a contractor up to a fixed date, and that the same had not been previously certified to, but withholding a sum "pending repairs," is not a final certificate, nor can it be construed as a progress estimate.

4. CONTRACTS (§ IV D—363)—PROGRESS ESTIMATES — ABANDONMENT BEFORE PAYMENT.

In a proviso in a building contract that, if the contractor shall observe and keep its terms and conditions, the owner will make monthly payments to him of a fixed percentage of the estimate certified by the engineer or architect in a progress certificate, the payments so provided for are subject to adjustment or re-adjustment at the end of the contract, and, if the contractor abandons the work so that he is disentitled to claim for the work done, his right to claim on the progress certificate falls with the principal claim and he cannot recover thereon.

[*Tharsis* v. *McIlroy*, 3 A.C. 1040, applied.]

AN appeal from the decision of Robson, J., *Merriam* v. *Public Parks Board*, 18 W.L.R. 151.

The appeal was dismissed, RICHARDS, J., dissenting.

H. J. Symington, for plaintiff.

Messrs. *A. B. Hudson*, and *E. P. Garland*, for defendants.

A. E. Hoskin, K.C., for third parties.

HOWELL, C.J.M.:—The facts in this case are fully set out in the judgment of Mr. Justice Robson, who tried this cause.

Section 25 of the contract provides for payment for this work, and is as follows:—

25. Said purchaser covenants with the said contractor that if the said work including all extras in connection therewith shall be duly and properly executed and completed as aforesaid to the satisfaction of the engineer, and if the said contractor shall observe and keep all provisions, terms and conditions of this contract, the purchaser will pay to the said contractor the sum as hereinbefore mentioned in the manner and at the times mentioned in the specifications upon estimates and certificates signed by the engineer and such further sum or sums for extras as may be certified to by the engineer as being due and owing to the said contractor.

The only provision in the specifications as to certificates is the following:—

18. Payments, each 85 per cent. of the amount of the estimate, will be made on or about the 15th of each month, upon progress estimates to be issued by the engineer on or about the 3rd of the month, for work completed during the previous month.

It is difficult to give an intelligent construction to these two clauses. The covenant in the contract is for payment upon completion to the satisfaction of the engineer; the provision in the specification is for payment from time to time before completion.

The plaintiff simply sues on a completed contract and alleges that he obtained a final certificate within the provisions of the above section 25.

MAN.

C. A.
1912

MERRIAM
v.
PUBLIC
PARKS
BOARD OF
PORTAGE
LA PRAIRIE.

Howell, C.J.M.

The contract was one to construct a dam across the Assiniboine river, with sheet piling so as to constitute a water-tight plane, so that the water would be diverted to an old river bed at Portage la Prairie. The structure which the plaintiffs claimed they had completed certainly did not hold the water of the river, and, from the evidence, I would not have expected it to be to the satisfaction of the engineers. Stevens, the chairman of the board, saw the work a day or two before the alleged final certificate was given, and, if his evidence is to be relied upon, I would not think the engineers should be satisfied.

Smith, one of the engineers, saw the work two weeks after that certificate was given, and he swears that he then told the plaintiffs the following: "I told them that the work was not completed satisfactorily," and he also describes the then condition of the work.

Ruddell, the agent of the engineers, the man on the work, also describes its condition when the water was raised by the stop logs, and it certainly then—about the time the certificate was given—had not much of the qualities of a dam, and could not be called a water-tight plane as required by the specifications.

On the 2nd of August, the plaintiffs had withdrawn from the work and claimed they had fulfilled their contract, and were entitled to their money. On that day they went to the engineer's office for their final certificate. Objections to the work were made by Mr. Chase, one of the engineers, and on reference by him to Ruddell it seems clear that the engineer thought something more should be done to complete the work. After some haggling, he decided that the sum of $500 should be retained out of the contract price and a certificate was given setting forth debits and credits as if all the work had been performed, but containing this charge against the plaintiff: "Retained pending repairs, $500." After making this charge, the balance is brought out in favour of the plaintiffs of $6,607.66, and then follows: "We hereby certify that the above statement, amounting to six thousand six hundred and seven 66/100 dollars is correct and has not been previously certified." There is no statement in the certificate that the work has been fully executed or completed and nothing respecting the satisfaction of the engineer. The certificate starts out as follows: "For work done by Messrs. Merriam & Symington up to 31st July, 1910."

There is no statement in the document that the certificate is a final one, and on the contrary, there is a direction to retain part of the contract price until certain repairs are made, which apparently the plaintiffs should have done. I would also infer from this that the plaintiffs had not done the work to the satisfaction of the engineers.

It was argued that as the engineers had power to change

the plan and design of the work by omitting certain portions of it, the certificate should be read as if the unfinished part of the work had been dropped from the design and that it was thereby a completed work satisfactory to the engineers. It cannot be said that this defective work was directed by the engineers to be so done or changed or omitted as provided by section 10 of the contract.

Section 10 of the specifications clearly limits the time and manner in which the engineers shall grant this certificate. It is as follows:—

> So soon as the contractor shall have completely fulfilled the contract requirements, the engineer shall forthwith so certify in writing to both the purchaser and the contractor and thereupon it shall be deemed that the purchaser has taken over the works.

This provision has not been complied with for the engineer has not certified that the contractor has completely fulfilled the contract requirements.

I agree with Mr. Justice Robson that the engineers had no power to give a certificate final in its nature until the work was completed and to their satisfaction. If authority is required for this proposition it will be found in *Davidson* v. *Francis*, 14 Man. R. 141, and in *Canty* v. *Clark*, 44 U.C.R. 222.

To recover on the statement of claim the plaintiffs must prove the completion of the work, and the satisfaction of the engineers and must produce their certificate issued under the terms of the agreement and specifications. The plaintiffs have failed in this and cannot recover for the contract price.

Although not raised on the pleadings the plaintiffs claim that during the progress of the work, progress certificates were from time to time issued and there is a balance due on them, and they ask now for a verdict for this amount.

It seems to me they cannot recover for this balance, even if a case had been made for it on the pleadings. Their case on the pleadings is that the work is completed, and now it is quite impossible to finish it because of its almost absolute destruction. They entirely withdrew from the work and asserted it was finished.

After the engineers had withdrawn their certificate, Mr. Smith asked Mr. Symington to make the dam reasonably watertight, but he refused and asserted his right to stand on the certificate as a final one. The engineers shortly afterwards called upon the plaintiffs to complete the work, but they refused.

The position of the plaintiffs is that they assert the contract is completed, and will do no more work. This is not a case of suing for a claim under a progress certificate while the contract is current and is being performed, but it is a claim for part payment when, because of non-fulfilment, nothing is payable to the plaintiffs. If, after a progress estimate is issued and be-

MAN.

C. A.
1912

MERRIAM
v.
PUBLIC
PARKS
BOARD OF
PORTAGE
LA PRAIRIE.

Howell, C.J.M.

fore payment, the contractor had abandoned the work he could not recover on the contract because he had abandoned it, and it seems to me that is practically the plaintiffs' position.

The provision in the specifications as to progress estimates above set out, is only for provisional payments subject to adjustment or re-adjustment at the end of the contract, as held by Lord Cairns in *Tharsis* v. *McIlroy*, 3 A.C. 1040, at 1045. And it would be strange if now, at the end of this contract, when the plaintiffs are entitled to nothing because they have not complied with its terms, they could recover on an estimate given when the contract was in force and all parties expected it would be carried out.

The claim of the plaintiffs because of misrepresentation as to the river bed had been fully considered by the learned trial Judge, and I fully agree with him.

The appeal must be dismissed with costs.

RICHARDS, J.A. (dissenting):—I agree with the learned trial Judge that the doctrine of substantial performance seems not to be applicable under the English decisions. The question, to my mind, simply is whether the engineers have given a final certificate, and if they have, whether they had power to do so.

The certificate of 2nd August, was, in my opinion, meant to be a final certificate. It begins by crediting the plaintiffs with the whole contract price. It directs the repayment to them of their deposit given as security for the performance of the work and also directs payment to them of $2,000, which had been held back from the estimates as further security.

There is no magic in the particular wording of a final certificate. It is sufficient that it shews on its face that it was intended to be a final one. For example, in *Clark* v. *Murray*, 11 Vict. L.R. 817, a certificate that the contractor was entitled to receive a named sum with the words: "This being the final certificate in full of all demands" was held to be a certificate that the whole of the work was completed to the satisfaction of the architect. In *Wyckoff* v. *Meyers*, 44 N.Y. 143, the contract provided that the last instalment of the contract price was to be paid "when all the work is completely finished and certified to that effect by the architect." The architect gave a certificate which reads: "This is to certify that the last payment of $1,800 is due . . . as per contract." This was held to be in effect a certificate that the work was completely finished.

There is, on the face of the certificate in the present case, the following: "Retained pending repairs, $500." The evidence shews that the work was completed, but that the flooring of the sluices up-stream from the stop logs was apparently not as tight as the engineer thought it should be and some of the up-stream sheet piling they also thought not to be tight. The evidence

further shews that the engineers decided that this might be remedied by boarding over the parts, and they further decided that they would not have this done by the contractors, but would themselves have it done or get it done otherwise. This is what the $500 was retained for.

The question arises whether the engineers had power to make these changes and then dispense with the doing by the contractors of what these changes called for.

The case relied on by the defence, it seems to me, is *Rex* v. *Peto*, 1 Y. & J. 37. In that case it was provided that the surveyor might order extra work to be done, in addition to what was shewn in the plans and specifications, or might order that any part should not be done or executed. It was held that this did not give the surveyor power to alter the whole nature of the foundation of the building, as that was neither an ordering of extra work, nor the omitting of any part of the work contracted to be done, but was a substantial alteration—and the contract gave the surveyor no power of alteration.

In the present case it is provided by section 7 of the contract that the engineer shall have the right to make or order any alterations or changes such as he may deem advisable . . . or to omit any portion of the work, or to increase or decrease dimensions or quantity of materials or work.

By section 10 of the contract it is provided that if any work or material which the contractor shall be required to perform or supply under the specifications, as directed by the engineer, be changed or omitted, whereby a less quantity of work or material is performed or supplied, then the engineer shall deduct from the contract price the value thereof.

Sub-section (*b*) of section 4 of the specifications says that it shall be within the rights of the engineer to issue plans and specifications further detailing, explaining or modifying the work.

Section 10 of the specifications says that so soon as the contractor shall have completely fulfilled the contract the engineer shall forthwith certify, and thereupon it shall be deemed that the purchaser has taken over the works.

It will be observed that the powers of the engineer are very wide as compared with those of the surveyor in *Rex* v. *Peto*, 1 Y. & J. 37.

It seems to me, though I express the opinion with a good deal of hesitation, that the powers of alteration and omission given by the contract and specifications would enable the engineers to make an alteration or change in the work by planking over such part of the sheet piling and sluice floors as they thought proper. The evidence shews that, in their then opinion, such sheet piling and floors would then comply with the purpose of the contract. Then, they having so decided, and having

MAN.

C. A.

1912

MERRIAM v. PUBLIC PARKS BOARD OF PORTAGE LA PRAIRIE.

Richards, J.A.

the right to order a portion of the work to be omitted, it seems to me that they have ordered the omission of that part so to be altered, and that on their having done so, the contract was in fact completed as required by its terms, and that the engineers were empowered to give a final certificate, which, it seems to me, they did on the 2nd of August. Though the wording of the certificate is, as to the $500 item, "Retained pending repairs," the letter with the certificate, and which I think may be read with it, shews that the item of $500 was really permanently deducted from the contract price, and not merely temporarily held back as against the plaintiffs. What it meant was that the $500 was deducted in respect of the work changed by the engineers, and then by them omitted from the work to be done by the contractors.

Holding these views, I would allow the appeal.

CAMERON, J.A.:—Under clause 13 of the specifications, the dam which the plaintiffs agreed to construct was to be watertight. "All sheet piling to be so driven as to form a watertight place." The contract provides in section 1 that the contractor shall perform, execute and complete the works which by section 26 are defined to be the whole of the works, matters and things required to be done. By section 7 of the contract the engineer may make or order any alterations or omit any portion of the work or increase or decrease dimensions, etc., "and the contractor shall, in pursuance of the engineer's written orders to that effect, proceed with and carry out the works as directed in pursuance of such orders." Clearly the engineer in giving the certificate of August 2, 1910, did not consider that he was, and in fact, was not, acting under this section. He gave the contractor no written orders to proceed as required thereby. Clause 6 of the specifications gives the Parks Board the right at any time to alter, deduct from, add to or omit any part of, the work without affecting the contract, which alterations the contractor shall carry out "upon written notice from the engineer." Obviously it cannot be asserted that the engineer was acting under this clause in giving the certificate of August 2, or, indeed, that a consideration of clause 6 enters into this case in any way.

The authority of the engineer in respect of this work is to be found altogether within the four corners of the contract (including therein the specifications), and by no fair reading of the contract can there be found in its terms power vested in the engineer to allow for work defectively done, or power to release the contractor from the performance of any essential part of the work required to be done thereby, and to assign the completion of any such part to himself or to others. The conclusion seems to me clear that the engineer had, under the contract, no

MAN.

C. A.
1912

MERRIAM
v.
PUBLIC
PARKS
BOARD OF
PORTAGE
LA PRAIRIE.

Cameron, J.A.

authority to give the certificate of August 2, which was therefore ineffective and void, and must be disregarded.

It seems plain, also, that document, inasmuch as it purports to withhold $500 of the contract price "pending repairs," is not final. Nor was it issued as, or intended to be, a progress estimate under clause 13 of the specifications, and it cannot be taken as such, as a reference to the wording of that clause clearly indicates.

The document of August 2, shews, on the face of it, that the work was not then complete and the evidence points strongly to the same conclusion. It is only when the works have been duly executed and completed to the satisfaction of the engineer and upon compliance by the contractor with all the provisions of the contract, that the "purchaser" covenants to pay. It is well established law that the contractor, to recover, must assert and prove strict compliance with the contract and specifications. I refer on this subject to the judgment of Killam, J., in *Brydon* v. *Lutes*, 9 Man. R., at pp. 471, 472. It seems to me that the plaintiffs have here failed to meet this essential requirement.

The judgment in favour of the plaintiffs in respect of the counterclaim made by the Parks Board has not been appealed against and stands.

I have read the judgment prepared by the Chief Justice in this matter and agree with his reasoning and conclusions.

I think the appeal must be dismissed.

Appeal dismissed.

P.E.I.

C. A.
1912

Jan. 23.

William F. H. **CARVELL** (complainant, appellant) v. William H. **AITKEN, Frederick Parker Carvell, and John A. Messervey** (defendants, respondents).

Prince Edward Island Court of Appeal in Equity, Sullivan, C.J., and Fitzgerald, J. January 23, 1912.

1. TRUSTS (§ II B—52)—INDIVIDUAL INTEREST OF TRUSTEE.

Where one sold his interest in a partnership to his fellow partners for a sum payable at a specified time and before that time died leaving a will by which he appointed as executors and trustees of his estate two of the remaining partners and the plaintiff, who was not connected with the firm, and payment of the debt, was not enforced when due, though interest thereon was paid annually thereafter, the plaintiff as a beneficiary under the will is not entitled to an accounting of the profits earned by the loan after it became due and cannot claim such profits in lieu of interest.

[*Vyse* v. *Foster*, L.R. 8 Ch. App. 309, L.R. 7 H.L. 318, followed.]

2. ESTOPPEL (§ III K—139)—RECEIVING BENEFITS—ACQUIESCENCE.

Where a partner sold his interest in the business to the other members of the firm for a sum payable at a specified time and payment was not enforced when due (the selling partner having died before its maturity) a trustee and executor of his estate who was also a *cestui que trust* under the will and who acquiesced in allowing the debt to remain uncollected and received his share of the interest paid thereon

P.E.I.

C. A.

1912

CARVELL v. AITKEN.

from time to time by the firm and who with full knowledge of his rights executed a release and discharge under seal to his predecessors in the trusteeship to whom the firm had repaid the debt has no right to also claim an accounting of the profits earned in excess of the interest by the loan after it became due.

[*Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, specially referred to.]

AN appeal from the judgment of the Vice-Chancellor, dismissing the bill of complaint.

The appeal was dismissed.

Neil McQuarrie, K.C., for appellant.

Messrs. *D. C. McLeod*, K.C., and *W. E. Bentley*, for respondent Aitken.

SULLIVAN, C.J.:—The question to be decided in this case is whether the respondents should be held accountable to the appellant for the profits made between 1st February, 1898, and 27th April, 1905, by the firm of Carvell Bros., on $52,000, held by them during that period for the estate of J. S. Carvell, deceased.

The material facts in the case are not in dispute. They are as follows: In the year 1893 the late J. S. Carvell sold his interest in the firm of Carvell Bros. to his co-partners for $52,000, and by a memorandum in writing, dated 3rd June of that year he agreed that that sum should remain in the hands of the new firm, constituted on his withdrawal, for a period of five years at 7 per cent. interest; the agreement providing that in the event of a dissolution of the new firm before the expiration of the period of five years, the said J. S. Carvell, his executors or administrators should be entitled to payment of the said sum at such dissolution.

This agreement was signed by J. S. Carvell and by all the remaining members of the firm of Carvell Bros., namely, Lewis Carvell, W. H. Aitken, F. P. Carvell and John A Messervey. J. S. Carvell died in 1894. By his will he appointed two of the respondents, namely W. H. Aitken, and the testator's son, F. P. Carvell, both continuing members of the firm of Carvell Bros., his trustees and executors. He also appointed his son, W. F. H. Carvell, the appellant, who was not a member of the firm, a trustee and executor of his will.

By his will J. S. Carvell devised the residue of his estate, including the said sum of $52,000, upon certain trusts but "subject to the directions hereinafter contained with regard to the money belonging to me now held by or owing to me from the firm of Carvell Bros."

The said W. F. H. Carvell and F. P. Carvell were present beneficiaries of a part of the estate and residuary legatees of the whole of it.

The will contained a provision that notwithstanding the dissolution of the firm mentioned in the agreement already referred

to, if the business should be continued by a firm of which the said W. H. Aitken and testator's son, F. P. Carvell, should be members, then the trustees might continue the said $52,000 or any part thereof in the firm until the 1st February, 1898. The will also contained a provision relieving the trustees from all liability because of the money remaining in such business, and from accountability for profits in the business by those trustees who were members of the firm. It also authorized the trustees to invest the trust funds "in and upon any security or securities which my trustees may think proper in their absolute discretion."

The $52,000 remained in the business of the firm until its dissolution on 31st January, 1905, interest thereon being duly paid to J. S. Carvell's estate at 7 per cent. until 1901, and at 6 per cent. after that date.

On 20th April, 1905, an order was made by the Court of Chancery appointing John A. Messervey a trustee in the place of W. H. Aitken who had resigned, and on 28th April, W. H. Aitken, F. P. Carvell and W. F. H. Carvell the appellant, paid over the fund with the interest then due to the then trustees, F. P. Carvell, W. F. H. Carvell and John A. Messervey, and receipts and releases under seal were then executed by such former trustees to the firm of Carvell Bros., and by such latter trustees to their predecessors in office for the amount of such fund, namely $52,000.

In the petition signed by the appellant and the other beneficiaries to the Court of Chancery praying that John A. Messervey should be appointed to fill the vacancy created in the trusteeship by the resignation of W. H. Aitken, they alleged their willingness that "the said W. H. Aitken should be so relieved and discharged."

Upon these facts the appellant's counsel argued that the judgment of the Vice-Chancellor dismissing the appellant's bill of complaint should be reversed, and that an order of the Court of Chancery should be made for an account of the profits of the firm of Carvell Bros. during the period mentioned, with a view to the appellant's participation in such part thereof as was earned by the $52,000. In support of his contention the appellant's counsel referred to and relied upon the doctrine established by the cases of *Piety* v. *Stace*, 4 Ves. J., 620; *Docker* v. *Somes*, 2 Myl. & K. 655; *Wedderburn* v. *Wedderburn*, 22 Beav. 34*; *Re Davis, Davis* v. *Davis*, [1902] 2 Ch. 314, and other cases in the same line, enunciating the general principle which is indeed a well-settled rule of the Court of Chancery that a trustee or an executor who improperly uses trust money in trade must account for the profits which he makes by that use of it.

*Same case, *Wedderburn* v. *Wedderburn*, 4 Myl. & Cr. 41, 8 L.J. Ch. 177, 3 Jur. 596, affirming 2 Keen 722.

P.E.I.

C. A.

1912

CARVELL v. AITKEN.

Sullivan, C.J.

The facts in the present case, as I view them, do not bring it within the rule as to liability for profits recognized by the authorities cited by the appellant's counsel.

In this case the principal partner of Carvell Bros. sold to the other members of the firm for a specified sum, payable at a fixed time his interest in a prosperous business which he as well as the other parties to the transaction evidently desired should be continued. In his will, subsequently made, two of those partners were appointed trustees and executors. Payment of the purchase money was not enforced when it became due, but the firm paid the trustees interest on it annually while it remained unpaid.

A feature in this case which distinguishes it from all the cases cited by the appellant's counsel, is that the relative positions of the trustees and the surviving partners were those of creditors and debtors in regard to a debt which arose upon a transaction entered into by the testator himself prior to the appointment of the trustees.

The Vice-Chancellor in his judgment followed the decision of the Court of Appeal and of the House of Lords in *Vyse* v. *Foster*, L.R. 8 Ch. App. 309, L.R. 7 H.L. 318. In that case a testator was partner in a business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stock-taking, and to be paid by instalments extending over two years, with interest at 5 per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of the testator's share was ascertained but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at 5 per cent. per annum, with yearly rests. One of the testator's residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed her bill against the executors claiming to be entitled to a share in the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees (with the exception of the plaintiff) approved of what had been done.

It was held by the Court of Appeal (reversing the decision of Bacon, V.-C.), that the plaintiff was not entitled to any account of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving his estate any right to share in the profits of the business: *Vyse* v. *Foster*, L.R. 8 Ch. App. 309. This decision was confirmed by the House of Lords, L.R. 7 H.L. 318.

It will be observed that the present case is very similar in its circumstances to *Vyse* v. *Foster*, L.R. 8 Ch. App. 309, L.R. 7 H.L. 318. The principle in that case is equally applicable to this, and the decision in that case should be held to lead to and govern the conclusion in this case.

There is another aspect of this case which presents itself adversely to the appellant's contention.

He was himself a trustee as well as one of the *cestui que trust*. He knew that the sum of $52,000 remained unpaid; he received his share of the interest paid on it by the firm and he acquiesced or concurred in allowing the debt to remain uncollected and bearing interest.

In the case of the *Duke of Leeds* v. *Earl Amherst*, 16 L.J. Ch. 5, Lord Chancellor Cottenham said:—

> If a party, having a right stands by and sees another dealing with a property in a manner in which he ought not, and does not interfere, that may be called acquiescence; that is, acquiescence while the act is in progress—he cannot complain of the act that was done with his own acquiescence.

See also *Powell* v. *Hulkes*, 33 Ch. D. 552.

In *Chillingworth* v. *Chambers*, [1896] 1 Ch. 685, Lindley, L.J., says, at p. 698:—

> It was treated by Lord Eldon as clear law in his day that a *cestui que trust* who concurs in a breach of trust is not entitled to relief against his co-trustee in respect of it: see *Walker* v. *Symonds*, 3 Swans. 1, 64. Lord Eldon's statement of the law was distinctly approved and followed in *Farrant* v. *Blanchford*, 1 D. J. & S. 107. Further, in *Butler* v. *Carter*, L.R. 5 Eq. 276, 281, Lord Romilly stated distinctly that where one of two trustees was himself a *cestui que trust* he could not call upon his co-trustee to replace stock which they had both permitted to be misapplied.

The appellant having elected to accept interest from 1898 to 1905, having executed, under seal, with a full knowledge of his rights, a release and discharge to the respondents as trustees, and having stood by and witnessed the respondent W. H. Aitken pay, in 1905, the amounts of their several interests in the partnership to the retiring members of the firm of Carvell Bros., one of whom F. P. Carvell was the appellant's brother and a co-trustee of his father's estate, on the basis of a dealing with the fund in question in the manner in which it had been dealt with, has rendered futile to himself the application contained in his bill of complaint.

There only remains for me to refer to the charge in the appellant's bill of complaint that W. H. Aitken, F. P. Carvell and J. A. Messervey by pretence and collusion retained $5,300 in the hands of Carvell Bros. out of the fund of $52,000, and appropriated the same to pay an alleged claim of Carvell Bros. against the appellant without his consent. The learned Vice-

P.E.I.

C. A.
1912

CARVELL
v.
AITKEN.

Chancellor has found as a fact that there was no evidence given before him which would justify his finding such a charge to be true. I have examined and considered the evidence, and I agree with the finding of the Vice-Chancellor that this charge has not been established.

This appeal will be dismissed with costs.

FITZGERALD, J., concurred

HASZARD, J., took no part as he had been engaged as counsel on the hearing before the Vice-Chancellor.

Appeal dismissed.

MITCHELL v. WILSON.

SASK.

S. C.
1912

April 2.

Saskatchewan Supreme Court (Regina Judicial District). Trial before Brown, J. April 2, 1912.

1. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT BY VENDOR—RECOVERY OF MONEY PAID.

Where a contract for the sale of real estate fixed the price at $1,350 and provided that the purchaser was to pay $200 in cash, to give two notes for a like sum each in ten days' time, and to arrange the payment of the balance later, this delay being permitted to give the purchaser an opportunity to hear as to an application that he had made for a loan on the property with the knowledge of the vendor for the purpose of arranging for the payment of the balance and the receipt given by the vendor for the cash payment described it as "money on a contract," and the purchaser went into possession and made extensive and costly improvements with the approval of the vendor, but was delayed beyond ten days in giving the notes and making a settlement of the balance of the purchase price by reason of not having heard as to his application for a loan, there being no attempt on his part to abandon or repudiate the contract, the cash payment was too large an amount in comparison with the total price to be paid to be deemed a mere deposit, but was payment on the contract which the purchaser was entitled to recover upon the vendor's unjustifiable determination of the contract by entering into possession of the property and re-selling the same.

[*March* v. *Wells*, 45 Can. S.C.R. 338, applied.]

2. VENDOR AND PURCHASER (§ I E—25)—RESCISSION OF CONTRACT BY VENDOR—RECOVERY OF SPECIAL DAMAGES.

Where time was not expressedly 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.

3. SPECIFIC PERFORMANCE (§ I E 1—33)—REAL PROPERTY—NOTICE TO COMPLETE.

Facts known to the vendor, at the time the contract was made, as having influenced the purchaser to agree to the time fixed for comple-

tion 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.

[*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, specially referred to. See also 7 Halsbury's Laws of England, p. 413.]

ACTION to recover payments of purchase price for land and special damages, the vendor having determined the contract of sale.

Messrs. *F. L. Bastedo* and *E. J. Moon*, for plaintiff.
H. M. Allan, for defendant.

BROWN, J.:—I prefer to accept the plaintiff's version of what took place in connection with this transaction. Not only did the plaintiff impress me favourably as a witness, but his version is much more likely, and is more in harmony with the documentary evidence, so far as that evidence goes. The facts as I find them are briefly as follows:—

The plaintiff, a stranger in the village of Radville, was desirous of securing some property on which to open up business as a merchant tailor. The defendant held lot 4, block 4, in that place under an agreement of sale on which there was still owing some $1,000 and interest. On May 7th, 1911, the defendant approached the plaintiff and offered to sell him this lot for $1,350, and the plaintiff said he would take it provided he could get it on easy terms, as he had only $400 cash. The defendant suggested to the plaintiff the advisability of getting a loan on the property with a view, I take it, of paying him (the defendant) in full and getting title in his own name. The plaintiff, before entering into any contract, in an effort to carry out this suggestion went to Weyburn, where he met one McCaig. McCaig stated that the thought he could get him about $800 by way of a loan on this property, and would let him know definitely in ten days' time. The plaintiff then went back to Radville, and on May 9th again saw the defendant and informed him that he could only get $800 on the property by way of loan. It was then agreed that the plaintiff would pay $200 cash and in ten days' time he would give two notes for $200 each payable in three and four months respectively, and the balance of the purchase-price was to be arranged, both parties at that time anticipating that by the expiration of the ten days word would have been received from McCaig with reference to the loan. The plaintiff paid the $200, and the defendant executed a receipt as follows:—

> May 9th, 1911. Received $200 (two hundred dollars) of lawful money on a contract of six hundred ($600).
> Contract. A. WILSON.
>
> Pay $200, $400 ten days on lot 4, block 4, west side Main Street, Radville. Balance to be arranged.
> A. WILSON.

SASK.

S. C.
1912

MITCHELL
v.
WILSON.

Brown, J.

On May 11th the defendant gave the plaintiff the key of the premises, and in pursuance of the purchase, and with the defendant's knowledge and consent, the plaintiff went into possession and immediately set to work to put the building situate on the front of the lot in shape for his business as a merchant tailor. The defendant was fully aware of the purpose for which the property was purchased, and was fully aware of the plaintiff's intention to fit the premises up for that purpose. On May 13th the defendant suggested to the plaintiff that his stable, situate at the back of this lot, would do as a workshop. The plaintiff acted on this suggestion, and purchased this stable for $75, paying the same on May 15th. The plaintiff immediately incurred expense in moving the stable to the front of the lot and in making alterations in it, fitting it up as a workshop for his business. The defendant was an eye-witness of all these alterations and improvements, frequently visiting the premises as the work was progressing.

On May 20th, ten days after the contract for the purchase of the lot was entered into, the defendant asked the plaintiff what he was going to do about the balance of the payment, and the plaintiff replied that he had not yet heard from McCaig about the mortgage, and that he would not give the notes until he did hear from him, and the defendant then said he would wait a few days longer. On May 23rd the defendant again asked for the notes, and the plaintiff then stated that he would like to see the title papers to the property—he had not as yet seen them—and the defendant replied that he would let him see them in a few days, that Mr. Moon had them at that time. He also intimated at that time that if the plaintiff did not give the notes soon he would take the place back, to which the plaintiff replied that in such event he would want his money back. On May 25th the defendant again saw the plaintiff and said he would take the place back. The plaintiff replied that he could have the place back if he gave him his money, but this was not agreed to. On the following morning, the defendant asked for the key of the premises, but the plaintiff refused, again saying he would give up the key if he got his money back. The defendant refused to return the money, and on the same day, without the consent of the plaintiff, he went into possession of the premises and continued to remain in possession, and subsequently resold the property. The plaintiff, in addition to paying $75 for the stable, to which I have referred, paid out $59.45 as wages for work done in fitting up the buildings on the lot for his business. The plaintiff brings this action to recover the $200 paid, with interest, and the items of $75 and $59.45 paid respectively for the stable and for labour.

I have no hesitation in finding that the cash payment in this case of $200 was a payment on the contract and not a mere

deposit. The receipt given at the time characterizes it as "a payment" on a contract. Again: the amount is large in comparison with the total price to be paid, and to the plaintiff the loss of $200 would be a very serious matter. Is it likely that for the mere privilege of holding this property for ten days the plaintiff would pay $200? And again: the fact that the plaintiff went into possession and made extensive and costly improvements, and all this with the knowledge and approval of the defendant, would indicate that the money paid was as a cash payment on the contract of purchase. Again: there was no abandonment or repudiation of the contract on the part of the plaintiff. He delayed in making settlement for the balance of the purchase price, but this delay could not be considered in any sense as an abandonment or a repudiation. On the other hand, the defendant, by entering into possession and re-selling the property, has determined the contract, and there is in consequence no obligation on the part of the plaintiff to come forward with the balance of the purchase price. Under these circumstances the plaintiff is unquestionably entitled to a return of the $200: *March Bros. and Wells* v. *Banton*, 45 Can. S.C.R. 338.

Is the plaintiff also entitled to a return of the $75 and $59.45? In deciding that question we must consider whether the defendant was under the circumstances justified in determining the contract. Time in this case was not of the essence of the contract. It was not made so by express terms, and it does not appear from the nature of the contract and the surrounding circumstances that such was the intention of the parties. See *Parkin* v. *Thorold*, 16 Beav. 59, 16 Jur. 959, 22 L.J. Ch. 174; 7 Halsbury's Laws of England, 413. But though time may not be of the essence of the contract, yet either party may, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice: *Parkin* v. *Thorold*, 22 L.J. Ch. 174 (*supra*); *Forfar* v. *Sage*, 5 Terr. L.R. 255; *Wallace* v. *Hesslein*, 29 Can. S.C.R. 171, 174; 7 Halsbury's Laws of England 413. In this case I am of opinion that there was no such reasonable notice as would make time of the essence of the contract. The defendant did not at any time give notice that the notes must be given by the defendant within a definite and specified time. The notice was of a very indefinite character, and the matter was left in a very indefinite shape. In any event, the notice given did not under the circumstances provide a reasonable time within which the plaintiff was to perform. The defendant knew perfectly well that the object of fixing the ten days as the time for completion was because the plaintiff expected by that time to have heard from McCaig with reference to the mortgage. The plaintiff had not as yet heard from McCaig, and he was naturally desirous of knowing where he was at before going further ahead. In the

SASK.
S. C.
1912
MITCHELL
v.
WILSON.
Brown, J.

event of not hearing from McCaig he must make other arrangements. I am of opinion that under the circumstances the defendant was very harsh, and was not justified in taking the action which he did. The delay of the plaintiff could not be regarded as an undue and unjustifiable delay. The contract was, therefore, unjustifiably determined by the defendant, and as a result he is liable to damages. The ordinary rule of common law as to damages would apply in such a case: the plaintiff may recover for any special damage he has received: Mayne, 7th ed., 215. Where, as here, the improvements made were contemplated by the parties at the time of the contract, and are the fair consequence of the contract, there cannot be, in my judgment, any question of the plaintiff being entitled to recover: *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.

I am of opinion, therefore, that the plaintiff is entitled to recover the $200 and interest, also the $75 and $59.45 aforesaid. There will be judgment in the plaintiff's favour for these amounts, making $334.45, and interest on $200 from May 9th, 1911, at five per cent., and costs.

Judgment for plaintiff.

McNERNEY v. FORRESTER.

MAN.
C. A.
1912
April 8.

Manitoba Court of Appeal, Howell, C.J.M., Richards, and Perdue, JJ.A. April 8, 1912.

1. BUILDINGS (§ II—21)—FIRE—DANGEROUS WALLS—OWNER'S DUTY.

Where the walls of a building are dangerous because of a fire, the owners of the damaged building from time to time are under a legal duty to the adjoining owner to take all reasonable measures to prevent the wall from falling over to the injury of his neighbour's property.

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, and *Attorney-General* v. *Tod Heatley*, [1897] 1 Ch. 560, applied.]

2. BUILDINGS (§ II—21)—DAMAGE BY FIRE—DUTY TO ADJOINING OWNER AS TO UNSAFE WALLS.

If the purchaser of land and of a building thereon which had been ruined by fire takes measures for the preservation of the building which were adapted only to the winter season, and for the support of the structure only while the debris caused by the fire remained a frozen mass and neglects to put in more substantial supports on taking out the debris in warmer weather, he will be liable to the adjoining owner whose building is injured by the fall of the wall, although he had followed the advice of the city building inspector, and of his own architect that the walls were sufficiently braced for the changed conditions.

[*Dalton* v. *Angus*, 6 A.C. 740; *Jolliffe* v. *Woodhouse*, 10 Times L.R. 553; *Valiquette* v. *Fraser*, 39 Can. S.C.R. 1, applied; *Ainsworth* v. *Lakin* (Mass.), 57 L.R.A. 132, approved; and see 3 Halsbury's Laws of England, p. 315.]

APPEAL by the plaintiffs from the decision of Metcalfe, J., in *McNerney* v. *Forrester*, 19 W.L.R. 32, in an action to re-

cover for injuries to the plaintiffs' building resulting from the fall of the walls of the defendants' building.

The appeal was allowed.

Messrs. *H. Phillipps* and *W. K. Chandler*, for plaintiffs.
Messrs. *J. E. O'Connor* and *A. K. Dysart*, for the defendants.

HOWELL, C.J.M.:—In December, 1909, a fire destroyed in part a six-storey brick building owned by one Sterling. The building was fifty feet by one hundred and twenty feet deep, running from Fort street to a lane twenty feet wide. The plaintiffs occupied then, and until the walls fell, the land adjoining the south wall.

Mr. Smith was the architect who acted for Sterling in the construction of the building, and after the fire he was a witness on Sterling's behalf in an arbitration between him and the insurance company.

Shortly after the fire, one Rodgers, the city building inspector, whose duties are apparently to order down or remove walls that are dangerous, and who has had in this work fifteen years' experience, examined the walls and tells in the evidence the general state of the building. The roof was nearly all burnt off and had fallen in, a small portion of it, however, apparently in front, had fallen part way down and was resting on some posts and beams. All the sixth floor but a few feet in front had fallen. All the fifth floor except a few feet of charred flooring and joists in the rear and about fifteen to twenty feet in front had also fallen. The fourth floor had been burnt away in the middle—the extent of which is not shewn clearly in the evidence—it had probably fallen in to the extent of one-half of one-third. The remaining floors were not injured by the fire.

Throughout the length of the building there extended two rows of wooden posts supporting two lines of wooden beams, thus dividing it lengthwise in about three equal divisions. Joists at right angles to these beams rested upon the latter, and the ends of these joists were anchored to the walls by iron fastenings, but the manner by which these were fastened together does not appear.

Although the joists and part of the floors which fell must have burnt through, yet these posts and beams were chiefly left standing as shewn by photographs put in at the trial, except some of those in the sixth floor and these photographs of the ruin taken before any removal works had been done, shew that the weather at the time of the fire was very severe as great masses of ice were hanging from the portion of the roof which had not wholly fallen and the beams and walls were covered largely with ice frozen, evidently as the water fell upon it while the fire was being extinguished.

When the joists burned through some of them merely

MAN.

C. A.

1912

MCNERNEY v. FORRESTER.

Howell, C.J.M.

dropped down on an incline with one end fastened in the wall and the other resting on the burnt debris and charred beams or on a floor below. The half-burnt roof and floors fell below, and no doubt rested partly on the half-burnt contents of the building and on the posts and beams making, as shewn by the photographs, a tangled ruin, and upon all this water was thrown, the fire extinguished and all was frozen in a solid mass.

The evidence shews that the debris was frozen solid up into the fifth storey, and apparently one or more posts in the sixth storey supported a fragment of the roof which seems covered with ice. Mr. Rodgers, after the fire, thought the walls dangerous, and notified Sterling that he must brace the walls and he ordered the putting in of nine transverse timbers, each reaching across the building, five at about the top of the sixth storey, just under the roof, and four just below the floor of the sixth storey, or at the top of the fifth. The lower four timbers were supported and steadied by the posts and beams left standing at the top of the fifth storey. The five upper ones, each 50 feet long, were not in any way supported or steadied, except at the ends by the north and south walls, and manifestly, as shewn by a photograph, they had sagged as one would have expected. The south wall had buckled or "bulged" southward to a noticeable extent and I gather from Rodgers' evidence that these timbers were put in—fastened as they were by iron bolts through the walls to planks—for the particular purpose of holding the walls together. Rodgers, who was called by the defendants, and gave evidence on this subject, and it is so important that I shall quote a portion of the vast volume of it:—

Q. After the fire was extinguished what did you do with reference to the building?

A. As soon as I could make an inspection of the walls, and satisfy myself as to their condition, I decided that they were dangerous, should a high wind occur, and I advised Mr. Sterling on the 11th that he must take steps to protect the walls.

Mr. Phillipps:—What kind of an examination did you make?

A. I viewed the walls from the inside and outside, and I could see that some bracing of the walls was necessary, as a high wind might do damage to surrounding property.

* * * *

A. The top wall was standing exposed from both sides and nothing to tie it in at all.

* * * *

His Lordship:—You say that constituted the danger?

A. The wind would have a full sweep at them, nothing to steady them at all.

Mr. Phillipps:—Nothing to steady them? A. No.

Q. When you say the wind would have a full sweep at them—supposing there were no braces in there at all, did you think any wind that might be expected to come along would do damage to them?

A. Was liable to.

Q. Was liable to? A. Yes, certainly.

Q. And that is something—or don't you think any ordinary wind would have been liable to result in damage?

A. Yes. The idea of putting in the braces was to draw them in to the portions that were standing up against the wall, the fallen joists.

Mr. Phillipps:—You spoke of a solid mass? A. Yes.

Q. You know the solid mass you are referring to, do you?

A. Yes.

Q. You have it now immediately present in your mind?

A. Yes.

Q. How long would that have continued to have supported, or how long would that have continued to have afforded the protection to the building, after the fire?

A. As long as it remained frozen.

Q. There is no doubt about that in your mind now? A. No.

Q. That is all clear? A. Yes.

Q. And it would have remained frozen longer than the outside walls? A. Yes.

Q. Because the sun would not have come in?

A. Any portion of it where the sun could come in at the back, and get to it, it would thaw faster in there than it would on the outside wall.

His Lordship:—By "the solid mass" you mean what?

A. I mean furniture, beams, joists, charred cinders, that had been left there, or debris is what I call it, and what portion of burned woodwork that they could shovel out of the building.

Q. By the solid mass you evidently mean floors, and everything in the building?

A. Yes, everything in there. The water poured in there on it, and it was frozen almost before it would strike it, and the spray, from where the stream would strike, rolling off and freezing, and freezing, and making just one solid mass of the whole thing.

Q. And there is no doubt that that would afford less support when it became thawed than it afforded when frozen?

A. Yes, to a degree; the joists burned off at the centre of the beams, the fire being at the centre of the building, when they would burn off they would drop down and form a brace against the outer walls, of course, as I have explained.

On the 10th of March, the defendants became the owners of this property, having previously for some time been fully aware of its state, and condition. They at once employed Mr. Smith as their architect, and authorized him to commence the work of rebuilding and the defendants, with Smith, employed one Finkelstein to remove the half-burnt rubbish and half-burnt furniture, the contents of the building, together with the ice and snow. The latter with a gang of men, after two weeks' work, on March 22nd, had the most of this removed, and on that day his workmen became greatly alarmed by some falling bricks and swaying of the walls and ran from the building. The defendant Forrester was sent for and he, on the evening of that

MAN.

C. A.

1912

McNERNEY v. FORRESTER.

Howell, C.J.M.

day, sent for both Rodgers and Smith. The next day both these men apparently examined the building. Rodgers swears he thought the walls then were still strong enough although he knew the weather was then much warmer and the debris was removed. To me, on this subject, his evidence is not satisfactory. Smith, the adviser of Forrester in all these matters, although present at the trial, was, for some reason, not called. He of all others knew of the state of the walls, for he directed Finkelstein from time to time as to the material which should be removed, and he gave evidence before the arbitration as to the loss by the fire. Forrester swears that both Rodgers and Smith told him on that day that the walls were strong enough as they were then braced, although the ice and debris had been removed. The next day the walls fell and the plaintiffs' building adjoining the south wall was crushed, the subject-matter of this suit.

At the time of the falling of the walls the wind was blowing at the rate of 36 miles per hour from the north-west, and Rodgers swears that this wind caused the walls to fall.

It was shewn by the evidence that on the 6th of March, while the interior frozen mass was firm, a wind of 56 miles per hour from the same direction was blowing and the walls remained firm, and it was also shewn by the evidence that for a few days before the accident the weather had turned warm, but from my own experience for 33 years I think this should not be unexpected.

It appears then that the original braces directed by Rodgers were considered sufficient, with the assistance of the frozen interior mass, that on the 6th of March this was sufficient against a very high wind, that shortly thereafter the frozen interior mass was removed by the defendants, and that on the 24th of March, with a wind much less forceful, the walls fell. The learned trial Judge in his reasons for judgment says:—

> I think Mr. Rodgers and Mr. Smith were mistaken when shortly before the accident they told Mr. Forrester that the walls were safe. I think that considering the temperature and the removal of the debris some further precautions should have been taken so as to counteract the effect of the removal of the ice and debris.

The learned Judge, however, found a verdict for the defendants.

It seems to me that the irresistible conclusion to be drawn is that the walls were greatly weakened by the debris having been removed, and that some one was negligent. Rodgers never spoke to the defendants respecting these walls until the 22nd or 23rd of March, after the debris was removed. Forrester has sworn to what Mr. Smith said, but the latter has not pledged his oath as to his opinion, or what he advised, and we do not know what his real views were.

The walls upon the defendants' property were dangerous

and a menace, and were a nuisance to the adjoining property holders, and although the work of restoration was in itself lawful, injury to the adjoining property might be expected unless certain precautions were taken. But the defendants claim that, having acted upon the advice of Rodgers and Smith, they are not liable. It will be at once apparent that he did not act upon the opinion of Rodgers, for he did not consult the latter until after the ice and debris had been removed and as the walls fell early the next morning after he spoke to Rodgers, he would have had little time to act if action had been directed. The only advice he took was that of Smith, a person employed by him, and as we do not know what this architect's real views or intentions were, I should presume strongly against the defendant because of his not calling him as a witness, and I think I am supported in this position by *Baker* v. *Furlong*, [1891] 2 Ch. 184.

It seems to me that the sole question of law is, can the defendants shield themselves behind the advice given them as Forrester swears by the architect Smith?

The case of *Jolliffe* v. *Woodhouse*, 10 T.L.R. 553, was an action between adjoining owners, and in it Lord Justice Lindley held that the duty owed to an adjoining owner could not be delegated to a builder or architect and thus free the defendant from liability. Sir Louis Davies, in *Valiquette* v. *Fraser*, 39 Can. S.C.R. 1, at page 4, held the opinion or advice of an architect was no more protection than the protection of an independent contractor. In 3 Halsbury's Laws of England, page 315, after discussing the duties of an employer where, if care is not taken, mischief will follow, the author says:—

> And he cannot divest himself of this duty by employing some other persons (whether contractor, architect or engineer) to do what is necessary to prevent mischief or by stipulating that such other person shall take precautions against it.

The law on the subject-matter of this suit in the State of Massachusetts is fully set forth in *Ainsworth* v. *Lakin*, 57 L.R.A. 132, and the authorities are all considered. It is there held that where walls are dangerous after a fire the owner cannot, as against an adjoining owner, shield himself behind an independent contractor, and that he cannot avoid liability by delegating that duty to another.

The duty which an owner owes to the adjoining occupant is also set forth in *Hughes* v. *Percival*, 8 A.C. 443, and at page 445 Lord Fitzgerald says:—

> He cannot get rid of the responsibility thus cast on him by transferring that duty to another.

I cannot understand why the negligence of an architect or an engineer would shield the defendant when he cannot get that protection from the most skilful builder or contractor.

MAN.

C. A.
1912

McNERNEY
v.
FORRESTER.

Howell, C.J.M.

The walls fell because of the negligence of the defendants, or some one employed by him, and in my view of the law he is liable.

Common experience here tells us that such a wind as that which was blowing on the morning of the accident cannot be unexpected, and I can see no reason to call that, or the temperature then prevailing, as *vis major* against which the defendant was not bound to provide.

The judgment will be set aside and the case disposed of as set out in detail in the judgment of Mr. Justice Perdue.

RICHARDS, J.A.:—The defendants became the owners of a six storey brick building, the side walls of which were 120 feet long. Prior to their ownership a fire had, during severe winter weather, destroyed the three upper floors. This fire burned away practically all the flooring of the two top storeys, and the greater part of that between the third and fourth storeys. There remained, however, in the three upper storeys many pieces of charred joists and other partly burned material. Much water was thrown on these upper storeys during the fire, which water froze there owing to the severity of the weather. The ice thus formed, together with the charred pieces of joists and other materials embedded in it, made a bracing that helped to keep the walls in place. As soon as possible after the fire the then owner caused braces to be put in, which, with the bracing formed by the ice and other materials already there, was apparently sufficient to keep the walls from falling.

After the defendants bought the property the defendant Forrester who acted for himself and his co-defendant and whom I shall therefore for brevity refer to as "the defendant" through their architect, employed a contractor to remove the frozen debris, but did not employ him or anyone to put in further braces, to take the place of the support thus removed. The contractor did clear out the upper three storeys leaving them with only the braces which had been put in by the first owner after the fire. The result was that the bracing left was insufficient. While in that condition a wind, not greater than might be expected at that time of the year, arose and blew down large parts of the side walls. One of those walls fell on, and injured, the plaintiffs' property next adjoining.

The trial Judge found that the bracing at the time of the fall was insufficient, and in this I think he was justified by the evidence. He, however, found that the defendant had relied upon the architect and the city building inspector as to the sufficiency of the bracing that had been put in after the fire, to safely maintain the walls, after the contractor had done his work, and held that, because of his so relying, he and his co-defendant were not liable for the damage resulting from the fall.

I do not see that the evidence, when analyzed, shews clearly that the inspector did give the advice on which the defendant says he relied. If given it was not till after the rubbish had been removed and the bracing thereby weakened. The fact that the architect, though in Court, was not called as a witness, casts a good deal of doubt on the statement that he advised the defendant that the course he took was a safe one. But, assuming, for the moment, that they, or either of them, did so advise, I am, with deference, unable to agree with the learned trial Judge as to his conclusion of law. There are decisions to be found of Courts, in some of the United States, in which the view taken by him has been upheld, but I do not think that it is the law of England or of this Province.

It has been suggested that the rule of law on which *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, was decided, applies to this case. It seems to me that, if I had to consider that point, I should hold that it does not. But, in the view I take of the facts, it is not necessary to decide that question here. The rule which does apply is, in my opinion, well stated in a decision of the Supreme Judicial Court of Massachusetts: *Ainsworth* v. *Lakin*, reported in 57 L.R.A. 132. I quote from page 135 (2nd column):—

> It was the duty of the defendant not to suffer such a wall to remain on his land, where its fall would injure his neighbour, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he would have no control, such as *vis major*, acts of public enemies, or wrongful acts of third persons, which human foresight could not reasonably be expected to anticipate and prevent.

In the present case it was apparent, I think, after the debris had been taken out, that the walls were not safely braced. If the defendant had employed the contractor, when taking out the frozen rubbish, and thereby weakening the bracing of the wall, to sufficiently replace such support with further bracing, and the contractor, though a competent one, had neglected to do so, and the injury which did happen had resulted therefrom, there is no doubt that the defendants would be liable. Their liability is the more apparent when he did not even arrange for anything to take the place of the support so removed. On what principle an owner of dangerous property who could not protect himself from an action for damages because he had employed a capable contractor, should be protected because, instead of relying on a contractor, he relied on an architect or city inspector, I am unable to see. The principle seems to be the same in either case.

In *Jolliffe* v. *Woodhouse*, 10 T.L.R. 553, the Court of Appeal for England held that where the defendant owed the plain-

MAN.

C. A.
1912

McNERNEY
v.
FORRESTER.

Richards, J.A.

tiff a duty, to do certain rebuilding with reasonable despatch, it was no answer to an action for breach of this duty, to prove that he had delegated the carrying out of it to an architect and builder.

In vol. III. of Halsbury's Laws of England, paragraph 670, it is said:—

> Where the nature of the contractor's employment is such that, though the work is in itself lawful, injury to the property of the neighbouring owner may be expected to arise in the natural course of events, unless certain precautions are taken, then it is the duty of the employer to take care that those things are done which are necessary to prevent the mischief arising; and he cannot divest himself of this duty by employing some other person (whether contractor, architect, or engineer) to do what is necessary to prevent the mischief, or by stipulating that such person shall take precautions against it.

I cannot see that the advice of a city building inspector can be placed on any higher plane than that of an architect.

I think the plaintiffs are entitled to recover under the circumstances of this case.

As the learned trial Judge took no evidence of quantum of damages and as the parties have agreed to that question being referred to the Master if we hold the defendants liable there will be such a reference.

Costs and further directions to be reserved. The plaintiffs to have the costs of the appeal in any event of the cause.

PERDUE, J.A.:—The plaintiffs were tenants of premises on the north-east corner of Fort and Graham streets in the city of Winnipeg, in which they carried on their business of blacksmiths. The Sterling block, a large brick warehouse, adjoined their premises immediately on the north. This block was six storeys in height and the side contiguous to the plaintiffs' premises was 120 feet in length. On 9th December, 1909, a fire took place in the block which greatly injured the upper portion of it, the interior of the fifth and sixth storeys, together with the roof, being almost completely destroyed. The third floor, counting the ground floor as the first, appears to have remained intact, but there was a large hole burnt in the fourth floor through which the wreckage of the storeys above fell and formed with the water thrown upon it a frozen mass extending almost to the sixth floor. The south wall, which adjoined the plaintiffs' premises bulged outwards at the top.

The upper portions of the end walls were also injured and weakened by the effect of the fire and of the water thrown upon them.

Immediately after the fire, Mr. Rodgers, the city building inspector, informed Mr. Sterling, the owner, of the dangerous condition of the walls. Accordingly, Mr. Sterling, under Mr. Rodgers' direction and with his approval, had braces put in

extending across the building from the north to the south wall. Four of these braces were placed near where the sixth floor had been and the remaining five were put in the sixth storey near the top of the walls. The object of putting in these braces was to secure the walls from falling until repairs or reconstruction could take place.

On 6th March, 1910, the defendants purchased the land and the injured building as it stood, taking possession of it on 10th March. On 24th March the accident occurred which caused the injuries of which the plaintiffs complain. A considerable portion of the side walls of the building from the fourth floor upwards fell, the south wall falling outwards upon the plaintiffs' premises and doing serious damage.

There can be no doubt that after the fire the building was in a condition which endangered the plaintiffs' premises. The then owner, Sterling, instead of taking down the walls to a point where they would cease to be dangerous, endeavoured to keep them in position by bracing them as above mentioned. After the building had remained in this condition for some three months, the defendants purchased it. Before buying it they made a personal examination of it and also had it examined by their architect, Mr. Smith. They, therefore, must be taken to have purchased the building with notice of its condition, and if the walls were in danger of falling, it became the defendants' duty as owners to protect the adjoining premises from injury: *Attorney-General* v. *Tod Heatley*, [1897] 1 Ch. 560.

The defendants place much reliance upon the approval by Rodgers and Smith of the manner in which the walls were braced, and upon the opinion of these gentlemen that sufficient precautions had been taken to prevent an accident. We have not the benefit of Mr. Smith's evidence as to what his opinion was. The defendants did not call him as a witness, although it was alleged by counsel and not denied that he was present during the trial. Evidence of what he stated to the defendant Forrester was not admissible to prove the opinion of Smith as an expert. The building inspector, Rodgers, is not an architect, but he has had some experience as a builder and much experience in judging of the strength of walls and the condition of buildings which have been injured by fire. He states that he made an inspection of the walls after the fire and considered them dangerous. He advised Sterling that the latter should take steps to protect the walls. In accordance with this advice and with Rodgers' approval the braces were put in. Rodgers expected that reconstruction work would soon be commenced and he did not anticipate that there would be such a long delay in making the repairs. It is clear that he approved of the system of bracing that was adopted only as a temporary expedient to keep the walls in position until the building could be repaired.

MAN.

C. A.
1912

McNERNEY
v.
FORRESTER.

Perdue, J.A.

Considerable evidence of experts was put in by the plaintiffs to shew that the braces were insufficient for the purpose for which they were intended. It is not necessary to discuss this evidence in detail. One fact of great importance was admitted by all the witnesses, including Rodgers. The pile of debris in the centre of the building, consisting of charred timbers, furniture and other material had been frozen into a solid mass by reason of the great quantity of water thrown into the building. Joists which had been burnt through in the interior part of the structure dropped down at one end, the other end remaining anchored or attached to the wall. The burnt ends of the joists became frozen in the interior mass and formed braces which helped to retain the walls in place. This frozen mass attached to the walls operated, in the opinion of all the witnesses who gave expert testimony, as a great source of strength to the structure. Rodgers states that it would have a stiffening effect on the walls, that it "would clamp the walls together," that it "brought the whole thing together tight." He also stated that he took that element of strength into consideration when he considered the braces.

It is therefore evident that if the interior mass of frozen material were removed the structure would be deprived of a factor which largely contributed to its safety.

The defendants obtained possession of the building on 9th March, 1910, and shortly afterwards they let a contract, through their architect, Smith, for the cleaning out of the building. The work of cleaning out proceeded under this contract and the interior mass of debris was removed. Some unburnt portions of floor were left and also the unburnt posts and beams that extended lengthwise through the building and supported the ends of the joists. There appear to have been no beams running across the building and where the joists were burnt there was nothing except the braces at the top to hold in the side walls. The trial Judge seems to have been under the impression that there were "bond timbers" which helped to support the walls, but these bond timbers, as explained in the evidence, were simply pieces of timber built lengthwise into the walls between the courses of brick, upon which the ends of the joists rested. They were a part of the wall itself and did not act as braces.

The effect of the removal of the interior mass was made evident shortly before the accident occurred. During a moderately windy day the walls commenced to shake, a brick fell from a chimney and the men working in the building became alarmed and ran out. On the following day, the 23rd, Smith, the architect, and Rodgers examined the building and thought the walls were safe. On the next day, the 24th, during a moderately high wind the walls fell. The accident occurred after a day of very high temperature for that time of the year,

the maximum on the 23rd being 73 degrees and the minimum 44 degrees. The effect of the high temperature would be to thaw the ice from the walls and to remove any strength they might take from their frozen condition. As shewing that the removal of the frozen mass from the interior of the building weakened the wall and contributed to the accident, evidence was given that on the 6th March, before any of the contents had been removed, the walls withstood a wind as high as 56 miles an hour from the north-west, while the wind on the day of the accident was only 36 miles an hour from the same direction.

I think the proper conclusion to be drawn from the evidence, as to the sufficiency of the bracing, is that the braces might be expected to maintain the walls in position as long as the interior mass remained undisturbed and in its frozen condition, but that as soon as any considerable portion of it was removed something should have been supplied to take its place. Even if no part of the interior mass were removed, it was admitted by Rodgers that there would be danger as soon as the temperature rose so as to cause a thaw.

Where the owner of land permits the walls or chimneys of the buildings erected upon it to get into a ruinous and dangerous condition and knowingly permits them so to remain until they fall upon and injure the house of an adjoining proprietor, he is liable for the damage caused: *Todd* v. *Flight*, 9 C.B.N.S. 377. There is the same liability under the laws of the Province of Quebec: *Nordheimer* v. *Alexander*, 19 Can. S.C.R. 248. The duty of an owner is to keep his building in such a state that his neighbour may not be injured by its fall: *Chauntler* v. *Robinson* (1849), 4 Ex. 163. The liability in such a case is clearly established if the owner knows his building is dangerous and fails to take steps to prevent it from falling, but difficulty arises in considering what degree of care, if any, will protect him in case an accident occurs and damage is caused to his neighbour.

The principle has been established by the case of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, that a person who for his own purposes brings on his land and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *primâ facie* answerable for all the damage naturally resulting. In such case he can only excuse himself by shewing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major*: *per* Blackburn, J., in the Exchequer Chamber (*Rylands* v. *Fletcher*, L.R. 1 Ex., p. 279), and approved in the House of Lords. The position of the defendants in the present case differs from that dealt with in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, in this respect that they had been putting the land

MAN.

C. A.
1912

McNERNEY
v.
FORRESTER.

Perdue, J.A.

to its natural use and the erections only became dangerous by the happening of a fire. But after the walls became dangerous, and were known to be so, by the owner of them, the liability in each case must, where injury takes place, be very similar.

An injured wall which may from want of cohesion fall over at any time on the adjoining land may reasonably be regarded as a thing having a tendency to escape within the rule laid down in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330. See Clerk and Lindsell on Torts, Can. ed., 439. There can be very little difference in the responsibility which a man incurs by keeping a reservoir filled with water threatening his neighbour's land and the responsibility he incurs where he keeps a ruinous wall overhanging his neighbour's property. If he cannot escape liability in the first case by shewing that he acted upon the best advice and took all reasonable care and precaution, can he in the second case evade responsibility by establishing a similar defence?

A person who keeps a lamp overhanging a public street is bound to maintain it in a safe state of repair and this is a liability which he cannot get rid of by shewing that he employed a competent person to put it in repair: *Tarry* v. *Ashton*, 1 Q.B.D. 314. The same responsibility would be incurred where the structure, without permission or right, overhung or threatened private land, in respect of an injury caused to the owner of the latter or to his property.

I think the present was a case where the owner of the damaged walls was bound to exercise the utmost diligence in protecting the plaintiffs from injury. Sterling, in the first place, and the defendants afterwards, knew of the condition of the walls. The south wall after the fire was in a very dangerous state and threatened the plaintiffs' premises. It was the duty of the owner of the wall to make it safe or to pull it down. If he allowed it to remain he was responsible for its safety.

The defendants urge that the walls had been sufficiently braced by Sterling's direction and that they were entitled to rely upon the opinion of Rodgers, the building inspector, and Smith, the architect, that this had been sufficiently done and that the walls were safe. They, as purchasers from Sterling, are in the same position as he in regard to their duties and responsibilities to the plaintiffs. It was Sterling's duty to make the walls safe and that duty he could not delegate to Rodgers or Smith or any other person so as to avoid responsibility himself: *Hughes* v. *Percival*, 8 A.C. 443; *Bower* v. *Peate*, 1 Q.B.D. 321, approved in *Dalton* v. *Angus*, 6 A.C. 740. The means taken or advised by Rodgers and Smith were insufficient and there is no question of *vis major* in this case.

Apart from the proposition whether the defendants would discharge their duty by acting upon the advice of a competent

architect there is another phase of the case which bears strongly on the defendants' liability. The evidence shews that the system of bracing adopted was intended to be of a temporary character only. When giving his approval of what was done to hold the walls in place, Rodgers relied upon the strength given to the structure by the interior frozen mass. Evidently, it was not intended that the bracing would be sufficient without the frozen debris as an internal support, unless something were done to take its place upon its removal. It is clear that the precautions which proved to be sufficient as long as the building remained in the same condition in which it was when the braces were first put in, completely failed when the contents of the building were removed and the ice thawed from the walls. If, therefore, it were admitted that Sterling had exercised due care and diligence in the precautions he took, the defendants by removing the contents of the building and depriving the walls of an important factor contributing to their support, while nothing was done to take its place, not only failed to exercise reasonable care, but were guilty of an act of positive negligence.

The learned trial Judge found that the accident occurred by reason of the insufficiency of the bracing. He was also of opinion that some further precaution should have been taken to counteract the effect of the removal of the ice and debris. This is in effect a finding that due care was not taken to avert the fall of the walls and the resulting damage to the plaintiffs. The trial Judge, however, took the view that the owners having in good faith acted upon the advice and assurance of the architect and the building inspector and having done what they advised, had satisfied the duty owed to the plaintiffs. I think it may be regarded as settled law that where a man owes a duty to another he cannot delegate that duty and evade the responsibility of seeing that the duty was adequately performed. If the duty has not been performed, it is no excuse for the person who should have performed it to shew that he had placed the matter in the hands of another upon whose skill he relied: *Jolliffe* v. *Woodhouse*, 10 T.L.R. 553; *Bower* v. *Peate*, 1 Q.B.D. 321, *supra; Hughes* v. *Percival*, 8 A.C. 443, *supra; Valiquette* v. *Fraser*, 39 Can. S.C.R., p. 4; *Ainsworth* v. *Lakin* (Mass.), 57 L.R.A. 132.

I think the appeal should be allowed with costs, the judgment in favour of the defendant set aside and judgment entered for the plaintiffs with costs on the King's Bench scale. As it was agreed between the parties that if damages were awarded the amount thereof should be found by the Master, there should be a reference for that purpose; further directions and the question of the costs of the reference will be reserved to be dealt with by a Judge of the Court of King's Bench.

Appeal allowed.

ONT.

H. C. J.
1912

March 20.

NELLES v. HESSELTINE; WINDSOR, ESSEX AND L.S. RAPID R. CO. v. NELLES.

(DECISION No. 3.)

Ontario High Court, Moss, C.J.O., in Chambers. March 20, 1912.

1. APPEAL (§ II A—35)—JURISDICTION OF SUPREME COURT OF CANADA—FINAL JUDGMENT.

A judgment of a provincial Court of last resort varying the judgment given on the trial of an action for damages for alleged breach of contract, and affirming the plaintiff's right of recovery with certain limitations as to damages as to which a reference was directed, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada, within the statutory definition of that term contained in section 2 of the Supreme Court Act, R.S.C. 1906, ch. 139, as a judgment order or decision "whereby the action is finally determined and concluded."

[*Clarke* v. *Goodall*, 44 Can. S.C.R. 284, and *Crown Life Insurance Co.* v. *Skinner*, 44 Can. S.C.R. 616, specially referred to.]

2. APPEAL (§ III F—98)—SEC. 71 OF THE SUPREME COURT ACT—EXTENSION OF TIME.

Section 71 of the Supreme Court Act, R.S.C. 1906, ch. 139, providing that the Court proposed to be appealed from, or any Judge thereof, may under special circumstances, allow an appeal although the same is not brought within the time prescribed by the Act, applies only to judgments otherwise appealable, and does not confer power to grant leave to appeal from a judgment which is interlocutory only or which is not a "final judgment" within the definition of that statute.

[*Vaughan* v. *Richardson*, 17 Can. S.C.R. 703, and *News Printing Co.* v. *Macrae*, 26 Can. S.C.R. 691, specially referred to.]

APPLICATION on behalf of the defendants the Windsor, Essex and Lake Shore Rapid Railway Company for an order allowing, in terms of sec. 71 of the Supreme Court Act, an appeal from a judgment pronounced by the Court of Appeal in this action on the 21st April, 1908 (*Nelles* v. *Hesseltine*, 11 O.W.R. 1062). For the previous applications to the Supreme Court of Canada, see *Windsor, etc., Co.* v. *Nelles* (No. 1), 1 D.L.R. 156, and *Windsor, etc., Co.* v. *Nelles* (No. 2), 1 D.L.R. 309.

Messrs. *M. Wilson*, K.C., and *A. H. F. Lefroy*, K.C., for the applicants.

C. J. Holman, K.C., for the plaintiffs.

MOSS, C.J.O.:—Several other directions are asked for in the notice of the application, but it is quite apparent that the only motion which I can entertain is that made under sec. 71. The other matters could only be dealt with by the Supreme Court of Canada or a Judge of that Court.

I have read the numerous affidavits and other papers forming the material on which the motion is supported and opposed, including the opinions of the Registrar of the Supreme Court of Canada upon the motion heretofore made on behalf of the applicants to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment in question, and of Mr.

ONT.

H. C. J. 1912

NELLES v. HESSELTINE.

MOSS, C.J.O.

Justice Idington, speaking for the Supreme Court, in affirming the Registrar. [See *Windsor, etc., Co.* v. *Nelles* (No. 1), 1 D.L.R. 156, and *Windsor, etc., Co.* v. *Nelles* (No. 2), 1 D.L.R. 309.]

I am fully sensible of the unfortunate situation which the applicants seem to occupy at present of not having ever had an opportunity afforded them of appealing from the judgment in question to the Supreme Court, owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case. Upon the application to the Registrar of that Court to affirm jurisdiction, he expressly held that there was no jurisdiction because the appeal had not been brought within sixty days, and determined nothing as to the point of the judgment not being a final judgment. But it is impossible not to see, from the references to the cases of *Clarke* v. *Goodall*, 44 Can. S.C.R. 284, and *Crown Life Insurance Co.* v. *Skinner*, 44 Can. S.C.R. 616, what the opinion of the Court was on the point.

Besides, the chief ground upon which the applicants rest their present application and excuse their delay is, that the judgment, not being a final judgment, was not appealable to the Supreme Court upon or after its being pronounced by this Court.

And, in view of the several decisions on the point found in the Supreme Court reports, which I have again read and considered, it does not seem open to question that the judgment of the 21st April, 1908, falls within the prescribed category of non-final and therefore non-appealable judgments.

The result is, that, as I have said, the applicants have been placed in an unfortunate position, seemingly without any special fault on their part. On the other hand, the plaintiffs are equally blameless, and undoubtedly, upon the faith of the judgment, have incurred large expense in and about the conduct of a reference which, on the applicants' contention, was based on an erroneous view of their liability.

The difficulty, and I think an insuperable one, that I find in the way of relief upon this application is, that the case is not one to which sec. 71 applies, and that I am without power to do what is asked. That section enables a Judge of the Court appealed from to allow an appeal only under special circumstances, although it was not brought within the prescribed time, which, if this were an appealable case, would be within sixty days. The expression "allow an appeal" has been interpreted as meaning only that a Judge may settle the case and approve the security: *per* Strong, J., in *Vaughan* v. *Richardson*, 17 Can. S.C.R. 703. See also *News Printing Co.* v. *Macrae*, 26 Can. S.C.R. 691, at p. 701.

But, as the context shews, the "appeal" to be allowed and the case to be settled and the security to be approved plainly

ONT.
H. C. J.
1912
NELLES
v.
HESSELTINE.
Moss, C.J.O.

refer to an appealable case, one that, but for the lapse of time, could have been appealed to the Supreme Court of Canada, as of course. The single power given to the Court or Judge appealed from is to remove, in such a case, the difficulty occasioned by the failure to carry an appeal to the Supreme Court within the prescribed time. It confers no power to grant leave to appeal in a non-appealable case, or for taking any other step in the matter.

I am unable, therefore, to see my way to making any order or to giving any directions as to security or otherwise as asked.

The motion must be dismissed, and the plaintiffs are entitled to their costs.

Application denied.

CAN.
S. C.
1912
March 21.

WEIDMAN et al. (defendants, appellants) v. **SHRAGGE** (plaintiff, respondent).

Canada Supreme Court, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. March 21, 1912.

1. CONTRACTS (§ III E—282)—RESTRICTING PRICES TO BE PAID—AGREEMENT—LIMITATION AS TO TIME AND PLACE.

An agreement between two dealers in junk aimed to destroy all competition in that business in the territory in which they were operating and aimed to lower prices paid by them for the stuff and indirectly to raise prices paid to them by their customers, the profits resulting to be divided between them, is not void at common law as being in restraint to trade.

[*Shragge* v. *Weidman*, 20 Man. R. 178, 15 W.L.R. 616, reversed on appeal.]

2. MONOPOLY AND COMBINATIONS (§ II B—16)—COMBINATION IN RESTRAINT OF COMPETITION—CRIMINAL OFFENCE UNDER CODE.

An agreement between two dealers in junk aimed to destroy all competition in that business in the territory in which they were operating and to lower prices paid by them for the stuff and indirectly to raise prices paid to them by their customers, the profits resulting to be divided between them, is void and unenforcible under the Criminal Code of 1906, sec. 498, declaring everyone to be guilty of an indictable offence who conspires, combines, agrees or arranges with any other person to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any article or commodity which may be a subject of trade or commerce.

[*R.* v. *Elliott*, 9 Can. Cr. Cas. 505; *R.* v. *Gage* (No. 1), 13 Can. Cr. Cas. 415; *R.* v. *Gage* (No. 2), 13 Can. Cr. Cas. 428; *Mogul Co.* v. *McGregor*, [1892] A.C. 25, specially referred to.]

APPEAL by the defendants from the judgment of the Manitoba Court of Appeal, *Shragge* v. *Weidman*, 20 Man. R. 178, 15 W.L.R. 616, reversing the judgment of Mathers, C.J.K.B., *Shragge* v. *Weidman*, 14 W.L.R. 561, on the trial of the action which was for an accounting under an agreement hereafter set forth, which by certain correspondence between the parties had been renewed for a further term at the time of the matters complained of.

The appeal was allowed and the judgment of Mathers, C.J. K.B., *Shragge* v. *Weidman*, 14 W.L.R. 561, restored.

The agreement sued on was as follows:—

This agreement made in duplicate this 28th day of March, 1905, between Benjamin Shragge, of the City of Winnipeg, in the Province of Manitoba, merchant, of the first part, and Weidman & Company, of the said City of Winnipeg, merchants, of the second part:—

Whereas the parties hereto are desirous of entering into an agreement to facilitate the dealings in various articles hereinafter mentioned, without in any way interfering with the freedom of trade and commerce:

Now this agreement witnesseth, and in consideration of the mutual covenant and conditions herein contained the said parties hereto do hereby agree as follows:—

1. The said parties hereby fix the prices mentioned in the schedule hereto annexed for the respective articles to which they refer, at the prices at which they shall pay for the various articles, these prices to be altered from time to time by mutual agreement to be made in writing. The parties hereto shall consult from time to time as to the prices at which they shall sell the said articles.

2. The partnership in bottles shall apply only to the Crown finish (quart bottles only), and not to other bottles mentioned in the schedule, but the agreement as to prices to be paid is to maintain with the same force as if the parties hereto were to divide profits.

3. The said parties hereto shall each keep true and correct books of account, in which shall be entered all transactions in connection with dealings from and after the 1st day of April, 1905, to the 15th day of December, 1905, in connection with rubbers, scrap-iron, copper, brass, zinc, lead, bones and junk, and Crown finish bottles (quart bottles only), and on or before the 10th of each month during the continuation of this agreement as aforesaid, shall make up a true and correct account of all business dealings, shewing the prices paid, the prices received, the expense, etc., as per schedule hereto annexed, and the profit and loss, as the case may be, and shall hand to the other party a cheque for half of the net profit of the previous month's business, or receive a cheque for half of the net loss, if any. These books of account shall be open, at all reasonable times of the day, for inspection of either of the parties hereto, including their bookkeepers. And on the 15th day of December, 1905, a valuation shall be placed on all stock then in hand, not sold, and a settlement on the basis of the profit or loss as aforesaid made, in the event of this agreement not being extended, but, if this agreement be extended, the business shall go on from month to month as aforesaid.

4. The true intent and meaning of these presents is that the parties hereto are, in connection with the articles mentioned in the schedule hereto annexed, to work for the mutual advantage of both, and to make full disclosure to one another of the full prices of all deals in which they shall engage. And in order to pay the expenses of any arbitrations which may occur between the parties hereto, under the next clause herein contained, each party shall pay into the hands of Messrs. Andrews & Andrews, the sum of $50, and will keep that amount to the credit of that fund, in the event of it being exhausted.

5. Should any dispute arise between the parties hereto, either as

CAN.

S. C.

1912

WEIDMAN v. SHRAGGE.

to this agreement or any matters arising thereunder, or any dispute of any kind or nature whatsoever between the parties hereto, during the continuation of this agreement, the same shall be referred to a member of the firm of Andrews & Andrews for his final determination, both of the parties hereto agreeing to abide by his decision, whatever it may be, and the said member of the said firm shall be entitled to charge for all time which he may spend in connection with all such arbitrations, the sum of $10 per hour, and the said arbitrator shall decide by whom such costs shall be paid, both the parties hereto agreeing to faithfully perform and carry out the award of such arbitrator, whatever it may be.

In witness whereof the parties hereto have hereunto set their hands and seals.

B. SHRAGGE.
WEIDMAN & CO.

Messrs. *J. S. Ewart*, K.C., and *F. M. Burbidge*, for appellant.
M. G. Macneil, for respondent.

SIR CHARLES FITZPATRICK, C.J.:—The action in this case is brought for an account based upon a contract between the plaintiff and the defendant which is described in the statement of claim as an agreement "for the purpose of carrying on their business in a manner mutually profitable to both parties to the said agreement." The defence denies the state of the account as alleged and pleads the illegality of the agreement under secs. 496 and 498 of the Criminal Code which are grouped under the general heading of "Offences connected with trade." The trial Judge decided the point of illegality in favour of appellants. On appeal this judgment was reversed.

Having carefully read the cases cited by counsel at the argument and referred to by the Judges below in their notes, I cannot better describe my condition of mind than by quoting from a very recent opinion of an eminent English jurist who said:—

> I am convinced it is impossible to give in a few pages a complete and accurate exposition of the English law as to combinations which are in restraint of trade or unduly impede free competition or employment so as to deduce from the numerous and conflicting cases clear and definite principles.

The same authority says that *The Mogul case, Mogul Steamship Co.* v. *McGregor*, [1892] A.C. 25, 66 L.P. 1, 40 W.R. 337, only decided that an action for conspiracy could not be maintained by the plaintiffs, because the defendants did not by entering into the contract under consideration render themselves guilty of a criminal conspiracy. But on the question whether the contract was void and illegal because it was in undue restraint of trade or unduly impeded free competition, there was the utmost diversity of opinion both among the Judges and the noble and learned Lords. In *Mitchell* v. *Reynolds*, 1 Sm. L.C. 10th ed., p. 391, the following principles were laid down:—That

all contracts in general restraint of trade are illegal in the sense of not being enforceable, but that agreements in partial restraint of trade, if for consideration, are valid, provided that the restraint is reasonable, in the sense that it is such as is reasonably necessary for the protection of the person who seeks to impose restraint (covenantee). In this case, however, we are not called upon to consider in what respect the contract declared upon is affected by the principles of the English law as to restraint of trade, nor are we at liberty to invent or give effect to any new ground of public policy. Our duty is to determine its validity in view of those sections of the Criminal Code relied upon. In effect, clause (*d*) of sec. 498 of the Code [Cr. Code of Canada 1906] declares in very plain language that an agreement which might in itself be perfectly lawful as made by the parties in the exercise of the freedom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition in an article or commodity which is a subject of trade or commerce. In other words, if the object of the parties to the agreement is to interfere with the free course of trade by unduly preventing or lessening competition the agreement is declared to be unlawful. It is not necessary, I repeat, that the agreement should be in itself fraudulent or otherwise illegal; and all agreements which prevent or lessen competition do not come within the operation of the statute; the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally. And it is for the Courts to say whether in the circumstances of each particular case the mischief aimed at exists. In *The United States* v. *The Trans-Missouri Freight Association*, 166 U.S.R. 290, it was held that the Sherman Act applies equally to all contracts tending to create a monopoly, whether or not they are reasonable or whether or not they are unlawful at common law.

Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce, and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited. The question for decision here, assuming the law to be as I have stated it, is:—Was the contract declared upon entered into for the purpose of unduly limiting competition in the purchase or sale of an article which is ordinarily a subject of commerce? It is admitted by both parties that junk, the subject-matter of the contract, is ordinarily a subject of commerce. The trial Judge found that the manifest purpose of the agreement

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Fitzpatrick, C.J.

was to prevent competition between the parties to it and to affect prices. He said:—

> It cannot be doubted that the tendency of such an agreement would be to lower prices on the junk purchased from the public, and, possibly, to increase the price of junk sold to the consumers.

The learned Judge also said:—

> It is true that in the present case the agreement to fix prices was between two dealers only, but these two practically monopolized the whole trade in junk in Western Canada, and when they ceased to compete with each other all competition was gone. The effect of their agreement was not only to limit competition but to destroy it.

And there can be no doubt on the evidence that the conclusion reached by the learned Judge is well founded; the main object and purpose of the agreement was to eliminate competition and to control the junk market in all Central Canada, both as to purchases and sales, and on that ground I hold that the question must be answered in the affirmative and that the agreement is, therefore, bad under the sections of the Code. I can see no distinction in principle between this agreement and one that might be entered into between two or more traders to control the price of all wheat purchased and sold in Western Canada, and if the object was to monopolize the wheat trade of Western Canada instead of, as in this case, the junk trade, would any Court hesitate to declare it illegal in that it was calculated to unduly impede free competition to interfere with the free course of trade, and to effect a wrongful purpose?

I would allow the appeal and restore the judgment of the trial Judge with costs.

DAVIES, J. (dissenting):—This is an appeal from the judgment of the Appeal Court of Manitoba reversing a judgment of the trial Judge which declared an agreement made between the parties on which the plaintiff had brought an action to be void as contravening sec. 498, sub-sec. (*d*), of the Criminal Code.

The agreement in question was made between two junk and bottle dealers who purchased these articles amongst others in Winnipeg and elsewhere in Western Canada, and shipped them for sale to Chicago in the U. S. A.

It was dated the 28th March, 1905, and was to continue from the first of April till the 15th December following, with a provision for an extension thereafter from month to month if mutually agreed upon, and as a fact it was renewed up to the 1st January, 1907. It professed to fix the maximum prices which each of the parties should pay for the several articles specified in the schedule, which prices were to be subject to revision by mutual consent, and provided that each party should make up accounts monthly shewing the profit or loss made on the business done and that the profits should be equally divided.

The trial Judge held that "the manifest purpose of the agreement was to prevent competition between the parties to it and to maintain a fixed price for junk purchased."

He further held, however, on the facts as proved and after reviewing a number of authorities that "the agreement in question went no further than that in *Collins* v. *Locke*, 4 A.C., p. 674; that the provision for carrying it into effect, *viz.*, the monthly division of net profits was not unreasonable and that the restraints imposed were nothing like as great as those in the case cited. He, therefore, held the agreement not to be void at common law as being in restraint of trade.

But, while upholding the agreement at common law he nevertheless held it was void as being in contravention of sec. 498, subsec. (*d*) of the Criminal Code.

The Appeal Court of Manitoba, Richards, J., dissenting, reversed the judgment and held the agreement was not void, either at common law or as contravening the Code. Richards, J., the dissenting Judge, in the Court of Appeal says nothing about the validity of the agreement at common law but follows the trial Judge in holding that it contravened the statute.

Chief Justice Howell held that outside of the criminal law the agreement was binding and that the intention of Parliament in passing the criminal statute was to "suppress certain contracts and combinations in restraint of trade and make the parties thereto liable to an indictable offence, and that the agreement did not contravene the statute." Cameron, J., agreed with him on both grounds, while Perdue, J., agreeing on the first ground that at common law the agreement was not bad, held that it did not violate the statute because it did not "unduly prevent or lessen competition" in the articles it covered.

With respect to the agreement here in question I agree with the trial Judge and the three Judges of the Appeal Court that applying the rule now followed by the Courts in determining the validity or otherwise of agreements or covenants claimed to be in violation of the common law it cannot be held void. That rule, as I gather it from the authorities, is that every case must be decided on its own facts and that the controlling and guiding rule in each case is whether the restraint attempted is reasonable or not with respect to the interests of the parties concerned and to the public interests.

The case of *Nordenfelt* v. *The Maxim Nordenfelt Co.*, [1894] A.C., p. 535, decided by the House of Lords, determines that a covenant against the convenanter engaging in a particular business though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers, wider than was necessary for the protection of the company nor injurious to the public interests of the country and, therefore, was valid. The speeches of the distinguished law

CAN.

S. C.
1912

WEIDMAN
v.
SHRAGGE.

Davies, J.

Lords who took part in that decision without any dissenting voice united in the test of reasonableness, as being the guiding and controlling test in all cases, and whether the covenant or agreement is general or particular. In determining the question of reasonableness they further held that the Courts should have regard as well to the interests of the public as of the parties to the agreement and that each case must be decided on its own facts and by the application to them of this general test. The later cases of *Dubowski* v. *Goldstein*, [1896] 1 Q.B. 478, and *Underwood* v. *Barker*, [1899] 1 Ch. 300, are to the same effect on similar reasoning. In the latter case Lindley, M.R., says, at pages 303-4:—

> The law as now settled cannot, in my opinion, be more accurately expressed than it was by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, at p. 565. He said: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with the individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad.

On page 305 he says further:—

> As was pointed out by Lord Macnaghten in Nordenfelt's case what may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer; but I do not understand him as saying that a restriction which is *reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established.* If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.

Applying what I conceive to be the modern rule with respect to the validity or invalidity of agreements or covenants in restraint of trade, I have no difficulty in agreeing on the facts of this case with the finding of the trial Judge confirmed by the Court of Appeal that the agreement in controversy from his obligations under which the defendant, appellant, seeks to escape, is a valid agreement at common law.

The question then remains whether this agreement at common law has been invalidated by the statute. I have reached the same conclusion as that come to by the Court of Appeal, that it does not violate the statute. I do not read the word "unduly" which prefaces and controls sub-sections (*a*), (*c*) and (*d*) of sec. 498 of the Criminal Code as having any greater or wider meaning than "unreasonably" which is the common law test, and if that word had been used in the statute the finding of the validity of the agreement at common law would, of course, settle the question. I have heard nothing during the argument, and the consideration given to the case since then has not suggested anything which satisfies me that the word "unduly" was intended to have any broader meaning than "unreasonably." That some limitation was intended by the word is, of course, conceded. If it does not mean unreasonably I do not know what it does mean. I prefer the word "unreasonably" to any of the others suggested, such as "improperly," "excessively," "inordinately," because I think it satisfies the intention of Parliament better than any of the others.

Section 498 of the Criminal Code was first enacted in 1889 in a statute intituled "An Act for the prevention and suppression of combinations formed in restraint of trade," which had for its preamble the following: "Whereas it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade." Parliament did not pretend to enact something new as part of the criminal law. It was not creating or defining a new offence before unknown to the law. It was simply, as said in the preamble, "declaring" and formulating what I venture to think the existing law then was, namely, that a conspiracy unlawfully (*a*) to unduly limit facilities for transportation, etc., or (*b*) to restrain or injure trade or commerce, or (*c*) to unduly prevent or lessen production, etc., or (*d*) to unduly prevent or lessen competition in any article which was a subject of trade or commerce constituted a misdemeanour. Punishments by way of fine and imprisonment were added, of course, as sanctions of the declared law.

The drafting of the new statute was, no doubt, faulty. The use of the two words "unlawfully" and "unduly" was necessary but that it was a declaratory law only and only intended as such I do not doubt.

CAN.

S. C.
1912

WEIDMAN
v.
SHRAGGE.

Davies, J.

The Criminal Code of 1892 re-enacted this statute in its 520th section, retaining both words "unlawfully" and "unduly," and enacted section 516 declaring what a conspiracy in restraint of trade was. That also was declaratory only of the existing law. In 1899 the section was amended by striking out the word "unduly" in paragraphs (*a*), (*c*), and (*d*). In 1900 the word "unduly" was restored in each of the three paragraphs, (*a*), (*c*), and (*d*), while the word "unlawfully" was struck out of the main section so that it read every one was guilty of an indictable offence, etc., who conspired, etc., with others to "unduly" limit, etc. In this latter form it remains at present.

I think the amendment striking out the word "unlawfully" was a desirable one, and that in view of the enactment of the present sec. 486 in the Code of 1892, the retention of the word "unlawfully" was unnecessary. The history of this legislation, however, throws little light upon its proper interpretation but it confirms me in my opinion that Parliament was not so much creating a new criminal offence as it was defining an existing though unwritten one and attaching to it punishments by fine and imprisonment.

If that is so and the misdemeanour defined by the statute is nothing more than a conspiracy to carry out contracts or agreements which by the common law were illegal as being in restraint of trade, the finding that this contract in controversy was not in restraint of trade would also determine that it was not a violation of the statute.

I agree with Chief Justice Howell and Cameron, J., that this is the real solution of the difficulties arising from construing art. 498 of the Code as creating a new offence instead of as declaring and defining an existing one. I also agree with them and Perdue, J., that the word "unduly" as used in the section should not be given a greater or wider meaning than the word "unreasonably," and that if so confined the suggested construction as one declaratory only is confirmed.

Holding, therefore, that the contract in question is not void at common law as being unreasonably in restraint of trade, I hold it is not within the declaratory law, sub-sec. (*d*) of sec. 498 of the Code, which is directed against conspiracies to unduly or unreasonably prevent or lessen competition in the purchase or sale, etc., of any article, etc., a subject of trade or commerce.

I would dismiss the appeal.

IDINGTON, J.:—By virtue of long experience in the business each had separately carried on in Winnipeg, these parties determined to control, by fixing the prices to be paid for the commodities dealt in, the entire purchases thereof between Lake Superior and the Rockies. They adopted, not as a partnership

though resembling it, a device or plan of sharing the profits derivable from the dealings each might have in specified leading articles of said commodities for which the maximum prices to be paid were to be fixed by them jointly from time to time. These prices, or the lower prices actually paid, were to be the profit sharing basis, and thus either transgressing by paying a higher price would be automatically penalized therefor.

There was neither joint capital nor mutual contribution of capital in any venture, nor joint action, in use of capital either used, or in the management of the business. Each carried on his own business free from interference of the other. At the end of the year an accounting was to be had of the profit or loss each had made on the basis of the maximum prices so fixed or such less prices as each might have paid. The only recital in the agreement expresses a desire "of entering into an agreement to facilitate the dealing in various articles hereinafter mentioned, without in any way interfering with the freedom of trade and commerce." In what way and how was this to facilitate dealing? When regard is had to the language used and what was actually done this much is clear: first, that merely partnership profits was not the purpose of the agreement, and next, that the parties had a consciousness of how perilously near they might be to infringing the statute.

They operated and accounted to each other on the basis of this agreement for a year, and then by letters renewed it, but fell out later, chiefly because the appellant did not conform to the purpose of the agreement. He had so far departed from the paths of rectitude as to buy from another Winnipeg dealer who had come into and ventured to operate in the chosen field of these parties. The mind of respondent never contemplated that kind of "facilitating the dealing in various commodities." It was clearly repugnant to the common purpose and a breach of faith. The recital must have been a mistaken or defective description of the common purpose. After repudiating this vile deed done by his brother-in-arms, he sued him for an account. The latter set up sec. 498 of the Criminal Code as a bar to this alleged right of recovery.

The defendant (now appellant) swears the purpose of the agreement was to control the market for themselves within said limits, to cease competition with each other, to get as large a profit by keeping out competition as they could; and he says they succeeded.

The learned trial Judge finds this story the true one, though contradicted by the plaintiff (now respondent). He says further "the effect of their agreement was not only to limit competition but to destroy it." The objection to such extrinsic evidence, which is always admitted to prove illegality, cannot prevail.

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Idington, J.

I agree with the learned Judge's findings of fact relative to the issue. I do so the more readily as the respondent's letters and admitted conduct confirm or at least harmonize with the appellant's oath and contradict the respondent's.

The section 498 in question reads, as it stood amended at the time in question herein, as follows:—

> Every one is guilty of an indictable offence . . . who conspires, combines, agrees or arranges with any other person . . . (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, etc.

The phrase "article or commodity" is defined in sub-sec. (*a*) as anything "which may be subject of trade and commerce."

The entire scope and purpose of this legislation and the operative limits to be assigned in it, are difficult of accurate comprehension and definition.

I am, however, with great respect, quite clear that the majority of the Court appealed from have misapprehended it.

If I understand them aright, the measure of the word "unduly" is to be found in a long line of authorities where contracts in restraint of trade had been held to be against public policy. If the purpose of Parliament had been merely to make parties to such contracts as these authorities relate to amenable to the criminal law, the expression thereof would have been easy, and I apprehend quite different in terms from those used either in the recital or operative parts of 52 Viet. ch. 41, which first enacted the law in question.

That Act recited "whereas it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for the violation of the same."

And in the forefront, as it were, of the offences to be dealt with, we find (*a*) the limiting of facilities for transportation; next, (*b*) the restraining of commerce; (*c*) the limiting of production, or unreasonably enhancing the price of that produced; and lastly, (*d*) which is in substance quoted above.

The whole scope of this legislation is clearly something beyond the narrow limits upon which the reasoning in support of the judgment appealed from seems to proceed. It cannot be said to be a purely declaratory Act. It covers ground not covered by the then existing law. In no sense can the field it covers be held to be co-extensive with the field of law relative to restraint of trade wherein these authorities had operated.

The *Maxim-Nordenfelt case, Nordenfeldt* v. *Maxim-Nordenfeldt,* [1894] A.C. 535, relied on to shew earlier cases overruled, or law relaxed, had not even been heard when this statute was enacted.

Not only that, but who that has had to struggle with the innumerable contracts and distinctions between contracts, alleged

to be in some way in restraint of trade, ever dreamed of the law on the subject being made merely clearer by making it the subject of criminal legislation? Yet the offence against public policy involved in the said cases had been recognized, however ill-defined, for nigh three centuries and never seems to have been directly rested on criminal law; nor yet as a supposed violation of morals. Public policy alone, it was said, required certain limits of time and space to be observed in such contracts and these limits were measured by the good old word "reasonable," so often found in every phase of our English law. Why should Parliament discard it and adopt another less in use, less easy of comprehension, if merely declaring and clarifying the law as applied in civil cases relative to restraint of trade?

Not only had the expansion of trade and commerce in England by the year 1889 rendered the lines laid down in many old cases somewhat unfitted to follow under new conditions then existing in England, but their applicability to Canada and its conditions seemed still more grotesque as a foundation and defined field of operation for a criminal statute such as we have to interpret and construe.

But it may be asked, why should it proceed by prefacing the whole with the word "unlawfully"? And further asked was it not merely the purpose to fix penalties for doing that which was already unlawful? Is it not clear that the draftsman erred in using both words "unlawfully" and "unduly" in the connection in which they were placed? Surely if a thing were unlawful it must be undue. It was never intended to declare that an undue measure of unlawfulness was the thing to become indictable.

Parliament set out as the recital shews, to declare what was to be held unlawful and evidently intended to declare that the unduly doing that which was referred to in sub-sec. (*d*), amongst others, were unlawful things and must be prohibited.

And to make this clear the Act was in 1899, inadvertently, as I think, amended by striking out the word "unduly" and thus leaving "unlawfully" the test. Next session, on attention being drawn to the inadvertence, the word "unlawfully" was stricken out and the word "unduly" restored. The Act as thus finally amended is what is pleaded here. This legislative history demonstrates as clearly as possible that it was not as against something already unlawful, but the unduly doing that then lawful so far as the criminal law extended that the amended statute was aimed at.

And with all this effort to express its meaning, we are asked to say it was not "unduly" that Parliament intended to use, but another word so commonly in use in relation to part of the very subject in hand.

CAN.

S. C.
1912

WEIDMAN
v.
SHRAGGE.

Idington, J.

It seems to me that so far from designing a law that must have for its limits of operation the field covered by such authorities, it was the settled purpose to avoid that being done. That was something which did not fit the subject in hand.

However, we are not debarred from looking at the legal history of either unreasonable restraint of trade as interpreted by the Courts or anything else within the common knowledge of mankind which, in order to effectuate the purpose of the legislature, may help us to find out, if we can, what meaning we must attach to the word "unduly" in sub-sec. (*d*) of sec. 498 of the Code as it stood in 1905 and 1906.

The contracts usually designated as in restraint of trade at common law may be so far as falling within the descriptive language of the statute, *primâ facie*, within the field of that which is prohibited by this statute. I can, however, imagine instances of such restraint which may arise and yet not have been unduly made within the Act. And for reasons I am about to advert to in connection with the *Mogul* case, *Mogul Steamship Co.* v. *McGregor*, [1892] A.C. 25, 66 L.T. 1, 40 W.R. 337, its operative range as a criminal statute affecting and invalidating contracts must exceed the narrow limits of the old doctrine referred to. It is now for the first time before this Court. So far as I can see each of the other cases cited to us, in which different Courts have dealt with its application, presented a mass of facts shewing the conduct of those charged with having infringed it, to have been more or less repugnant to the minds of all right-thinking men, and hence the duty to apply it apparently clear.

The magnitude of the aggregate business involved, the far reaching evil consequences likely to flow from upholding as legal the respective schemes attacked in these cases, and the chances that if upheld their peculiar features so obnoxious to the welfare of the community, would be so greatly extended as to become disastrous, all aided the Courts to apply the Act.

Whether, if such schemes were allowed to run their own course entirely unfettered and unfostered by legislation, the result would be so dreadful as frightened people imagine, one may be permitted to doubt.

If one considers the long history of the abortive attempts exemplified in the long lists of Acts repealed by 22 Geo. III. ch. 71, and 7 and 8 Vict., ch. 24, this doubt will hardly disappear. As we have nothing, however, to do with the wisdom or unwisdom of the legislation, such considerations are only of value here in aiding us by a survey of the whole field of its possible operation to try by drawing lessons from past failures to give it such effect as will not operate detrimentally upon any person or class of persons, not desiring to improperly defeat competition; and, above all, that it may not become itself, by virtue of our de-

cision, an undesirable restraint upon the freedom of men in their business dealings, and thus another hindrance to competition.

This being a criminal statute we must try to find the vicious purpose aimed at in order to bring parties within its prohibitions. What then are to be the distinguishing features that may, in any given case, and must in this case enable us to determine whether or not it falls within any of the prohibitions of the statute? To do that we must examine it in its general bearing and survey if we can its whole possible field of operation.

One thing which must appear in any given case is that the agreement or arrangement is one designed to prevent or lessen competition. It must be also an attempt at what would be an unduly doing thereof, that is agreed upon. It needs neither success nor actual operation nor aught but an agreement to try what, if successful, would be the unduly preventing or lessening of competition.

Crimes usually imply something all right-minded men condemn. This one may or may not necessarily be so offensive. For example, the contracts of hiring, of leasing, of partnership and incorporation, may in some ways involve an actual, and within some of said cases, unreasonable lessening of competition, and hence be conceivably formed outside the offence created by this statute, or fall well within it. It may be that all of these contracts, or indeed many others *primâ facie* legitimate, and possessing no inherent evil, may involve changes disturbing and possibly lessening competition, yet each and all be so used as to produce a great injury to society. It is this feature of the problem which this Act attacks that requires in the limitation and definition of the offence some qualification such as the word "unduly" has been chosen to serve. The test must in each case be the true purpose and its relation to the activities specified in and by the words of the statute, and a finding of an evil or vice answering to the descriptive word "unduly."

It may be asked how can prevention or lessening of competition or attempt thereof be an evil when the fact confronts us that the whole business fabric of Canada is founded upon restraint of competition? It may be said that in face of such fact it is impossible to assign an evil motive or vicious purpose of any kind in merely contracting to prevent or lessen competition.

It may well be, indeed, that the one is the logical sequence of the other by force of the development thereof, or the activities induced thereby, yet be unjustifiable for those enjoying the benefits of these restrictions to abuse the power thereby given them.

We must, moreover, recognize that there are many statutes for beneficent purposes yet productive of evils which call for

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Idington, J.

amendments to the law to meet the evil by-product thereof, whilst retaining for some wise purpose, the parent statute, as it were.

Corporate creations are necessary for the promoting of manufacturing and commercial life. Yet the facilities and capacities given them also tend in many ways to produce and do produce much of the evil I conceive to be aimed at by the statute.

Patent laws may be righteous protectors of the inventor or discoverer and beneficent stimulatives, yet may be made undesirable weapons of offence.

It seems to those whose race and country have had such implicit belief in the sanctity of contract, untainted by immorality or illegality, difficult to justify on ethical grounds the invasion of any field covered thereby.

It is important, therefore, to make clear from the observation of the operation of possible causes and the experience relative thereto and in other regards, how such a vicious purpose as implied in violating this Act may spring from being tainted with a desire to do that which may not of necessity and under all circumstances be held in itself vicious.

The development of modern industrial and commercial life, however, has certainly, when some of the later results are looked at, justified men in re-examining the profound belief heretofore held in unfettered contract and such competition as may exist therewith. And when they produce as the result of such examination a statute like this and throw upon the Courts the duty of drawing the line at the right place we must, in order to discriminate properly, examine all such and similar suggestions as the several foregoing, and all else within the whole range of legislation bearing on the problem so far as we can and determine the principles upon which to proceed.

The state assuredly has the right to withdraw its aid from him who plots with another to deprive his fellow-men of the reasonable expectations each of them in entitled to cherish if the ordinary results of competition are allowed that free scope upon which so much of the prosperity and happiness of the dwellers in a free country hang.

It is at this point the onus of the whole question lies. We must assume Parliament realized that the unlimited power of competition begotten of combination, and the unlimited right of contract cannot any longer exist together with a full enjoyment of the ordinary results of competition to which I have just referred, and hence a new statutory crime had to be created.

The necessity for finding in this new crime the vicious or evil purpose inherent in the agreement of the parties to it, renders it necessary to determine in each case as it arises where the ordinary rights of the public to enjoy their reasonable expectation of due and fair competition (which are yet possible within the limits left when legitimate effect has been given or allowed

for the restrictive legislation I have referred to) are at an end and the absolute right of contract begins. We need not traverse here the whole field but use, as illustrative, a part of the evil existent under the old law, and the operation thereon of the new, and observe the wide distinction between the operation of the doctrine of public policy relative to restraint of trade, and the effective range of this new law.

The law as it stood in England coeval with the first passing of this Act, and till then existent as our law also, was laid down by the highest authority, relative to the right of competition as follows, in the case of *The Mogul Steamship Co.* v. *McGregor, Gow and Co.*, [1892] A.C. 25, at p. 37, 66 L.T. 1, 40 W.R. 337, Lord Halsbury said:—

> I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.
>
> I entirely adopt and make my own what was said by Lord Justice Bowen in the Court below: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future, and until the present argument at the Bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law Courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'"

And in the same case Lord Morris said, page 49, as follows:—

> The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons.

It is to be observed that this was said in a case where the "conference" or league of shippers seemed by reason of its being against public policy to be admittedly not binding between the parties. In that case it seems to have been also made clear that those entering into such contracts committed no offence for which an indictment would lie.

We know, as part of common knowledge, that the most effective weapon such combinations have used on a gigantic scale to crush out competition in the United States, for example, has been that which was adopted by the defendants in that case.

If this statute is not aimed at such combinations here, what can it have been aimed at?

There are a great many subsidiary methods commonly in use to promote the ends such combinations are directed to. Amongst those are the purchases or leases of factories to hold them in idleness; the combinations to fix prices, and to refuse to deal with anyone who will neither accede thereto nor join the association,

CAN.

S. C.

1912

WEIDMAN v. SHRAGGE.

Idington, J.

nor submit to undertaking for an observance of their rules; the restrictive contracts in sales; and the rebates given, or shifting rates of profit conditioned upon the observance of the terms imposed relative to resales, and thus and thereby covering the fixed or variable prices, and the lists of parties or classes of people not to be dealt with, or alone to be dealt with.

Often these devices are aided by the use or abuse of the patent laws which are made to lend a strength to the operation of these compacts dictated by the combinations; and the use or abuse of the incorporating laws are made to bear the like fruit.

The combination to remove competition by such like devices means, when pushed far, the ruin of many by the temporary lowering of, and fitful changing of, prices, and though some of the public may reap for a time the benefit of such proceedings it means later on the payment by the public of much higher prices than in a fair competition at a fair continuous normal rate of profit would have to be paid and generally as much higher as can possibly be extracted from the public regardless of any measurement of price by way of what a fair profit requires. In the long run it means, if successful, the reaping of enormous wealth by the few, to the detriment of the many.

The right in this country to drive others out of trade by such means and for such selfish purposes, so plainly recognized by the quotation above, as legitimate in England and formerly here, is taken away by this statute. The statement of this legal right was not intended by their Lordships to countenance the use of any but legal means.

Bowen, L.J., in joining in the judgment from which the above appeal to the House of Lords was taken, says in *Mogul Steamship Co.* v. *McGregor*, 23 Q.B.D. 598, at page 614, as follows:—

> No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.

It is quite clear, however, that the covert use of all these means which the late Bowen, L.J., refers to are likely to be facilitated if not encouraged by a recognition of freedom to resort to the schemes this state of law in England permits. This statute is intended to prohibit not only the use of all such schemes but also all else conceivably productive of the like results as such means might produce, whether allied together with such schemes or not.

The doctrine of *Allen* v. *Flood*, [1898] A.C. 1, 77 L.T. 717, 46 W.R. 258, might also help in conceivable circumstances to lend an appearance of legality to that which would thwart the operation of this Act and in such cases may have to be discarded.

The almost exultant tone of exposition several of the judgments in the *Mogul* case, *Mogul Steamship Co.* v. *McGregor*, [1892] A.C. 25, 66 L.T. 1, 40 W.R. 337, adopt in maintaining the law as laid down above may be well warranted in a country enjoying free trade. But we have chosen an entirely different commercial system and must have regard thereto. We must act in harmony therewith. We must assume that an Act such as this is not placed on the statute book for an idle purpose. Its operation must not be minimized simply because of difficulties in the way of enforcing it. Its purpose is to crush out of existence an evil. Its success, if any, must depend on its administration. Its great risk of failure lies in the fact that the requisite knowledge of the social and commercial forces shaping the social structure does not lie in the daily path of the lawyer's life, and that it cannot be well supplied by expert evidence.

I desire to guard against the impression that each of many of the devices I have referred to by way of illustration, and others of a like kind that do exist, must necessarily be obnoxious to the Act. It is the purpose to which they may be put that is the test. If that purpose be to bring about what the Act is designed to frustrate, it is vicious. My endeavour herein is to point the attitude to be taken and the path or way to ascertain and identify in the concrete an evil which is incapable of concise and accurate definition.

The application of tests by which to ascertain the possible evil results the Act seeks to avert may be much facilitated by a study in that regard of the jurisprudence of the United States with a commercial system and an historical development similar to but older than our own.

The enhancing or lowering of prices, the variation thereof without obvious causes other than the evil purpose the Act forbids, the margin of profit, the scale of business, the operative field, the frame of the contract, the devices used therein and in its execution, the refusal to deal with others without assigning any reasonable cause, which is so inconsistent with the ordinary motives of men presumed to be governed by a due observance of the act; the entire conduct of the parties, and the results produced, must each and all furnish some aid to determine whether or not the Act has been intended to be violated.

On the other hand, every step taken in the past to enlarge the bounds of human freedom of thought and action has stimulated discovery and invention, and as a product thereof increased competition, which may have left by the way here and there financial wrecks as the result thereof. This has made men cry aloud in denunciation of the waste of human energy and loss of human comfort resulting from competition. The cry is often a thoughtless one. People raising it seldom reckon with the absolutely necessary waste there is and must ever be incidental to

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Idington, J.

growth, though all nature attests it on every hand. Destroy competition and you remove the force by which humanity has reached so far. The altruism some people would substitute for it may, when it has arrived, bring with it a higher sense of justice, but it has not arrived. All these considerations must always be kept in view and not be lightly set aside or the results involved therein be confounded with the actual products of violation of the Act and used as absolute, or necessarily any, proof of a vicious purpose.

For example, though rate of profit may be some guide the use of any standard of profit itself apart from the comparison of changes of one time or set of conditions with another must, as evidence, be of trifling value.

To apply the standard of profit that might enable the stupid, the slothful, the ignorant, the over-capitalized man working with antiquated machinery and a mill or warehouse overmanned, to compete with the standard that may be fairly reached by the men of brains, of energy, of sleepless viligance, with only adequate capital to earn dividends for, and all the advantages that the latest improvements, invention or discovery can furnish, would be a sorry one indeed for society.

The fate of the former class must not be considered. But the latter must not resort to unfair devices. They do not need them. They are without them the best kind of commercial asset the world can have, and must never be depressed or suppressed by this law.

They may indeed need to be protected, and it ought to be the anxious care of society and its Courts of justice to see that they get protected against the combinations of the men of the other class who ultimately must go to the wall before their onward march if they be given a fair chance.

In thus illustrating the law as it was, the evil to be remedied, the principles to be observed in applying the remedy and the difficulties to be met in doing so, I by no means pretend to have covered the whole ground, but enought to enable those concerned in this case to apprehend the law.

I desire to add a few words here to what I said at the outset on the question of the widely different fields covered by the doctrine of public policy relative to restraint of trade and this criminal statute.

This Act not only destroys a former right of combination, but also renders illegal every direct or indirect device contrived by the art of men to serve those agreeing in the purpose of acquiring the market for themselves and adopted by them to execute such purpose, and thus also destroys the devices they may have incidentally adopted to promote the main purpose. All that is, directly or indirectly, knowingly used to promote any criminal purpose must be held void.

A world-wide difference exists and may by grasping this principle of law be appreciated here between the consequence flowing from the application of the public policy principle and that of this statute.

It is quite conceivable that in many ways people might have entered into contractual relations of a subsidiary or collateral character with any of the parties to the combination in question in the *Mogul* case subserving the purposes thereof and be bound by and able to enforce such collateral or subsidiary contracts, even if the existence and purpose of the combination were known to the people so contracting.

I can find no authority which has ever reached so far as to hold contracts having such an indirect relation to the restraint of trade being held void or tainted thereby with illegality.

Indeed, within the principle that "when the immediate object of an agreement is unlawful the agreement is void (see Pollock on Contracts, 8th ed., p. 386), it is difficult to see how collateral or subsidiary contracts, for example, designed to facilitate the execution of a plan (of which the execution is legal) once agreed upon could be held void. The compact itself in restraint of trade was void, but the execution of the purpose thereof was held to be legal though involving the destruction of competition. The subsidiary contracts forming no part of the originating compact, but merely legally aiding that legal execution of it, could hardly be held void.

On the other hand, every kind of contractual relation attempted to be made with anyone of the parties to a combination obnoxious to this statute and to the knowledge of the party so contracting and subserving the purposes of the combination in doing that which violates the Act would be clearly void if for no other reason than constituting an aiding or abetting a violation of the criminal law or as part of a conspiracy to defeat the criminal law.

This exact distinction I draw between the operation of the doctrine of public policy and this Act was not taken in argument, and though I am profoundly convinced of its validity and importance, I am not to be taken as carrying in absence of argument or necessity of doing so, the suggestion as to the validity of contracts subsidiary or collateral to a scheme formed in restraint of trade as violating public policy too far or indeed further than mere illustration and suggestion.

The doctrine of restraint of trade violating public policy is not abolished by this Act which I conceive not to be a substitution therefor. And as suggested by many learned Judges the interests of the public means something possibly not yet passed upon in all its shades. Nor am I to be taken as suggesting that the illustration, the *Mogul* case, *Mogul Steamship Co.* v. *Mc-*

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Idington, J.

Gregor, [1892] A.C. 25, 66 L.T. 1, 40 W.R. 337, furnishes, covers all this Act is applicable to, far from it.

In this case I do not see such difficulties as I have adverted to as possible and as I anticipate must arise in many others. In addition to the vicious purpose to be sought in such cases which I think is only too apparent herein we have the extent of field over which it was intended to reign, and did reign in its execution. It would have presented much greater difficulty had respondent's thorough-going contempt for the thought of doing anything like a "malimid" (Hebrew for school teacher) or indeed in any way regarding the welfare of others not been made so apparent.

His one thought was if possible to destroy all competition and, if need be, those who ventured to come in competition with him. His language and conduct portray exactly what this statute strikes at. Its aim was to put out of business use the methods of men banding themselves together to render it difficult, if not impossible, for others to become rivals, and stop competition in the same field of business.

These parties succeeded so far that their profits were nearly doubled. They seem to have been reasonably successful previously to this and thus had no excuse for their conduct. Their purpose was so clearly obnoxious to the Act it would matter not even if increased profits had not been reaped. The legal result ought to be the same.

It is because of the novelty of the case and the need that there should be no misapprehension arising from its results and that honest men may not be entrapped from reliance on the former state of law here and in England, which I have adverted to, and still existent in England, which seems in harmony with the commercial ethics of most men, that I have dealt at such length with it.

It is to be observed that the individual seems still free to do as was permitted to the combination in the *Mogul* case. The corporation possibly may also, but there a nice puzzle may be presented some day which I will not venture to anticipate. It may itself be founded on a scheme to violate the Act.

The appeal should be allowed with costs here and in the Court below, and the trial judgment be restored.

DUFF, J.:—The learned trial Judge has in effect found that it was one of the direct and governing aims of the parties to the agreement in question to restrict and if possible suppress competition in the buying and selling of the articles specified in the Provinces of Manitoba, Saskatchewan and Alberta, with the object of establishing and maintaining a monopoly of the distributing trade in those articles. I think the evidence supports that view. At least, one of the articles—scrap iron—is shewn to have been a commodity of considerable commercial import-

ance. I think that in entering into such an agreement the parties to it were guilty of an offence under section 498 (*d*) of the Criminal Code.

I agree with the Court of Appeal, that looked at from the point of view of the parties alone the provision of the agreement for fixing the prices at which the commodities in question were to be bought would be a provision reasonably necessary for the protection of the interests of persons who should agree to share profits and losses in the purchase and sale of such commodities. But that circumstance, in my judgment, is not decisive of the question upon which we have to pass in this appeal.

The view upon which the judgment of the Court of Appeal is based, as I understand it, is that the question at issue must be decided by ascertaining whether at common law the Courts would have refused to enforce this agreement as being an agreement in restraint of trade; and that the answer to this question must in turn be governed by the opinion of the Court upon the point whether or not the term of the agreement providing for the fixing of prices was reasonably necessary for the protection of the interests of the parties under their contract to share profits and losses. That view, I think with respect, is based upon an inadequate conception of the principle of the common law as well as of the theory underlying the enactment we have to apply.

An opinion which has often found expression in text-books and sometimes in the judgments of very distinguished Judges is that the common law considers freedom of contract of such paramount importance that given a principal lawful contract not in itself effecting any restraint of trade (a partnership, a contract for the sale of a business, a contract of employment) subsidiary agreements restraining trade or competition are entitled to the aid and protection of the law if only such subsidiary agreements are reasonably necessary for the protection of the individual interests of one of the parties in the principal transaction.

But it is impossible now to affirm that such is the rule of the common law. In *Maxim* v. *Nordengelt*, [1893] 1 Ch. 630, at p. 649, Lindley, L.J., said:—

> In *Roussillon* v. *Roussillon*, 14 Ch. D. 351, 42 L.T. 679, 49 L.J. Ch. 338, 28 W.R. 623, Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord James in *Leather Cloth Company* v. *Lorsont*, 39 L.J. Ch. 86, L.R. 9 Eq. 345, 21 L.T. 661, 18 W.R. 572, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard is as finally settled, nor, indeed, as quite correct. *The doctrine ignores the law which forbids monopolies.*

CAN.

S. C.
1912

WEIDMAN
v.
SHRAGGE.

Duff, J.

In the same case Bowen, L.J., said, at page 667:—

> For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds is necessary, for the advantageous transfer of the goodwill of a business in which he is interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; *and a rule founded on public policy does not admit of any exception that would really produce public mischief;* such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use—a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important.

The judgment of A. L. Smith, L.J., at pages 672 and 673, makes it clear that that learned Judge accepted the view that an agreement in restraint of trade would not be enforced if it was clearly one prejudicial to the interests of the public however unexceptionable it might be from the point of view of the parties.

In the House of Lords, *Nordenfeldt* v. *Maxim-Nordenfeldt Co.*, [1894] A.C. 535, Lord Herschell says at page 549:—

> I must, however, guard myself against being supposed to lay down that if this can be shewn (that is to say, if it can be shewn to be reasonable from the point of view of the parties' interests) the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the *covenant might, nevertheless, be held void on the ground that it was injurious to the public interest.*

Lord Ashbourne, at page 559:—

> I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

Lord Morris, at page 575:—

> These considerations (*i.e.*, the governing considerations in determining the validity of an agreement in restraint of trade) I consider, are whether the restraint is reasonable and *is not against the public interest.*

And finally, Lord Macnaghten at page 565 states the law thus:—

> The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing

more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned *and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.* That, I think, is the fair result of all the authorities.

It is quite clear that all of these eminent Judges had in view the possibility of a state of circumstances arising in which the public interest in restraining encroachments upon freedom of competition might have to be maintained at some sacrifice of the public interest in freedom of contract even in such common commercial transactions as the sale of a business.

It was because no doubt in the opinion of the legislature the conditions had actually come into existence which Lord Bowen foresaw as a possibility merely, that this legislation was enacted. The particular sub-section with which we are concerned was plainly intended to protect the specific public interest in free competition. In applying the section the public interest in freedom of contract in commercial matters, and especially in freedom of disposition by the individual of his own labour and skill and in freedom of dealing in private property, must, of course, be kept scrupulously in view, otherwise there might conceivably be some risk of ultimately defeating the objects of the enactment by depriving the legitimate commercial energies of the country of some of their important incentives. But giving full effect to these considerations, I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

ANGLIN, J.:—The plaintiff sues for an accounting of profits made by the defendants in their junk business, to a share of which he claims to be entitled under the terms of an agreement between them. The defendants, who pleaded as a defence the illegality of this agreement on the grounds that it was designed to effect a restraint of trade unlawful at common law and that it contravened clause (*d*) of sec. 498 of the Criminal Code, in that it was an agreement to unduly prevent or lessen competition in the purchase and sale of articles which were a subject of trade or commerce, appeal from the judgment of the Court of Appeal for Manitoba reversing the judgment of Mathers, C.J.,

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Anglin, J.

who had held that the agreement, although not illegal at common law, was in contravention of clause (*d*) of sec. 498 of the Code.

If the determination of this appeal depended solely upon an appreciation of the evidence contained in the record, I should be disposed not to entertain it, notwithstanding the dissent of Richards, J.A., from the judgment of the appellate Court. As I understand the matter, however, it is upon the meaning to be attributed to the word "unduly" in sec. 498 of the Code that the Court of Appeal differed from the learned trial Judge, and it is the appellate Judges' interpretation of that important statutory provision which the defendants ask us to review.

I agree with the decision in *The King* v. *Elliott*, 9 Can. Crim. Cas. 505, that it does not follow that, because an agreement of which the alleged purpose is "to unduly prevent or lessen competition in the . . . purchase . . . or sale" of some "article or commodity which may be a subject of trade or commerce" is not unlawful at common law, it may not constitute an offence against clause (*d*) of sec. 498 of the Code. As pointed out in that case, Parliament in striking out the word "unlawfully," with which the introductory paragraph of sec. 520 (now sec. 498) originally concluded (55 and 56 Vict., ch. 29), should be credited with an intention to effect some real change in the law. I cannot think that this word was struck out merely because it was thought that, upon a proper construction, the agreements dealt with in sec. 498 would be held to be only such agreements as are declared by sec. 496 to be conspiracies in restraint of trade. As originally enacted in the Code of 1892, sec. 520 (498), contained both the words "unlawfully" and "unduly." To constitute an offence under it the parties must have unlawfully agreed "to unduly limit facilities for transporting, etc., to unduly prevent, limit, or lessen manufacture, etc., or to unduly prevent or lessen competition in production, manufacture, purchase, barter, sale, transportation, etc." The history of sec. 498, I think, precludes the view that in amending it, Parliament merely wished to remove a tautologous word. "Unduly" was first struck out (62-3 Vict., ch. 46), "unlawfully" being left in; but in the following year (63-4 Vict., ch. 46) "unlawfully" was struck out and "unduly" was restored. As the Code was originally drawn, sec. 516 (now sec. 496) did not govern sec. 520. The latter section was complete in itself. Since it contained the word "unlawfully" there could be no occasion to import that restriction from sec. 516. I see no good reason for now giving to sec. 496, which is an exact reproduction of sec. 516, an effect which the latter did not have, and obviously was not meant to have, in the original Act.

If, however, sec. 496 should be held to modify or qualify anything in sec. 498, I would incline to the view that it would be the principal or introductory clause. If so, it would apply to each

of the sub-clauses of sec. 498 and no change would have been effected by striking out the word "unlawfully." While, as pointed out by Phippen, J., in *The King* v. *Gage* (No. 1), 13 Can. Crim. Cas. 415, there are serious difficulties in reading clause (*b*) of sec. 496 as wholly unrestricted (the learned Judge treating clauses (*a*), (*c*) and (*d*) as specifying particular instances of a generic offence covered by clause (*b*), thought the word "unduly" should be read into it, as at present advised I am not prepared to accede to the view expressed by Howell, C.J.M., in *R.* v. *Gage* (No. 2), 13 Can. Crim. Cas. 428, at p. 430, and referred to in *The King* v. *Clarke* (No. 2), 14 Can. Crim. Cas. 57, at p. 63, that clause (*b*) of sec. 498 should be confined in its application to such agreements as are declared to be conspiracies in restraint of trade by sec. 496. But it is not now necessary to determine that question, and I allude to it merely to avoid any possibility of leaving the impression that I would import into the clause (*b*) the word "unlawfully."

The single, if not simple, question before us is whether in the instrument under consideration the parties agreed "to unduly prevent or lessen competition in the . . . purchase . . . (or) sale" of junk and bottles.

It is, perhaps, doubtful whether there is in the agreement any sufficiently definite provision as to sale prices to bring it within the statutory prohibition. But there is a distinct undertaking as to purchase prices to be paid by the parties, which I cannot read as aught else than a mutual promise that during the currency of the agreement neither would pay for bottles or junk prices higher than those specified in the schedules. That this agreement tended "to prevent or lessen competition" between the parties to it in the purchase of the scheduled articles there can be no question. In view of the fact that they controlled from 90 to 95 per cent. of the junk business in the territory in which they operated (a circumstance most material and proper for consideration in determining the true nature of the agreement, its purpose and the intent of the parties to it) it seems to me equally clear that, if carried out, it would tend to destroy in that territory all substantial competition in the purchase of junk and bottles and to leave the public as to the market price for these articles entirely at the mercy of the contracting parties.

The suggestion that, if too great a depression in prices should result, competition would be invited rather than discouraged seems to ignore the fact that provision is made for consultation between the parties as to sale prices and that it is declared to be the intent of their arrangement that they are to work for the mutual advantage of both. The evidence establishes that the prices to which they bound themselves to adhere in purchasing

CAN.
S. C.
1912
WEIDMAN
v.
SHRAGGE.
Anglin, J.

the scheduled articles were materially smaller than had been paid by them when there was competition between them. Of course, it would be to their mutual interest to place these prices as low as practicable, yet not to put them so low nor to raise their sale prices so high that the margin of profits would invite the invasion of their field by really formidable rivals. Were such an invasion threatened they had it in their own hands at any time to reduce their sale prices to meet it. Small competitors they were in a position to crush. I have no doubt that the purpose of the agreement was to prevent or lessen competition in the purchase of junk and bottles for the advantage of the parties, without regard to the public interest, but with the certain incidental consequence that the latter interest would suffer as the result of the provision for a substantial reduction in such purchase prices below what they would be under fair competition. It is not open to question that the agreement was well calculated to accomplish its purpose.

But every agreement to prevent or lessen competition is not declared to be an offence. The elimination or diminution of competition must be undue. It is suggested that if "unduly" does not mean "unlawfully"—and the history of the section seems to forbid such an interpretation—it is used as the equivalent of "unreasonably," and that before an agreement can be said to provide for unduly preventing or lessening competition, the Court must be satisfied that it is designed to do so to an extent not reasonably necessary for the protection of the interests of the parties to it, whatever may be its effect upon the interests of the public. I cannot accept that suggestion. It would re-introduce the common law test of illegality as defined in the modern case such as *Collins* v. *Locke*, 4 A.C. 674; *Dubowski* v. *Goldstein*, [1896] 1 Q.B. 478, 484, and others referred to in the judgments of the provincial Courts and at bar in this Court. If deemed an interchangeable equivalent of "unduly" the presence of the word "unreasonably" in clause (*c*) of sec. 520 as originally enacted and now found in sec. 498, is scarcely intelligible. If the word "unreasonably" were used in the statute instead of "unduly" there might be much to be said for the view that any agreement reasonably necessary for the protection of the parties to it is not in contravention of sec. 498.

The difference, in my opinion, between the meaning to be attached to "unreasonably" and that which should be given to "unduly" when employed in a statutory provision such as that under consideration, is that under the former a chief consideration might be whether the restraint upon competition effected by the agreement is unnecessarily great, having regard to the business requirements of the parties, whereas under the latter the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of

the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition, the benefit of which is the right of every one: *The King* v. *Elliott*, 9 Can. Crim. Cas. 505, 520.

Applying this test to the agreement before us, when we find that it was designed and, if carried out according to the intent of the parties, would be effectual to destroy all competition in the articles which it covered throughout the extensive territory in which they operated, that it was intended to bring about a material reduction directly in the prices which had been paid to junk and bottle collectors and indirectly in the prices which had been paid to the public for the purchase of such articles when competition was unfettered and which would obtain under fair competition, and that the situation was such that the parties to the agreement were not subject to other competition and were in a position effectively to combat the introduction into their territory of other competitors, the proper conclusion seems to be that it was an agreement unduly to prevent or lessen competition in the purchase of these articles.

I might add that if, notwithstanding its utter disregard of the public interest and the incidental prejudice to that interest which it was calculated to cause, such an agreement would nevertheless be lawful if shewn to be reasonably necessary for the protection of the business interests of the parties to it, the evidence in the record does not establish such necessity. The effect of the operation of the agreement would appear to have been to increase the profits which the parties had been previously making by upwards of 15 per cent.—an object which though legitimate, or even laudable, does not sanction the employment of illegal or prohibited means to attain it. It is not established that the profits made by the plaintiff and defendants before the agreement in question was entered into, were not reasonably sufficient; still less that the increase provided for and brought about was indispensable to their conducting reasonably successful business enterprises.

It may be that to give effect to the defendants' plea of illegality will enable them dishonestly to escape from the consequences of a bargain which they made fully understanding and appreciating its effect. But that the purpose of Parliament in enacting sec. 498 of the Criminal Code should be carried out and that the influence of its provisions for the protection of the public interests should not be weakened or impaired is much more important than that in a particular case a party to an illegal agreement should be prevented from dishonestly evading his private obligations.

I would, with respect, allow this appeal and restore the judgment of the learned trial Judge. The appellants should have their costs in this Court and in the provincial Court of Appeal.

Appeal allowed.

ALTA.

S. C.

1912

April 13.

THE KING and the Provincial Treasurer of Alberta v. THE ROYAL BANK.

Supreme Court of Alberta, Harvey, C.J., Scott, Beck and Simmons, JJ. April 13, 1912.

1. CONSTITUTIONAL LAW (§ II A 2—175)—PROPERTY AND CIVIL RIGHTS—POWERS OF PROVINCIAL LEGISLATURE—NON-RESIDENTS.

The Alberta and Great Waterways Railway Bonds Act, Alberta Statutes 1910, ch. 9, declaring that the proceeds of bonds issued by a railway company incorporated in that province for the purpose of constructing a railway wholly within the province, the payment of which bonds had been guaranteed by the province, which proceeds were standing to the credit of the provincial treasurer in a special account in a bank within the province, should form part of the general revenue fund of the province, and be forthwith paid over by the holders thereof to the treasurer of the province free from any claim of the railway company or its assigns, falls within clause 13, "Property and Civil Rights in the Province," of section 92 of the B.N.A. Act and is therefore within the constitutional powers of the provincial legislature even though it affects the interest in such proceeds of parties without the province.

[*Jones* v. *Canada Central R. Co.*, 46 U.C.R. 250, and *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Assn.*, [1902] A.C. 73, specially referred to.]

2. CONSTITUTIONAL LAW (§ II A 3—196*a*)—BANKS AND BANKING—ALBERTA AND GREAT WATERWAYS RAILWAY BONDS ACT (ALTA.).

Where a provincial legislature incorporated a railway company and empowered it to build a railway wholly within the province and to issue bonds and authorized the provincial government to guarantee the bonds to a specified amount and directed the proceeds of the sale of the bonds to be paid by the purchaser directly into a bank or banks approved by the Lieutenant-Governor in Council, to the credit of a special account in the name of the provincial treasurer, to be paid to the railway company from time to time as a specified portion of the line was completed to the satisfaction of the Lieutenant-Governor in Council, and an agreement was subsequently made between the Government and the company settling the details in carrying out the legislative enactments, in which was incorporated the statutory requirements as to the paying in and paying out of the proceeds of the sale of the bonds, and the bonds were sold and the proceeds deposited as required in certain banks, a subsequent Act, Alberta Statutes 1910, ch. 9, assuming primary liability on the bonds and declaring the proceeds of the same held on special deposit in branch banks within the province to be part of the general revenue fund of the province and requiring them to be paid over forthwith by the banks to the provincial treasurer, is not *ultra vires* as banking legislation within sec. 91, B.N.A. Act, giving exclusive jurisdiction to the Dominion Parliament to legislate on banks and banking or as being in conflict with the Canada Bank Act, though one of the banks incorporated under federal authority having its head office in another province claimed an interest in the proceeds under an alleged assignment made to it for past and future advances by a construction company to which the railway company had theretofore attempted to assign the fund.

3. BANKS (§ IV A—46)—SPECIAL DEPOSIT—PROVINCIAL LEGISLATION.

The fact that the chartered bank incorporated by a statute of Canada, with which was deposited by statutory authority in a special account to the credit of a provincial treasurer in a branch of the bank within the province, the proceeds of the sale of the bonds of a railway company incorporated by a provincial Act for the purpose of building a railway wholly within the province, claimed an interest

in the fund under an alleged assignment thereof for past and future advances made to it by a construction company to which the railway company had theretofore attempted to assign the moneys which were under the terms of both assignments to be paid out from time to time as the work was completed in accordance with statutory provisions prescribing the method of payment to the railway company, does not render invalid as conflicting with the Canada Bank Act, a subsequent provincial Act declaring the proceeds of the bonds to be part of the general revenue fund of the province as upon the railway company's default in performing the construction work required upon the province's guarantee of the bonds, and ordering such proceeds to be paid forthwith by the holders thereof to the provincial treasurer.

4. CONSTITUTIONAL LAW (§ II G 1—525)—PROVINCIAL STATUTE—CONFISCATION OF PRIVATE RIGHTS.

A provincial statute is not *ultra vires* merely because it may operate as a confiscation of private rights the benefit whereof is thereby applied for the purpose of the public revenue of the province.

[*Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 102 L.T. 375 (P.C.), and 18 O.L.R. 275, specially referred to.]

5. CONSTITUTIONAL LAW (§ II A 4—210)—REVENUE FUND—STATUTORY ASSUMPTION OF PROCEEDS OF GUARANTEED BONDS.

The Alberta and Great Waterways Railway Bonds Act (Alberta Statutes 1910, ch. 9), passed with a view of protecting the province from loss by reason of its guarantee of the payment of bonds issued by a railway company incorporated by the province for the purpose of building a railway wholly within the province, is not unconstitutional because it declares such proceeds to be part of the general revenue fund of the province, especially in view of the provision of section 5 of the Alberta Treasury Department Act, 1906, ch. 5, that all revenues from whatever source arising, of which the legislature had the power of appropriation, should form one general revenue fund, though such means of raising revenue is not specifically authorized by section 92 of B.N.A. Act.

6. INTEREST (§ I B—24)—BANK ACCOUNT—SPECIAL DEPOSIT.

Where the proceeds of the sale of the bonds of a railway company incorporated by a provincial legislature for the purpose of building a railway wholly within the province were deposited with a bank to the special account of the treasurer of the province in accordance with the terms of an Act guaranteeing the payment of the bonds by the provincial government, which special account was to carry interest at such rate as the bank and the railway company might agree upon and the bank agreed with the railway company to pay 3½% interest on the deposit, the Crown is entitled to the interest at such rate thereon accrued up to the time of its demand in an action to recover the proceeds under a subsequent Act passed for the purpose of protecting the province in its guarantee of the bonds, in which such proceeds are declared to be a part of the general revenue fund of the province and are ordered to be paid forthwith to the provincial treasurer.

7. INTEREST (§ I H—56*a*)—DEPOSIT IN BANK—RATE AFTER REFUSAL TO PAY OUT TO PARTY ENTITLED.

On the wrongful refusal of a bank to honour a demand for the withdrawal of a special deposit, the depositor may be allowed interest thereon in an action for its recovery at the legal rate from the date of the demand even though the legal rate is in excess of the rate of interest at which the special deposit was to be carried.

APPEAL from the judgment at trial in favour of plaintiffs for $6,042,083.26 and interest, pronounced by Stuart, J., on November 4, 1911.

By ch. 46 of the statutes of 1909, assented to on February

ALTA.

S. C.

1912

THE KING v. THE ROYAL BANK.

Statement

25th, 1909, the legislature of Alberta incorporated three persons therein named, all resident out of the province, by the name of "The Alberta and Great Waterways Railway Company," and empowered the company to construct a railway wholly within the province and to issue bonds to the extent of $40,000 a mile and to any extent desired for terminals at Edmonton, and conferred upon the government the option of purchasing the company's rights and properties at any time. By chapter 16, assented to on the same day, the provincial government was authorized to guarantee the payment of bonds of the company to the extent of $20,000 a mile for a mileage not exceeding 350 miles and to the extent of $400,000 for terminals. The Guarantee Act provided that the moneys realized by sale of the bonds should be paid by the purchaser directly into a bank or banks approved by the Lieutenant-Governor "to the credit of a special account in the name of the treasurer of the province or such other credit as the Lieutenant-Governor in Council may direct," that the balance at credit should be "credited with interest at such time and at such rate as may be agreed upon between the company and the bank holding same." There were two alternatives for payment out, and the second of these, which was the one accepted by the company, provided as follows: "the moneys so paid into the said bank shall be paid out to the company from time to time upon the completion (except as to ballast) of every section of ten miles of railway line to the satisfaction of the Lieutenant-Governor in Council according to the specifications," etc., and as certified by the government engineer, there being special provisions for the part relating to the terminals.

On the 29th of October, 1909, an agreement was executed between the railway company and the government as provided for by the Act settling the details for the carrying out of the Acts. It is provided in the agreement that the "proceeds of the bonds shall be paid into a bank or banks approved by the Lieutenant-Governor in Council to the credit of a special account in the name of the treasurer of the province, and shall be paid out to the company from time to time upon the completion, except as to ballast, of every section of ten miles of railway to the satisfaction of the Lieutenant-Governor in council," etc.

The company in the fall of 1909 decided to issue its bonds for $7,400,000, and pending the preparation of the definitive bonds an interim bond for that amount was issued, upon which the guarantee of the province was endorsed.

A sale of the bonds was affected in England, the payment of the proceeds being arranged through the banking house of Morgan in New York. Arrangements were made with different banks having branches in Alberta for the deposit of the moneys, $6,000,000 of the $7,000,000 for the road proper being de-

posited with the defendant bank and placed to the credit of the treasurer of Alberta in the Edmonton branch in that province, the account standing in their books as follows: "The Provincial Treasurer, Province of Alberta—Alberta and Great Waterways Railway Co. Special Acct." The ledger account also bears the following particulars: "Address, Edmonton, Alta.," and "allow 3½ per cent. interest." The payment of the proceeds of the bond sale was made in four monthly instalments, the first being credited on November 4th, 1909, the deferred instalments bearing interest, the total amount received by the bank being $6,042,083.26. The ledger account shews the interest to have been computed and added up from time to time, as the different instalments were paid in and thereafter each three months, the amount appearing in September 30, 1910, as $218,335.55, to which on December 31st $52,144.18 was added, making the total at that time $270,479.73.

Section 14 of chapter 46 above referred to provides that the work of constructing the said line of railway should be commenced within one year from the passing of the Act. This requirement was not lived up to by the company, as according to the evidence, it never procured the sanction of the minister to its plan, profile and book of reference as required by section 73 of the Railway Act, being chapter 8 of the Alberta Statutes for 1907, and under section 80 of that Act the company could not commence construction of the railway until this had been done. The same section 14 further provided that the work of constructing the said railway should "proceed with the utmost despatch," but the respondents allege that no construction whatever was done during the summer season of 1910, down to the date of the passing of the statute next mentioned. Default was made by the company in the payment of the instalment of interest which fell due upon the said bond on July 1st, 1910, and the government of the Province of Alberta was compelled to and did pay the same pursuant to its guarantee. On the 16th day of December, 1910, an Act of the Legislative Assembly of the Province of Alberta was assented to, being chapter 9 of the statutes passed in the second session of that year, which statute was entituled as follows: An Act respecting the bonds guaranteed for the Alberta and Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the province.

Notice in writing of the said statute was at once given the defendant bank, said notice containing also a demand for the immediate payment to the Provincial Treasurer of the amount standing to the credit of the said account, and a cheque for the same presented to the manager of the defendant bank at Edmonton for payment. The manager of the Edmonton branch refused to comply with this demand or to honour this cheque

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Statement

and written notice was immediately served upon him that interest at the rate of 5% per annum from that date would be claimed in respect of the amount of principal and interest then standing to the credit of the said account. This action was immediately thereafter commenced against the defendant bank to recover the amount standing to the credit of the account on the 16th day of December, 1910, with interest computed to that date at the rate of 3½% per annum, and from that date at the rate of 5% per annum. Afterwards on the application of the defendant bank the defendant companies were added as parties to the action in order that the rights of all parties claiming to be interested in the money in question might be adjudicated upon in the one action. The action was tried before the Hon. Mr. Justice Stuart at the sittings of the Supreme Court held at Edmonton on the 9th, 10th, and 11th days of October, 1911. Judgment was reserved at the conclusion of the argument, and was afterwards given on the 4th day of November, 1911, in favour of the respondents for the full amount of their claim without costs.

Messrs. *R. B. Bennett*, K.C., and *H. H. Hyndman*, for defendant bank and *Frank Ford*, K.C., for the other defendants, appellants:—It is contended on behalf of the defendants that the statute, being chapter 9 of the Alberta statutes of 1910 (second session) upon which the plaintiffs' claim is based, is *ultra vires* of the legislature of the Province for the following reasons:—

1. The statute attempts to confiscate private property and to apply that property to the increase of the revenue of the Province and is a means of raising revenue other than by direct taxation within the Province, to which means of raising revenue the Province is limited by section 92 of the British North America Act.

2. The statute is essentially banking legislation and conflicts with clause 15 of section 92 of the British North America Act giving the Parliament of Canada exclusive jurisdiction over "banking and incorporation of banks and the issues of paper money."

3. The Act is in direct conflict with the express provisions of the Bank Act, being chapter 29 of the Revised Statutes of Canada.

4. The statute affects or purports to affect property and civil rights not in the Province and does not come within the provisions of clause 13 of section 92 of the British North America Act relating to "property and civil rights in the Province" and does not come within clause 16 of the said section 92 dealing with "generally all matters of a merely local or private nature in the Province."

The statute is an unauthorized interference between the banks and their customers, and deals with what may be called the essential feature of banking, which is the receiving of deposits and the paying of cheques drawn on such deposits. See *Foley* v. *Hill*, 2 H.L.C. 28, 9 English Reports, 1002, as to what is included in the term "banking" and what the essential feature of banking is. See also, Paget's Law of Banking second edition, page 1; Grant on Banking, pages 1 and 2; Falconbridge on Banks and Bills of Exchange, p. 209. It is clear from the evidence that the Royal Bank, the Union Bank and the Dominion Bank are incorporated and are subject to the provisions of the Bank Act of Canada as being chartered banks, and in taking the deposit of the moneys in question on the terms agreed upon as shewn by the evidence, these banks were carrying on the business of banking and nothing else. Then again, the Act is an interference with what is essentially banking legislation, for the reason that it purports to wipe out the lien held by the Royal Bank for advances made in accordance with the agreement made when the deposit was made. A banker's lien is peculiar to the trade or business of banking and the statute in question requires that the money be paid over "without any set-off, counterclaim, or other deduction whatsoever." If these words have the effect of wiping out the lien of the Royal Bank the statute is, the appellants contend, *ultra vires* for this reason if for no other. As to the construction of the British North America Act see the case of *Tennant* v. *The Union Bank*, [1894] A.C. 31. The cases holding that certain matters are essentially railway legislation are peculiarly in point as shewing that where a subject-matter is exclusively assigned to the Dominion, such as banking, or as in these cases what is known as "railway legislation," the province cannot legislate at all. See *Madden* v. *Nelson and Fort Sheppard Railway*, [1899] A.C. 626; *C.P.R.* v. *Notre Dame Des Bonsecours*, [1899] A.C. 367; *C.P.R.* v. *The King*, 39 Can. S.C.R. 476; *G.T.R.* v. *Attorney-General for Canada*, [1907] A.C. 65; *Attorney-General for British Columbia* v. *C.P.R.*, [1906] A.C. 204; *City of Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52; *Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.*, [1909] A.C. 194. The plaintiffs themselves have treated the transaction as a banking transaction by basing their claim upon a cheque assumed to be drawn upon the deposit. The cheque was drawn by the provincial treasurer, who as a fact did not make the deposit and whose presence in the transaction was merely for the protection of the province on its guarantee.

The Act in question is in direct conflict with the provisions of the Bank Act, being chapter 29 of the Revised Statutes of Canada. Section 95 directly authorizes the receipt of deposits

ALTA.

S. C.

1912

THE KING v. THE ROYAL BANK.

Argument

and the payment out in accordance with the deposit and the terms agreed upon with regard thereto.

Here the bank is by the legislation asked to pay out, to a person other than the depositor and before the time agreed upon when the deposit was made, the amount deposited. The Act changes a time deposit into a deposit payable on demand, and also requires that the deposit be paid out to one only of the two persons in whose names the account stands, one of whom, namely, the provincial treasurer of Alberta, who while named in the style of the account has really no claim upon the same. Section 96 of the Bank Act provides that a bank shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any deposit made under the authority of this Act is subject; and that, except only in the case of a "lawful claim," by some other person before repayment, the receipt of the person in whose name any such deposit stands, or, if it stands in the names of two persons, the receipt of one or if it stands in the name of more than two persons, the receipt of a majority of such persons shall, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust, and with which the deposit has been made, had notice thereof, be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit. In the present case before the cheque in question was presented and before any demand was made by the manager of the Imperial Bank to whose order the cheque was payable, the Royal Bank had received a "lawful claim," that is, they had received notice from the Canada West Construction Company, Limited, and the Alberta and Great Waterways Railway Company, that they claimed the money notwithstanding the statute and this notice forbade the bank to pay out the money otherwise than in accordance with the terms of the deposit. The words "lawful claim" when used in the Bank Act mean a claim which is *primâ facie* substantiated. See *Bank of Toronto* v. *Dickinson*, 8 O.W.R. 323; *Dominion Bank* v. *Kennedy*, 8 O. W.R. 755 and 834. Falconbridge on Banking, page 219. As to the meaning of the words "civil rights" in the B.N.A. Act, see *Citizens Insurance Co.* v. *Parsons*, 7 A.C. 96, at pages 109-111; *Liquor Prohibition Appeal*, [1896] A.C. 348, at page 364. Appellants contend that it is clear that the legislature never intended the confiscation to take effect until the definitive bonds had been issued and guaranteed, and it is clear from the evidence that they never have been issued or guaranteed. The definitive bonds called for by the mortgage were not issued at the time the Act was passed. The bonds had been signed by the president of the railway company and at the time the Act was passed they were in the hands of the government. In his evi-

dence, Mr. Sifton said that after this date he signed the bonds himself and then tendered them to the house of Morgan & Company, who declined to receive them, and they are still in his possession. The Trust Company whose signature thereto is required, have refused to sign them. It is, therefore, contended that the Act is not to take effect until the directions or requirements of section 1 have been complied with and until the bonds, not the interim bond, but the ultimate or definitive bonds have been created by the guarantee of the treasurer and have been delivered to the purchaser.

C. A. Masten, K.C., and *L. F. Clarry*, Deputy Attorney-General, for the Crown and the Provincial Treasurer, *contra*:—The company had made default both in the construction of its road and in meeting its obligation for interest under the bonds. No portion of the railway had been completed. None of the moneys in question had become payable and the whole transaction was to that extent executory. The province was largely interested for its own protection in providing that this large sum of money should not be dissipated and that the state should not for fifty years, the life of the bonds, be compelled to pay interest at 5% on $7,400,000, while it was receiving only 3½%. Its legislation, therefore, in this respect was not one of confiscation but an Act of necessity looking to the protection of the state by the most conservative course that appeared to be open to it. Even if the Act in question was of the character described by counsel for the appellants, the authorities are quite clear that, if the Act was otherwise within the competence of the legislature it is not unconstitutional on the ground taken by appellants that it confiscates money without awarding compensation to the parties interested in the same. Such is not a legal objection to its validity: *Florence Mining Co.* v. *Cobalt Lake*, 18 O.L.R. p. 275, at pp. 279 and 292; see same case affirmed on appeal to the Privy Council: *Florence Mining Co.* v. *Cobalt Lake Mining Co.*, 102 L.T.R. p. 375; Lefroy's Legislative Power in Canada, proposition 21; *Cleveland* v. *Melbourne*, 4 Legal News 277 (Que.), judgment of Ramsay, J., p. 279; *Beardmore* v. *Toronto*, 20 O.L.R. 165 and 21 O.L.R. 505; *McDowell* v. *Palmerston*, 22 O.R. 564; *Smith* v. *London*, 20 O.L.R. 133. It must be pointed out that the Act under which the railway company received its corporate existence was passed by the Legislative Assembly of the Province of Alberta. The Act under which the guarantee of the province was given was passed by the same body. The order in council under which this money found its way into the defendant bank was passed by the Lieutenant-Governor of Alberta in Council in pursuance of the terms of the Guarantee Act of 1909. All of the legislation, therefore, as a result of which this fund was created, was passed by the same legislative authority as passed the Act

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Argument

whose constitutionality is now attacked. The claim to this money which has been made by the Crown, it is submitted, is simply a further step taken by the government of Alberta, which it was logically compelled to take in order to meet the situation which had arisen out of the acts and defaults of the railway, the construction company and the bank done under cover of the Legislative Acts of 1909. The Acts of the Alberta Legislature, ch. 16 of 1909, ch. 46 of 1909 and ch. 9 of 1910, are all one transaction. In the result then, apart altogether from the question as to whether or not this money is in fact and in law within the territorial limits of the province of Alberta, it is submitted that in view of the above considerations the Legislative Assembly of Alberta has the power to legislate as it has seen fit to do with respect to this matter and so to continue to regard the subject matter of this legislation as being a matter of a merely local nature in the province. In this connection the judgment of Mr. Justice Osler in *Jones* v. *Canada Central R. Co.*, 46 U.C.Q.B. 250, at p. 261, is very apt. The Act impugned is capable of being justified under sub-sec. 16 of sec. 92 of the B.N.A. Act as relating to a matter of a "merely local or private nature in the province," and a matter does not cease to be of a local or private nature merely because the legislation regarding it might conceivably have an effect outside the province: *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73, at p. 79, where it is said that matters which are "substantially of local or of private interest" in a province, matters which are of a local or private nature "from a provincial point of view" are not "excluded from the category of 'matters of a merely local or private nature' because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province." This money must be treated as being in the province in which the branch of the bank at which the account of the same is kept is located: *County of Wentworth* v. *Smith*, 15 O.P.R. p. 372; *Haggin* v. *Comptoir d'Escompte de Paris*, 23 Q.B.D. 519, at p. 522; *Newby* v. *Von Oppen*, L.R. 7 Q.B. 293; *Woodland* v. *Fear*, 7 E. & B. p. 519; *Prince* v. *Oriental Bank Corporation* (1878), 3 A.C. 325; *Clode* v. *Bayley*, 12 M. & W. p. 51; Halsbury's Laws of England, vol. 1, p. 606, par. 1232; Maclaren on Banks and Banking (3rd edition), pages 109, 110 and 111; Hart on Banking (2nd edition), 1906, at pages 84 and 85. Some assistance may be gained upon the question as to the place where this money must be held to be from the decisions under the various Provincial Succession Duty Acts, and in that connection reference may be had to the case of *Attorney General of Ontario* v. *Newman*, 31 O.R. 340, 1 O.L.R. 511. *Woodruff* v. *Attorney-General*, [1908] A.C. 508, is the converse of the above case, it being held in the *Woodruff*

case that property of the testator in the hands of trustees in the State of New York was not subject to Succession Duty in Ontario. *Lovitt* v. *The King*, 43 Can. S.C.R. p. 106, was an authority to the contrary of the principle laid down in the *Newman* case, but decision in *Lovitt's* case, 43 Can. S.C.R. 106, has since been reversed by the Privy Council: *R.* v. *Lovitt*, [1912] A.C. 212, 81 L.J.P.C. 140, 105 L.T. 650, 28 Times L.R. 41, and, as the facts of that case affecting the situs of the money, are not unlike the facts which are involved in this appeal the decision of the Privy Council may be looked upon as an authority in support of the respondents' contention that the situs of the money in question herein at the time of the passing of the Act in question was Edmonton. If the situs of the money is held to be in Alberta, it is submitted that the mere fact that the other parties concerned in the litigation are resident outside of the province does not take away the jurisdiction of the legislature over the money. See Lefroy on Legislative Power in Canada, proposition 68, at pp. 759, 762, and 764. See also 2nd edition of Clement's Canadian Constitution at pp. 284 to 289. The fund in question was originally placed under the dominion of the government of Alberta. It was deposited by that government in the Royal Bank in the name of the Provincial Treasurer. The Provincial Treasurer under sec. 96 of the Bank Act was the only person capable of giving the bank a receipt for this money. The Provincial Treasurer was admittedly a trustee of the moneys to deal with them in accordance with the Guarantee Act of 1909, and the railway company and its assigns might have become beneficially interested in the fund on building the railway in compliance with the statute. The only thing which the statute of 1910 did was to change the rights *inter se* between the provincial treasurer and his *cestui que trust*. That is dealing with "property and civil rights" in the province, not with "banking." The provincial treasurer was the creditor and the only creditor of the bank both before and after the statute of 1910. Section 95 of the Bank Act imposes a restriction upon a depositor's right to withdraw money which he has placed to his credit in the bank when the same is lawfully claimed as the property of some other person. This section merely defines the circumstances under which it is or is not safe for a bank to pay out a sum of money to the depositor's order; the section is not intended to cover a case where a bank wishes to maintain control of a fund entrusted to it. But in any case, neither the railway, nor its assigns have shewn "lawful claim" to the money in question. Before any such lawful claim could be made, the railway must have been built in the manner called for by the Guarantee Act. If the Provincial Act of 1910 is otherwise within the competence of the legislature, the provincial treasurer is

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Harvey, C.J.

in virtue of it a person making a "lawful claim" to this money. The language of section 2 of the Act of 1910 is broad enough to free this fund from a banker's lien, if such lien ever existed. The defendant bank is not entitled to a banker's lien on this fund: Halsbury's Laws of Eng. vol. 1, p. 620, par. 1253 and 1254; *Cuthbert* v. *Robarts, Lubbock & Co.*, [1909] 2 Ch. at p. 226; *Ex parte Kingston*, 6 L.R. Ch. App. 632, at p. 640.

HARVEY, C.J.:—The evidence shews that there was some public excitement over this railway transaction, that there was a royal commission to investigate, and that there was a change of government which took place in May, 1910, and during the session of the legislature following two further statutes were passed relating to this matter, assented to on December 16, 1910. The first of these Acts is chapter 9 and is entitled: "An Act respecting the bonds guaranteed for the Alberta and Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the Province." This Act recites the two Acts above mentioned, the execution of bonds to the amount above specified secured by mortgage, the sale of the bonds and the default of the company in the payment of interest thereon, and the payment by the province of such interest, the default in the construction of the line and the fact that the proceeds of the bonds are lying in the banks named, of which the defendant bank is named as holding $6,000,000 and interest.

The enacting part is as follows:—

1. The Province of Alberta hereby ratifies and confirms the guarantee by it of the said bonds and the treasurer of Alberta is hereby empowered and instructed to execute a guarantee on behalf of the Province of said bonds.

2. The whole of the proceeds of the sale of the said bonds and all interest thereon, including such part of the proceeds of said sale as is now standing in certain banks in the name of the treasurer of the Province or otherwise, as follows, viz.:—

Six million dollars and accrued interest in the Royal Bank of Canada;

One million dollars and accrued interest in the Union Bank of Canada;

Four hundred thousand dollars and accrued interest in the Dominion Bank;

is hereby declared to form part of the general Revenue Fund of the Province of Alberta free and clear of any claim thereon or thereto by the Alberta and Great Waterways Railway Company, their successors or assigns, and, together with all accrued interest thereon, shall, to the extent to which they are so held, be forthwith paid over by the banks hereinbefore recited, and by any other person holding any part thereof, to the treasurer of the Province without any set-off, counter-claim or other deduction whatsoever.

3. Notwithstanding the form of the said bonds and the guarantee thereof, the Province of Alberta shall as between itself and the Alberta

and Great Waterways Railway Company be primarily liable upon the said bonds to the several holders thereof, and the Province shall indemnify and save harmless the railway company and its assets and undertaking from any and every claim made under the said bonds or any of them.

The other Act is chapter 11 and is entitled: "An Act respecting alleged claims in connection with the Alberta and Great Waterways Railway Company," and provides that anyone claiming to have suffered loss or damage in consequence of the passing of the preceding Act may file a claim with the clerk of the executive council, with the evidence in support thereof, that the Lieutenant-Governor in Council shall investigate and consider or cause to be investigated and considered such claims and report to the Legislative Assembly, but that nothing in the Act shall be deemed to establish a liability enforceable in a Court of law.

Immediately after the passing of these Acts a demand was made on behalf of the provincial treasurer on the defendant bank for the amount deposited with it with interest and for the amount without interest, which demands were refused.

No money had been paid out in the meantime, and the evidence indicates that no portion of the railway had been completed so as to entitle the company to any payment. The company, had, however, entered into an agreement with a construction company for the construction of the railway, agreeing to assign to it, in consideration therefor, all of its assets, including the proceeds of the bond sale. The terms of the agreement as to these proceeds, which may be of some importance, are as follows:—

The payments of the proceeds of the said bonds shall be made when and as the same are payable to the railway company under the terms of the said in part recited agreement and statutes of the Province of Alberta, and

For the purpose of more fully effectuating and carrying out the intention of the parties hereto the railway company assigns, transfers and sets over and agrees to assign, transfer and set over, as and when the same shall be earned and payable, to the construction company, the proceeds of the said bond issue, and the cash subsidy, if any, to be paid to the railway company by the Government of the Dominion of Canada.

Subsequently on the 8th March, 1910, a formal assignment was executed, the operative words being "have assigned, transferred and set over, and by these presents do assign, transfer and set over, when and as earned under the terms of the statutes in that behalf and the agreement for the construction of the railroad made between His Majesty the King and this company, the proceeds of the $7,400,000 issue of bonds," etc. On the same day the construction company executed an assignment to the defendant bank, which recited its indebtedness and the contemplation of further indebtedness for advances made in the ordin-

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Harvey, C.J.

ary course of business, and assigned to the bank "as collateral security for the said advances all the proceeds payable to us as and when earned of the bonds," etc. (This is the correct reading of the original, though the word "as" does not appear in the appeal book.)

The chief defences to the plaintiff's claim relate to the validity of the Act, ch. 9 of 1910, though it is also contended that even if valid on a proper construction it does not support the plaintiff's claim. It is urged that the Act is *ultra vires* the legislature:—

(1) Because it does not come within any of the classes of subjects assigned by sec. 92 of the British North America Act to the provinces;

(2) Because it deals with essential banking legislation which is assigned exclusively to the Dominion under sec. 91, and is in conflict with the Dominion Bank Act, ch. 29, R.S.C.

(*a*) in altering a time deposit to a demand deposit,

(*b*) in destroying a banker's lien,

(*c*) in destroying the effect of the assignment which was a valid security under the Bank Act;

(3) Because it confiscates private property for the raising of a revenue.

It is necessary to consider these objections in detail.

Lefroy's Legislative Power in Canada, on p. 416, advances the following proposition as laid down by the Privy Council in *Russell* v. *The Queen*, 7 A.C. 829, at p. 838:—

> The true nature and character of the legislation in this particular instance under discussion—its grounds and design and the primary matter dealt with—its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs, and any merely incidental effect it may have over other matters does not alter the character of the law.

On this principle counsel for the plaintiffs maintains that keeping in view the other Acts to which I have referred, it is clear that the Act questioned does really fall within both class 10, Local Works and Undertakings, and class 16, generally matters of a merely local or private nature in the province, and that it also comes within class 13, Property and Civil Rights in the Province.

I am inclined to the view that this contention is correct, but whether or not it should be held to be included in classes 10 and 16 it appears to me that the very recent decision of the Privy Council in *Rex* v. *Lovitt*, [1912] A.C. 212, definitely concludes the question in favour of its being covered by class 13. In that case it was held that money deposited in a branch bank in New Brunswick, whose head office was in England and whose head office for Canada was in Quebec, was property in the Province of New Brunswick. The question there was whether taxa-

tion imposed on this property came within class 2, "Direct taxation within the Province." It is apparent that, for the purpose of that case, this means "direct taxation on property within the province," and the conclusion of that case, therefore, furnishes an exact interpretation of the words of class 13 as applying to the present case.

It may be noted that in the present case not merely was the deposit made in the defendant bank's branch at Edmonton, but that it should be so made was a condition of the delivery up of the bond.

The fact that persons resident out of the province have certain rights which may be affected by the legislation cannot render the legislation invalid if otherwise unobjectionable, as was pointed out in *Jones* v. *Canada Central R. Co.*, 46 U.C.Q.B. 250, 261.

Having reached the conclusion that the legislation is on a subject on which the province is given power to legislate it is necessary to consider whether it is objectionable on the second ground urged, as being essential banking legislation or in conflict with the Bank Act. It is apparent to any one examining and considering the provisions of sections 91 and 92 that legislation under the different classes of one section must very frequently trench on one or more of the classes of the other section, and there are numerous decisions of the Privy Council and the Canadian Courts upholding such legislation. The principle applicable under such circumstances was laid down in *G. T. Ry. Co.* v. *Atty.-Genl. for Canada*, [1907] A.C. 65, in which Lord Dunedin, who delivered the judgment, states:—

> A comparison of two cases decided in the year 1894, namely, *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1894] A.C. 189, and *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, seems to establish these two propositions: first, that there can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and secondly, that if the field is not clear and in such a domain the two legislations meet then the Dominion legislation must prevail.

In *Huson* v. *South Norwich*, 24 Can.S.C.R. 145, at p. 155, Taschereau, J., referring to the former of the two cases cited by Lord Dunedin, says:—

> It results from that case, if I do not misunderstand it, that there are under the British North American Act subjects that may be dealt with by both legislative powers and that the Provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the Provincial legislatures if it fall within any of the classes of subjects enumerated in sec. 92.

In *Canadian Pacific Railway Co.* v. *Notre Dame de Bonsecours*, [1899] A.C. 367, in which the validity of a provincial

ALTA.

S. C.

1912

THE KING v. THE ROYAL BANK.

Harvey, C.J.

Act was impugned as an interference with the Dominion's powers to regulate Dominion railways, it is stated at p. 372:—

> The British North America Act whilst it gives the legislative control of the appellants' railway, *qua* railway, to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated or that it shall in other respects be exempted from the jurisdictions of the Provincial legislatures.

In *Bank of Toronto* v. *Lambe* (1887), 12 A.C. 575, in which the validity of a Quebec Act imposing taxes on corporations, including banks, was upheld, it is stated at p. 585-6 as follows:—

> It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, *viz.*, the regulation of trade and commerce; and within class 15, *viz.*, banking and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks, and again: Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec it intended to limit them on the speculation that they would be used in an injurious manner. . . . But whatever power falls within the legitimate meaning of classes 2 and 9 is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

In the light of the foregoing principles it is necessary to consider the objection that this is banking legislation. It is said that the Act makes a time deposit payable forthwith, thereby changing it into a demand deposit, thus dealing with an essentially banking transaction. The terms of the statute on which this money was to be deposited have already been referred to.

In addition the evidence shews that the assistant general manager of the bank wrote the president of the construction company the following letter on October 23, 1909:—

> Provided the Government of the Province of Alberta will, out of the proceeds of the sale of the Alberta and Great Waterways Railway Company's 50 year first mortgage 5 per cent. bonds place on deposit with the Royal Bank of Canada the sum of six million ($6,000,000) dollars to be withdrawn only as and when the same shall become payable to the said railway company under the progress estimates to be issued from time to time in connection with the construction of the said railway company's line of railway, and then only to the extent of 6-7ths of such estimates and

Provided the Canada West Construction Company, Limited, will furnish the bank with a satisfactory continuing guarantee for the sum of one million ($1,000,000) dollars against loss. The Royal Bank of Canada will undertake to grant the Canada West Construction Company, Limited, credit to the extent of the following amounts within the specified periods, viz.:—

Seven hundred and fifty thousand ($750,000) dollars to April 1, 1910, to be increased to one million two hundred and fifty thousand ($1,250,000) dollars between April 1, 1910, and January, 1911, to be reduced to seven hundred and fifty thousand ($750,000) dollars by January 1, 1911, and to be paid in full by January 1, 1912.

This bank will also, upon the security of bills of lading or warehouse receipts, covering new rails required for the said railway, make advances to the extent of eighty (80) per cent. of the mill cost of such rails plus freight to Edmonton.

This bank will charge interest at the rate of 5 per cent. upon all advances made and allow interest at the rate of 3½ per cent. on the amount of the deposit standing at credit of the Alberta Government trustee above indicated.

and that the Premier of the Province wrote the president of the railway company on October 28th, 1909, the following letter:—

The Government of Alberta is agreeable to the change proposed by you that the three millions of dollars that was to have been deposited to the credit of the Provincial treasurer in the Traders Bank of Canada be paid instead into the Royal Bank of Canada, thus making six millions of dollars of the purchase price of the bond issue of the Alberta and Great Waterways Ry. Co. to be deposited to the credit of the provincial treasurer of Alberta in the Royal Bank.

You can assure the Royal Bank that the Government will abide strictly by the terms of the Act of the Provincial legislature which states that the balance that may remain from time to time in the various banks shall not be taken to be public moneys received by the Province, but shall be dealt with as provided in the said Act, being chapter 16 of the statutes of Alberta, 1909.

and that on November 9th, 1909, an Order in Council was passed, which recited, amongst other things, that

It is the understanding of the said Government that under the proper interpretation of the said Act the said moneys when so paid into the said banks respectively, not being public monies received by the Province, can only be withdrawn as set out in the said Act, etc.

and approved of the defendant bank for the deposit of $6,000,000, the Union Bank of Canada for $1,000,000 and the Dominion Bank for $400,000.

It is contended there was constituted an agreement that the moneys should be deposited only to be drawn in the manner and on the conditions specified, and that the bank gave credit and agreed to pay interest on the faith of it. There appears to me to be a fallacy in considering that there was any agreement which could effect the terms of the deposit, they being fixed by the statute and entirely beyond the control of any of the parties

ALTA.

S. C.

1912

THE KING v. THE ROYAL BANK.

HARVEY, C.J.

claimed to be contracting. This, however, does not meet the essence of the objection for by the terms of the statute the moneys were to be paid only as provided by the statute, which necessarily would be in instalments extending over a considerable period. It is, perhaps, significant that the argument on this point did not examine critically the details of the conditions of this deposit which was referred to in general terms as a time deposit.

An examination of the Bank Act shews that the only classes of deposits referred to in it are deposits payable on demand and deposits payable after notice, or on a fixed day, which are specified in the schedule. A search through the recognized text-books on banking fails to reveal any reference to any class of deposit payable on an indefinite contingency such as the present, and I can only conclude that not only is it not authorized by the Bank Act but it is not even recognized by banking customs and practice. Paget refers to a current account the moneys of which are, of course, payable on demand and then deals with deposit accounts in ch. 3, which he says are of three classes, 1. repayable at call or on demand; 2. withdrawable on specified notice; 3. for a fixed period; and states that the customer has no right to draw cheques against 2 or 3 and probably not against 1. The deposit in such accounts, it would appear, are such as are evidenced by a deposit receipt issued by the bank. The deposit in the present case clearly does not come within either class 2 or 3 above mentioned, and apparently is not within the contemplation of 1, but as far as banking practice is concerned must be treated as a deposit to current account, and would, therefore, be payable on demand as far as the subject of banking is concerned, and the statute apparently, therefore, in no way affects the relation of the parties. It certainly does not, in this regard, conflict with any provision of the Bank Act and does not deal with what is essential banking legislation since, as indicated, such a conditional deposit has no recognition by banking practice.

Apart altogether from the statute in question, if the company and the Government agreed to abandon the enterprise could the bank maintain that the money could not be taken out of its hands? Certainly the Courts would not countenance any such claim and their decision would not be based on any Dominion law relating to banking, but on questions of property and civil rights, and if it is urged that the Court would require some notice to be given, and we assume such to be the case, it clearly would be on the same ground and the right to such notice could, therefore, be taken away by the legislature. The same conclusion would apparently be reached from a consideration of section 96 of the Bank Act which relieves the bank from liability to see to the execution of trusts and which would, therefore,

seem to involve a duty to pay out to a trustee on his demand: see *Gray* v. *Johnston* (1868), L.R. 3 E. & I. App., p. 1.

It is urged that the Act purports to destroy a banker's lien and is, therefore, invalid. It may be said that the Act does not contemplate any general application and, therefore, does not purport to do any more than is necessary to give effect to its terms in the particular case and, therefore, if under the facts of this case there was no lien the statute does not purport to destroy any lien.

In *Misa* v. *Currie*, L.R. 1 A.C. 554, at 569, one of the learned Lords in giving judgment declared that all moneys paid into a bank are subject to a lien as well as documents. Inasmuch as the relationship established by a deposit of money is that of debtor on the part of the bank to the customer as creditor, Paget points out that it would be more logical to consider the right in respect of a deposit as one of set-off instead of lien. The distinction, however, is unimportant for the present consideration. It is apparent that the right of lien or set-off can apply only in respect of a claim against the customer who is the bank's creditor. In the present case the provincial treasurer is the customer and there is no suggestion of any claim by the bank against him or the province. The only claim that is suggested as sufficient to support a lien is a claim of nearly $400,000 advanced by the bank to the construction company. If it may be suggested that the lien could attach to the construction company's interest in the money, it appears to me that the claim of lien cannot be established because it is impossible to shew any interest in the construction company. Assuming an interest in the railway company, which would support a lien for a claim against it, the assignment from it to the construction company does not purport to assign its interest but to assign the very proceeds, but not until earned and payable under the terms of the Act as is shewn by reference to the two documents dealing with the assignment above mentioned. Even if it should be considered that the assignment did pass the interest of the railway company, the construction company having assigned in the same way to the bank, the bank could scarcely claim a lien against its own property.

There is the further consideration also on this point that the banker's lien, now being considered, is not given or in any way dealt with by the Bank Act, but is a part of the provincial law relating to property and civil rights. As is pointed out by McLaren on Banks and Banking (2nd ed.), p. 137, in the provinces when the common law is in force it is regulated by the law merchant, while in Quebec where the civil law prevails it is regulated by the terms of the Civil Code. It is thus not uniform throughout Canada, and undoubtedly a provincial law abolishing all liens would destroy a banker's lien unless the Dominion

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Harvey, C.J.

Parliament saw fit to legislate on the subject. What has been said on the subject of lien applies almost equally to the objection that the bank's security by way of assignment has been destroyed.

As pointed out, the assignment has passed nothing and, therefore, nothing has been taken away, and in the same way as the lien its validity and effect must depend on provincial law even if we assume that such an assignment is not forbidden by the Bank Act, as to which some of the Judges in *Rennie* v. *Quebec Bank*, 1 O.L.R. 303 and 3 O.L.R. 541, seemed to have some doubt.

The next objection to consider is that the province has no right to confiscate private property for public revenue. The word "confiscate" is defined by the New Oxford dictionary as meaning "to appropriate (private property) to the Sovereign or the public treasury." The word confiscate, therefore, appears to be an apt word to apply to this legislation without importing anything opprobrious, but the word itself involves an appropriation to the public treasury, and if the province has the right to confiscate it must be for the benefit of the public revenue.

It is pointed out that provision is made in the British North America Act for raising a revenue by direct taxation and by licenses, also for subsidies from the Dominion to supplement the revenue, and that these means are impliedly all that are available to the province. Without considering that these are all intended for annual income for current expenditure in which they differ from the present, I can see no force whatever in the contention that by authorizing certain things to be done for the purpose of raising a revenue, there is any reason to infer an intention that other things may not be done for the same purpose, but, if there could be any doubt, the statements which appear in various decisions of the Privy Council would remove it.

In *Powell* v. *Apollo Candle Co.* (1885), 10 A.C. 282, a statement is quoted from *Hodge* v. *The Queen*, 9 App. Cas. 117, with approval and the statement is made on p. 290 that that case and *Rex* v. *Burah*, 3 App. Cas. 889, had "put an end to a doctrine which appeared at one time to have had some currency, that a colonial legislature is a delegate of the Imperial Legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted."

The quotation from *Hodge* v. *The Queen*, 9 App. Cas. 117, is in part as follows:—

> When the British North America Act enacted that there should be a Legislature for Ontario and that its Legislative Assembly should have exclusive authority to make laws for the Province and for Provincial purposes in relation to the matters enumerated in sec. 92 it conferred powers not in any sense to be exercised by delegation from or as agent of the Imperial Parliament but authority as plenary

and as ample, within the limits prescribed by sec. 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the local legislature is supreme and has the same authority as the Imperial Parliament.

Several years later, in *Attorney-General for Canada* v. *Attorney-General of the Provinces*, [1898] A.C. 700, in delivering judgment, Lord Herschell said:—

> The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limits upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected.

This last extract is quoted as authority for the conclusion reached in *Florence Mining Co.* v. *Cobalt* (1909), 18 O.L.R. 275, and the Privy Council, in affirming the judgment, [1910] 102 L.T. 375, though deciding on another ground, say they can find no fault with this view, and in the case of *Rex* v. *Lovitt*, to which reference has already been made, decided only a few months ago, reference is made to the hardships effected by the Act in question, and it is said (p. 224):—

> But these are considerations rather for the New Brunswick legislature than for the Law Courts, and though the Court will not easily adopt a construction leading to such results, if the language of the statute is explicit, effect must be given to it.

In view of these unqualified opinions, it must be concluded that the statement in the earlier case of *Dobie* v. *The Temporalities Board* (1882), 7 A.C. 136 at p. 151,

> but that the Quebec legislature should have power also to confiscate these funds or any part of them for provincial purposes is a proposition for which no warrant is to be found in the Act of 1867,

must be considered as limited to such cases as that one and as referring only to property of corporations carrying on their business under Dominion authority as would be the case if a legislature attempted to confiscate the bank's premises.

It is a matter of history that the Imperial Parliament has confiscated the property of rebels on numerous occasions, and the authorities quoted establish the provinces' right to do what the Imperial Parliament can do in relation to the subjects over which it has authority. It is clear, therefore, that the right to confiscate private property over which the province has jurisdiction, such as the moneys in question, belongs to the province. As has been pointed out, an attempt to establish the justness of such legislation before the Court would be out of place since its function is merely to determine the legal but not the moral validity of the Act.

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Harvey, C.J.

For the reasons stated, I am clearly of the opinion that the Act in question is one which the province has power to pass.

A number of other objections were taken, none of which, in my opinion, is entitled to prevail.

It is argued that this is an Act of a private nature from which it follows that if the recitals are not true effect should not be given to it, and also that it binds only the persons named and as the construction company is not named it is not bound. I cannot conceive on what ground the Court could arrogate to itself power to repeal an Act of the legislature which it had power to pass on any such ground. If the legislature has been misled and done something in consequence it has the power to correct the error, and, in my opinion, it alone can correct the error. As to the second point, even if we assume the Act to be a private one, which it is not, it may be noted that the plaintiffs make no claim against the construction company and the railway company who are parties at their own request. They are simply claiming a particular fund in the bank's hands.

The most elementary rule of construction of an Act is that effect must be given to the intention of the legislature when it is clear from the terms of the Act, and the intention of this Act is so clear that it seems impossible to suggest any but the one intention, *viz.*, to appropriate the deposit in the bank. As a matter of fact, however, the construction company's claim, if it has any, is as an assignee of the railway company and it is, therefore named in the Act under the term "assigns" in sec. 2.

Then it is said that the title and recitals shew that the intention is only to pursue the ordinary legal rights of foreclosure for default and the Act should be so construed. As I have just stated, the operative part of the Act shews clearly what the intention is and it is not necessary to resort to the title or recitals to suggest something different.

In the *Sussex Peerage Case* (1843), 11 Cl. & F. 85, at p. 143, Chief Justice Tindal says:—

> My Lords, the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer (*Stowel* v. *Lord Zouch*, Plowden, 369), is "a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.

It is also argued that the moneys in the bank are not the proceeds of the sale of bonds but only of one bond because a single

bond was delivered. If this were a proper construction the construction company, at least, could have no interest to support in this action for its interest is, as the agreement and assignment shew, in the proceeds of the sale of bonds. The fact appears, however, to be that the bonds were sold though they have not yet been delivered, but have only been executed, and the expression is, therefore, strictly accurate.

The learned Judge allowed interest on the deposit at 3½ per cent., the agreed rate up to the time of the demand; and at 5 per cent. after the demand, to which objection is taken. It is said that there was no agreement to pay 3½ per cent. to the province. This appears to me to be immaterial. There was an agreement to pay 3½ per cent. on this money and the books of the bank shew that the interest was actually appropriated to the account. Even if it could be claimed that the railway company only could insist on this interest, the legislature in forfeiting the company's right has given the province all the rights the railway company had, including this right to interest, which is specifically appropriated. It cannot be said that there was a failure of consideration for the bank's promise to pay interest either, even assuming the bank's promise to have been based on the conditions named in the letter of 23rd October, 1909, for it did get the deposit, which was what is stipulated for, though it may not have been able to keep it as long as it had hoped, but this was not anything that the parties could promise and the bank must be assumed to have known the province's right to change the conditions of the first Act and to have received the deposit on that understanding.

The allowance of interest afterwards is really by way of damages or indemnity for the deprivation the bank imposes on the province. In my opinion, the rate of 5 per cent. is reasonable and proper for it is the rate which the bonds bear and which the province is called on to pay and notice that it would be claimed was given. It is suggested that a claim having been made by the construction company the bank was justified in leaving it to the Courts to decide the rights and should, therefore, not be called on to pay a penalty.

There appears to be a complete answer to this in the fact that the bank has contested the plaintiffs' claim at every point. If it had left the contest between the plaintiff and the other claimant and paid the money into Court it would have freed itself from liability in this respect, but, having taken the fight on its own shoulders and on its own behalf, it has no right to complain of the natural consequences.

On the application of the railway company and the construction company to be added as parties no costs were granted for the reason stated in the report: *Rex* v. *Royal Bank*, 17 W.L.R. 508, at p. 519, that it was thought to be settled by the Privy

ALTA.

S.C.

1912

THE KING v. THE ROYAL BANK.

HARVEY, C.J.

Council in *Johnson* v. *The King*, [1904] A.C. 817, that the ordinary rule was that there should be no costs as between the Crown and a private litigant, and the learned trial Judge made no order as to the costs of the action for the same reason.

It appears, however, that in the case of *Rex* v. *Lovitt*, [1912] A.C. 212, above referred to, the Privy Council gave the costs of the appeal to the Crown. Also in an appeal from this Court to the Supreme Court of Canada, decided since our decision on the application referred to was given: *Alberta Ry. Irrigation Co.* v. *The King*, 44 Can.S.C.R. 505, costs were given against The King not merely on the appeal but in the Court below in which no order was made as to costs by reason of counsel having intimated an agreement that there should be no costs. A further examination of the decisions of both the Privy Council and the Supreme Court of Canada since *Johnson* v. *The King* shews that almost invariably in both Courts costs have been given in actions between the Crown and a private litigant as in other cases. The fact stated with reference to the Supreme Court case shews that in that case, at least, costs could not have been asked and that the case was dealt with in respect to costs as any ordinary case.

A further reference to *Johnson* v. *The King*, [1904] A.C. 817, shews that opposition was made to the granting of costs and the point was argued.

Apparently, we concluded that the rule stated in that case was of wider application than was intended and the proper inference from the later cases would appear to be that if the point is not raised, as is the case here, costs should go as in ordinary cases.

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

SCOTT, J.:—I agree with the conclusion reached by the other members of this Court that the Act under which the plaintiffs claim the fund in question (ch. 10 of 1910) is within the constitutional powers of the Legislative Assembly of the province.

In my view the fund must be treated as property within the province. Under the statute, ch. 16 of 1909 (which I will hereinafter refer to as the Guarantee Act) and the subsequent agreement thereunder between the provincial government and the railway company the fund was to be deposited in the branch of the defendant bank at Edmonton and was to be paid out only in the manner provided by that agreement. It was so deposited and still remains there.

It was contended on behalf of the defendants that, even if it were held that the fund was property within the province, the bondholders who have an interest in it being without the province and the Canada West Construction Company, which claims an interest in it, were not subject to the jurisdiction of the

legislature and that, in so far as it affects their interests, the Act is, therefore, *ultra vires*. I cannot agree with this contention. It would, in my view, be unreasonable to hold that the legislature could not legislate with respect to lands within the province in a manner which would affect the interests of the owner or others having an interest merely because they were without the province and not personally subject to the jurisdiction of the legislature, and I can draw no material distinction between such a case and the present one. The view I have expressed upon this contention is supported by Osler, J., in his judgment in *Jones* v. *Canada Central Railway Company*, 46 U.C.Q.B. 250, at p. 259, and I cannot find that the view he there expressed has ever been questioned.

I am also of opinion that, apart from the question raised by the defendant bank, the Act of 1910 was within the competence of the Legislative Assembly by reason of its relating solely to a matter of a local nature. The railway company was incorporated by the assembly for the purpose of constructing a railway within the province and the fund in question was provided for the purpose of constructing that railway, and the statute deals only with that fund.

It was also urged on behalf of the defendants that the Act of 1910 was *ultra vires* by reason of its being confiscatory in its nature.

In my view the fund in question was the property of the railway company. It was the proceeds of the sale made by the company of its bonds which, under the Guarantee Act and the agreement under it, it was authorized to sell and the only interest the province had in the fund was to insure that it should be applied in the construction of the railway. It was for that purpose and that purpose alone that the provincial treasurer was made the custodian of the fund. He was, therefore, merely a trustee thereof and he cannot be said to have held it as provincial treasurer or as moneys of the province. The Act in providing that it shall form part of the general revenue fund of the province, if effective, effectually deprives the railway company and its assignees of their interest in the fund and, in that respect, it appears to be open to the charge that it is confiscatory. With the propriety of such legislation this Court has nothing to do and I, therefore, do not express any opinion upon the point. Its legal aspect only can be dealt with upon this appeal. It appears, however, that the fact that the Act is confiscatory does not render it *ultra vires*. In *The Florence Mining Co.* v. *Cobalt Lake*, 18 O.L.R. 275, Riddell, J., in his judgment in the Court below at p. 279, and Moss, C.J., in his judgment in the Court of Appeal at p. 292, expressed the view that it was competent for a provincial legislature to confiscate property within

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Scott, J.

its legislative jurisdiction, and the Privy Council in the same case (102 L.T.R.) at p. 375 expressed its approval of that view.

It was also urged on behalf of the defendants that the Act of 1910 was *ultra vires* because it was in effect a means of raising a revenue for the province which was not authorized by sec. 92 of the British North America Act, that the only authorized means of raising revenue being direct taxation and the issue of shop and other licenses.

Because the Act provides that the fund shall form part of the revenue fund of the province it does not follow that it is one for the purpose of raising a revenue. Its manifest scope and object is to protect the province from loss by means of its guarantee of the bonds of the railway company. The provision that it shall form part of the revenue fund does not imply that it shall be considered revenue in the ordinary acceptation of the term, *viz.*, annual or other periodical receipts. Section 5 of The Treasury Department Act (ch. 5 of 1906) provides that all revenues whatsoever, however arising, or received, and over which the Legislative Assembly has power of appropriation, excepting moneys which may otherwise be specially disposed of by the legislature, shall form one general revenue fund to be appropriated for the public service of the province. As no other provision is made for the disposition of any moneys to which the province is entitled I think the reasonable construction to be placed upon the word "revenue" in that section was intended to include all moneys which the province should receive from any source whatsoever except as stated in that provision.

It was further contended by the defendant bank that the Act of 1910 is *ultra vires* because it is in effect banking legislation, and that it is in direct conflict with the Bank Act (R.S.C., ch. 29).

It is true that under sec. 91 of the British North America Act the Dominion Parliament has exclusive jurisdiction to legislate upon the subject of banks and banking. In my view, however, the Act in 1910, if otherwise within the competence of the Legislative Assembly, should not be held to be legislation respecting banks or banking and, therefore, *ultra vires* merely because it indirectly affects a particular bank in respect of one particular transaction. Mr. Lefroy, in his work on legislative power in Canada, at p. 416, states the following proposition:—

> The true nature and character of the legislation . . . its ground and design and the primary matter dealt with— its object and scope must always be determined in order to ascertain the class of subject to which it really belongs and any merely incidental effect it may have over other matters does not alter the character of the law.

A number of cases in Canadian Courts cited by the author support his proposition, and it appears to be a reasonable deduction from them. It is applicable to the present case as the

Act only incidentlly affects the interest claimed by the defendant bank. I have already expressed the opinion that, in dealing with property within the province the legislature can deal with the interest of the owner or other person interested therein who is outside the province or otherwise not subject to its legislative jurisdiction. Take, for instance, the case of the Canada West Construction Company which claims, and may have been entitled to, an interest in the fund subject to the claim of defendant bank. That company was incorporated under a statute of the Dominion, yet it has not contended on this appeal, nor do I think it could successfully contend that the legislature could not extinguish that company's interest in the fund, assuming that it is property within the province. In my view the defendant bank is not in any better position with respect to the fund than the construction company. It is true that under the Bank Act banks are entitled to exercise certain privileges and powers which cannot be interfered with by a provincial legislature, such as the taking of security upon personal property for advances previously made, and it is shewn that the assignment of the fund in question was taken by defendant bank by way of security. I think, however, that the assignment to the defendant bank must be held to have been taken subject to the power of the legislature to deal with the privileges and powers of the railway company under which company the defendant bank claims title to the fund. I think it is clear that the legislature might at any time revoke the charter of the railway company and thus effectually prevent the construction of its railway and as, under the Guarantee Act and the agreement thereunder between the railway company and the provincial government and also under the terms of the assignment held by the defendant bank, the interest of the latter is dependent upon the construction of the railway being proceeded with, it would, I think, necessarily follow in such case that the bank could never acquire any interest in the fund. True the legislature has not revoked the railway company's charter but if the Act of 1910 is effective the legislature has, I think, effectually prevented the construction of the railway by appropriating to the province the fund which was provided for its construction. It has been held that a provincial legislature cannot do indirectly what it cannot do directly and I see no reason why it cannot do indirectly what it can do directly.

It was also contended by the appellants that the Act of 1910 is ineffective as it has not the effect of extinguishing the claims of those interested in the fund, they not having been named therein.

The defendants, other than the railway company, as assignees of that company's interest in the fund are referred to in the Act with sufficient certainty, as it declares that the fund shall be

ALTA.
S. C.
1912
THE KING
v.
THE ROYAL
BANK.
Scott, J.

free from the claims of that company and its assigns. The bondholders are the only other persons interested in the fund. They are not parties to the action, and it does not appear that they have ever claimed an interest in the fund, and I cannot see that it is open to the defendants to contend that the Act is ineffective as against their claims merely on the ground that it may be ineffective as to the claims of others.

In my opinion, the learned trial Judge erred in awarding the plaintiffs interest on the fund prior to the demand made upon the bank therefor after the passing of the Act of 1910. There was no agreement between the bank and the government as to the payment of interest. There was no agreement between the railway company and the bank that the latter should pay interest upon the fund at the rate of 3½ per cent. per annum, but it must be assumed that the bank was aware of the terms of the agreement between the railway company and the government under which the fund was to remain in the bank and available for its use during the construction of the railway, and that at least a portion of it would so remain until its completion, and in my view it would be unfair to hold the bank liable for the payment of the interest when the legislature has stepped in and deprived the bank of the benefit it had under that agreement.

For the reasons I have stated I am of opinion that the judgment of the learned trial Judge should be amended by awarding to the plaintiffs judgment for six million, fifty-two thousand and eighty-three dollars and twenty-six cents, with interest at five per cent. from 16th December, 1910.

There should be no costs of the appeal to either party.

BECK, J.:—The Alberta & Great Waterways Railway Company was incorporated by special Act of the Legislature of Alberta, ch. 46 of the year 1909, assented to on the 25th of February, 1909. By another special Act of the same legislature, ch. 16 of 1909, assented to on the same day, the province was authorized to guarantee the payment of the principal and interest of bonds to be issued by the railway company.

On the 28th October 1909, an agreement was entered into between the railway company and the provincial government for the construction of the railway.

On the same day a bond to the amount of $7,400,000 was issued by the railway company and guaranteed by the provincial treasurer on behalf of the province. Also on the same day a mortgage to secure the payment of this bond and bonds to be substituted for it was made by the railway company to the Standard Trusts Company, a company incorporated by an Act of the Legislature of Manitoba and having its head office in Winnipeg in that province.

The bond was sold and the proceeds, $7,400,000, were paid to three Canadian banks as follows:—

The Royal Bank of Canada, $6,000,000.

The Union Bank of Canada, $1,000,000.

The Dominion Bank, $400,000.

The Guarantee Act (sec. 5) provided that all moneys realized by sale, pledge or otherwise, of the railway company's guaranteed bonds should be paid directly by the purchaser, subscriber, pledger or lender into a bank or banks approved by the Lieutenant-Governor in Council to the credit of a special account in the name of the treasurer of the province or such other credit as the Lieutenant-Governor in Council might direct.

It was in pursuance of this provision of the Guarantee Act and of an Order in Council of the 9th November, 1909, that the above mentioned payments were made.

The same section of the Act provides in effect that the amount from time to time at the credit of the special account shall be credited with interest at such times and at such rate as may be agreed upon between the company and the bank. The company and the bank did, in fact, arrange that the bank should charge interest at the rate of five per cent. per annum upon all advances and allow interest at the rate of three and a half per cent. on the amount of the deposit standing to the credit of the account, and this arrangement was made apparently without intervention by the government.

The Guarantee Act (sec. 5) gave the railway company the choice of two methods for the payment out of the proceeds of the bonds, and they chose one which provided for payment as follows: "The moneys so paid into the said bank shall . . . be paid out to the company from time to time upon the completion (except as to the ballast) of every section of ten miles of railway line . . . to the satisfaction of the Lieutenant-Governor in Council, according to the specifications fixed or to be fixed by contract between the government and the company and as certified upon the certificate of the engineer appointed by the Lieutenant-Governor in Council."

The bond was sold through the agency of J. P. Morgan & Company at New York on the terms of one quarter of the price being paid down and the balance in three equal monthly payments, with interest. These payments were duly made and the several amounts to the extent of $6,000,000 and interest were ultimately placed to the credit of "The Provincial Treasurer, Province of Alberta: Alberta & Great Waterways Railway Co. Special Acct." at the branch office of the Royal Bank, Edmonton, as follows:—

ALTA.

S. C.

1912

THE KING v. THE ROYAL BANK.

Beck, J.

1909		
Nov. 4	.....	$1,501,250 00
Dec. 3	.....	1,507,291 62
1910		
Jan. 3	.....	1,513,750 00
Feb. 3	.....	1,519,791 64
Making a total of	.....	$6,042,283 26

which is the principal sum involved in this action.

On the 9th November, 1909, the Canada West Construction Company, Limited, was incorporated by Letters Patent issued under The (Dominion) Companies Act, with its chief place of business at the city of Winnipeg in the Province of Manitoba.

On the 22nd November, 1909, the railway company and the construction company entered into an agreement whereby the construction company agreed to construct the railway, which the railway company had by agreement with the provincial government agreed to build. The consideration for this agreement to construct was the agreement of the railway company

(1) to pay to the construction company the entire net proceeds of the guaranteed bond issue of $7,400,000, together with any cash subsidy that the railway company might receive from the Dominion Government;

(2) to issue in favour of the construction company or its nominee fully paid-up stock of the railway company to the extent of $6,950,000;

(3) to pay to the construction company or give credit to it in respect of any expenses incurred by it in the operation of the road during construction;

(4) to pay to the construction company all revenues of the railway company from whatsoever source derived, and all interest that the railway company might receive in respect of the proceeds of the bonds while on deposit during construction.

The agreement contained the following clauses:—

> The payments of the proceeds of the said bonds shall be made when and as the same are payable to the railway company under the terms of the said in-part-recited agreement (that is the railway company's agreement with the Province for the construction of the road) and Statutes of the Province of Alberta.
>
> For the purpose of more fully effectuating and carrying out the intention of the parties hereto the railway company assigns, transfers and sets over as and when the same shall be earned and payable, to the construction company the proceeds of the said bond issue and the said cash subsidy, if any, be paid to the railway company by the Government of the Dominion of Canada.

The construction company immediately set about carrying out the work of construction; a Mr. Waddell was engaged as

chief engineer; a plan and profile of the road with a book of reference were prepared and submitted to the government for approval; some surveying of the route and some work of clearing it and some grading were done. The plan, profile and book of reference were submitted to the government on the 23rd February, 1910.

On the 8th March, 1910, the railway company executed a separate assignment to the construction company of "when and as earned under the terms of the statutes in that behalf and the agreement for the construction of the railroad, etc., the proceeds of the $7,400,000 issue of the bonds." On the same day the construction company executed an assignment to the Royal Bank of Canada in the following form:—

> KNOW ALL MEN BY THESE PRESENTS, that we, the Canada West Construction Company, Limited, being indebted to the Royal Bank of Canada, and contemplating being further indebted to the said bank, for advances made to us in the ordinary course of business, have assigned, transferred and set over, and by these presents do assign, transfer, and set over unto the said bank as collateral security for the said advances, all the proceeds payable to us as and when earned, of the bonds of the seven million four hundred thousand dollar ($7,400,000.00) issue of bonds of the Alberta and Great Waterways Railway Company, guaranteed by the Province of Alberta, which proceeds are payable to us under and by virtue of an assignment or assignments from the Alberta and Great Waterways Railway Company to us.

Notice of these two assignments was given to the government and their receipt was acknowledged on the 12th May, 1910.

A session of the provincial legislature opened on the 10th February and closed on the 26th May, 1910 (see stats., 1910). At this session the action of the government in relation to the arrangements with the railway company was severely criticised, with the result that the government resigned a day or two before the close of the session.

A second session of the legislature was held the same year from the 10th November to the 16th December. At this session an Act was passed intituled: "An Act respecting the bonds guaranteed for the Alberta & Great Waterways Railway Company, being an Act to specify certain defaults of the railway and the consequent rights of the province," (ch. 9 of 1910, second session) which was assented to on the 16th December, 1910. This Act reads as follows:—

> WHEREAS the Alberta and Great Waterways Railway Company heretofore applied to the legislature of the Province of Alberta to guarantee its bonds, and
>
> Whereas the legislature of the Province of Alberta did by an Act passed in the year 1909, chapter 16, and intituled an Act to provide for an issue of guaranteed securities of the Alberta and Great Waterways Railway Company (assented to February 25th, 1909), authorize

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Beck, J.

the guarantee by the Province of the bonds of the Alberta and Great Waterways Railway Company to the extent of seven million four hundred thousand dollars ($7,400,000.00), and

Whereas bonds of the railway to the amount of seven million four hundred thousand dollars ($7,400,000.00), have been executed by the said company secured by a mortgage in favour of the Standard Trusts Company, payment of which bonds the Province of Alberta has guaranteed, and

Whereas the bonds hereinbefore referred to have been sold, but the said company has made default in payment of interest thereon and the Province of Alberta has paid the said interest so in default, and

Whereas the said company has made default in the construction of its line, and

Whereas certain proceeds of the said bonds (viz., to the amount of their par value together with accrued interest) are now lying to the credit of the provincial treasurer or otherwise in certain banks as follows:—

In the Royal Bank of Canada, $6,000,000.00 and interest; In the Union Bank of Canada, $1,000,000.00 and interest; In the Dominion Bank $400,000.00 and interest.

THEREFORE HIS MAJESTY by and with the advice and consent of the Legislative Assembly of the Province of Alberta, enacts as follows:—

1. The Province of Alberta hereby ratifies and confirms the guarantee by it of the said bonds and the treasurer of Alberta is hereby empowered and instructed to execute a guarantee on behalf of the Province of said bonds.

2. The whole of the proceeds of the sale of the said bonds and all interest thereon, including such part of the proceeds of said sale as is now standing in certain banks in the name of the treasurer or otherwise, as follows, viz.:—

Six million dollars and accrued interest in the Royal Bank of Canada;

One million dollars and accrued interest in the Union Bank of Canada;

Four hundred thousand dollars and accrued interest in the Dominion Bank;

is hereby declared to form part of the general Revenue Fund of the Province of Alberta free and clear of any claim thereon or thereto by the Alberta and Great Waterways Railway Company, their successors or assigns; and, together with all accrued interest thereon, shall, to the extent to which they are so held, be forthwith paid over by the banks hereinbefore recited, and by any other person holding any part thereof, to the treasurer of the Province, without any set-off, counterclaim or other deduction whatsoever.

3. Notwithstanding the form of the said bonds and the guarantee thereof, the Province of Alberta shall as between itself and the Alberta and Great Waterways Railway Company be primarily liable upon the said bonds to the several holders thereof, and the Province shall indemnify and save harmless the railway company and its assets and undertaking from any and every claim made under the said bonds or any of them.

On the 16th December a written demand was made by the provincial treasurer upon the Royal Bank of Canada as follows:—

> I hereby notify you that the statute entitled "An Act respecting the bonds guaranteed for the Alberta and Great Waterways Railway Company being an Act to specify certain defaults of the railway and the consequent rights of the Province," which was passed by the Legislative Assembly of the Province of Alberta at the session thereof which ended to-day, has this day received the Royal assent and is now in force. I beg to hand you herewith a certified copy of this statute.
>
> And further, take notice that the King represented herein by the Province of Alberta and by me as the treasurer of the said Province, and I as such Provincial treasurer hereby demand payment from you to the undersigned of the sum of six million, forty-two thousand and eighty-three 26-100 dollars ($6,042,083.26) amount of deposit; together with accrued interest on the said sum of $6,042,083,26 computed to date, being the whole of a certain deposit now lying in the following account at your Edmonton branch;
>
> "The Provincial treasurer, Province of Alberta, Alta., and Great Waterways Railway Company special account."
>
> This claim is made in pursuance of all rights, claims and title which the Crown holds to said fund in any manner whatsoever, including the title held by the Crown under the said statute.
>
> A cheque drawn by me on you for the said sum of six million, forty-two thousand and eighty-three 26-100 dollars ($6,042,083.26) in favour of the Imperial Bank of Canada will be presented to you by the said bank and the payment of the same by you will be considered by me a payment of that amount on account of the sum hereby demanded.

On the same day a cheque was presented to the bank in accordance with the intimation contained in the foregoing notice. Payment was refused, and thereupon a further notice was given by the provincial treasurer to the bank as follows:—

> Take notice that the King represented herein by the Province of Alberta and by me the treasurer of said Province, and I as such Provincial treasurer, claim that you have wrongfully refused to honour the cheque of the Provincial treasurer drawn in favour of the Imperial Bank of Canada, covering certain moneys now lying to his credit in your Edmonton branch in the following account:—
>
> "The Provincial treasurer, Province of Alberta, Alta., and Great Waterways Railway Company special account."
>
> And that on demand duly made by the Crown and by me, you have wrongfully neglected and refused to pay over the moneys lying to the credit of said account and the accrued interest thereon or any part thereof.
>
> And further, take notice that the Crown and the Provincial treasurer will claim against you interest at the rate of 5 per cent. per annum from this date on the aggregate amount of principal and interest this day owing by you in connection with the above account.

On the same day—16th December—this action, an action of debt on the statute, was commenced. The claim was for

ALTA.

S.C.
1912

THE KING
v.
THE ROYAL BANK.

Beck, J.

$6,253,868.01, with interest at 5 per cent. per annum from the date of the writ. This amount was calculated as follows:—

Amt. received by the bank on acct. of the proceeds of the bond.....	$6,042,083 26
Interest at 3½ compounded half yearly	211,784 75
	$6,253,878 01

The Alberta & Great Waterways Railway Company and the Great West Construction Company, Limited, were on application added as parties defendant.

Each of the defendants defended, and the case went to trial before Stuart, J., who directed judgment to be entered for the plaintiff for the amount claimed with interest at the rates claimed. This is an appeal from that judgment.

The validity and effectiveness of the last mentioned Act is questioned. Primarily the defendants contend that it is invalid, inasmuch as it attempts to invade rights which are matters to which "the exclusive legislative authority of the Parliament of Canada extends" by virtue of the British North America Act, sec. 91, clause 15, "Banking, the incorporation of banks, and the issue of paper money," and the concluding words of that section: "and any matter coming within any of the classes of subjects enumerated in this section 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 this Act assigned exclusively to the legislatures of the provinces." The Crown, on the other hand, contends that the Act in question is not invalid, inasmuch as it purports to deal with matters in respect of which the legislature of the province "may exclusively make laws" by virtue of sec. 92, clause 10: "local works and undertakings," or clause 13: "property and civil rights in the province," or clause 16: "generally all matters of a merely local or private nature in the province." In order to appreciate the force and effect of the arguments founded on these two views it seems to be necessary, in the first place, to consider and ascertain the position and rights of the bank in respect of the moneys in their hands. Deposits upon trust are, of course, quite fully recognized by the general law of banking and the Bank Act fully recognizes such deposits by expressly dealing with the subject. Section 96 is as follows:—

> The bank shall not be bound to see to the execution of any trust, whether expressed, implied or constructive, to which any deposit made under the authority of this Act is subject.
>
> 2. Except only in the case of a lawful claim, by some other person before repayment, the receipt of the person in whose name any such deposit stands, or, if it stands in the names of more than two persons,

the receipt of a majority of such persons, shall, notwithstanding any trust to which such deposit is then subject, and whether or not the bank sought to be charged with such trust, and with which the deposit has been made, had notice thereof, be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit.

3. The bank shall not be bound to see to the application of the money paid upon such receipt.

Independently, apparently, of any such statutory provision the House of Lords held in *Gray* v. *Johnston*, L.R. 3 H.L. 1, in effect what is there put by Lord Westbury as follows:—

> A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker and it is impossible for the banker to set up *jus tertii* against the order of the customer, or to refuse to honour his drafts, or on any other ground than some sufficient one arising from an act of the customer himself. Supposing therefore that the banker becomes incidentally aware that the customer, being in a fiduciary or representative capacity, meditates a breach of trust and draws a cheque for that purpose, the banker, not being interested in the transaction has not the right to refuse the payment of the cheque, for if he did so he would be making himself a party to an enquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* as a reason why he should not perform his own distinct obligation to his customer.

The bank, there seems no doubt, as far as the receipt of the moneys is concerned, received them in its ordinary capacity of a bank and in an ordinary and recognized course of business. The bank became debtor to whom? Who was its customer? The answer, it seems to me, is the provincial treasurer; and he was a trustee of the moneys upon the trusts indicated by the Guarantee Act and the agreement between the railway company and the province—the beneficiaries of the trust being the railway company only, unless default on its part occurred, but in that event also the province and the trust company as representing the bondholders for, in my opinion, the terms of the mortgage in reference to "the mortgaged premises" must be interpreted as intended to include the railway company's "rights" in respect of the proceeds of the bonds.

It is fairly evident that mistakes have occurred in the printing of the latter part of sec. 5 of the Guarantee Act and that there should be a period after the word "nominees" in the 6th line from the end of the section, and that the remainder of the section should read as follows:—

> Pending the completion of the said respective lines and terminals, the balance at the credit of such special account shall *until* (not "when") paid out as above provided for, be deemed part of the mortgaged premises under said mortgage and shall not be taken to be public moneys received by the Province.

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Beck, J.

The same words correctly printed appear in chapter 14, sec. 6, and chapter 15, sec. 6, of the statutes of the same year.

The result seems to me to be that, dismissing from consideration for the moment any other circumstances, the provincial treasurer as the bank's customer might immediately after the deposit have demanded from the bank—whether by cheque or not, is unimportant—payment to him of the entire amount of the deposit. And the contingency of such a demand might have arisen had the railway company and the government come together and agreed to rescind their agreement for the construction of the road and to abandon the project altogether. Did anything take place to change this situation? For on behalf of the bank it is contended that the moneys in question were not "payable on demand" (see sec. 112; sch.D. 4) but either "payable after notice or upon a fixed day" (*ib.* 5) or on the terms and conditions indicated by the Guarantee Act, and the agreement between the railway company and the province, supplemented perhaps by the agreement between the bank and the railway company, in whom it is contended the property in the moneys lay. And then the argument proceeds that these moneys being held by the bank on terms other than that they were "payable on demand" and the contract to that effect being one which the bank could lawfully make the Provincial Act declaring them to be payable forthwith is *ultra vires* as infringing upon the rights of the bank; jurisdiction over which lies exclusively in such a matter as this, with the Dominion Parliament. If it were held that these moneys were held by the bank upon the last mentioned terms and conditions, a difficult question of law might arise as to what would be the implied terms—for some are expressed—of the holding in the event of those terms and conditions, instead of being fulfilled, being not complied with. I have, however, already indicated my opinion that the provincial treasurer was the bank's customer and creditor; that it was he and not the bank who was the trustee for those having various interests in the moneys; that as between him and the bank the moneys could be withdrawn on demand; and that, therefore, if they ceased to be liable to be so withdrawn it must have been owing to something occurring subsequent to the deposit. It is claimed that such a condition was brought about by the assignment of the moneys by the railway company to the construction company and by the latter's assignment to the bank, and the fact of the bank making advances to the construction company upon the security of those assignments; and this being so, the Act in question is an attempt to deprive the bank of a security which, as an essential of the business of banking, the bank had a right to take. This contention, however, it is obvious, it seems to me, finds a complete answer, if it be correct to say, that the provincial treasurer was alone the customer

and the creditor of the bank with regard to these moneys, that he alone was the trustee of them for the railway company, the construction company and the government according to their several interests as beneficiaries and that assignees of the beneficiaries merely acquired their rights—the right of the bank as an assignee, obviously, in no way affecting the position of the provincial treasurer except, of course, in substituting another party to whom he was liable to account, namely, the bank, whose position in this respect was in no sense peculiarly that of a bank, but merely of an ordinary assignee of chose in action or contingent claim by a method of assignment not specially applicable to banks and a transaction, therefore, subject to the legislative authority of the provincial legislature.

An argument against this view was based upon the words "Excepting only in the case of a lawful claim" occurring in section 96 and like words occurring in section 95, but both decisions and the provisions of the Act itself appear not only to protect the bank against the claims of beneficiaries, but oblige the bank to disregard them leaving such claims to be protected by legal proceedings to be taken by the beneficiaries against the trustee for either an anticipated or actual breach of trust, and, it seems to me, therefore, that the lawful claim referred to is intended to be one not arising by dealings, which recognize the trust, with beneficiaries whose assignee can be in no better position than they, but a conflicting and paramount claim. It was contended, too, that by virtue of the terms of the Guarantee Act, inasmuch as it provides for the payment into a bank to be named by the railway company and approved by the government and of the order in council fixing upon a particular bank and nothing being provided with regard to payment out there was no power in the government to disapprove of this bank and so entitle the provincial treasurer to withdraw the moneys except on fulfilment of the terms and conditions of the agreement between the railway company and the government.

This, if it be so, appears to me, however, to be matter relating to the terms of the trust and consequently, not affecting the bank as the depositary of the moneys though it may effect it as the assignee of one of the beneficiaries, but that status is not, as is evident a status in any way peculiar to a bank.

Then it is contended that the Act in question is *ultra vires*, because in confiscating the fund in the hands of the bank it assumes to declare it "to form part of the general revenue fund of the Province of Alberta" shewing that the Act is one for the purpose of raising a revenue, a thing, it is contended, which can be accomplished only in one or other of the methods authorized or provided by the British North America Act, or the Alberta Act, 4 & 5 Edw. VII. (1905), ch. 3.

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Beck, J.

It was pointed out that "the Treasury Department Act" (ch. 5 of 1906 Alberta) shews that "revenue" in the expression "general revenue fund" has a much wider meaning than perhaps the ordinary use of the word suggests.

Sec. 1(*e*) says:—

> The expressions "public revenue," "revenue" and "public money" respectively mean all revenue and public moneys arising from any source whatever, whether such revenue and such moneys belong to the Province, or are held by the Province, or collected or held by officers of the Province for, or on account of, or in trust for any provinces forming part of the Dominion, or for the Dominion or for the Imperial Government, or for any other party or person.

Sec. 5 says:—

> All revenues whatever, however arising or received, over which the Legislative Assembly of the Province has power of appropriation, excepting moneys which may otherwise be specially disposed of by the legislature, shall form one general revenue fund to be appropriated for the public service of the Province.

The chief sources of revenue authorized or provided for by the British North America Act or the Alberta Act are:

(1) Subsidies (Alberta Act, secs. 18, 19, 20);

(2) A share of the properties of the former North-West Territories (*ib.* sec. 22);

(3) Direct taxation (British North America Act, sec. 92, clause 2);

(4) Licenses (*ib.* clause 9).

There are undoubtedly others—the sale of public lands and timber in the event, which seems likely, of the province acquiring any (B.N.A. Act (sec. 92, clause (5)); fees for the incorporation of companies (*ib.* clause 11), and also such as may at any time arise by reason of provincial legislation authorized under the general heads "Local works and undertakings" (clause 10), "Property and civil rights" (clause 13) and "Matters of a merely local or private nature" (clause 16).

The forfeiture of lands to the province for non-payment of taxes, would, I fancy, fall under one or other of these classes of subjects and afford a source of revenue in the wide sense of the term as used in the Act impeached. An instance of such a forfeiture will be found in *Re C. & E. Land Co.*, 2 Alta. L.R. 446, affirmed *sub nom. C. & E. Land Co.* v. *Atty.-Gen. of Alberta*, 32 C.L.T. 91.

The Act in question, if it does not offend against the Bank Act—and I have already stated my conclusion that it does not—must, in my opinion, fall within the legislative authority of the provincial legislature under all or some or one of the three headings mentioned and if so, it seems to me there can be no legal objection to it merely because in its result it becomes

a source of revenue to the province in the wide acceptation of that term.

One other ground of objection is taken to the validity of the Act in question, namely, that assuming the Act is properly to be deemed one relating to "local works and undertakings"; "property and civil rights" or "matters of a merely local or private nature," each of these classes of subjects are in the British North America Act restricted, the first by implication, the two others expressly by the words "in the province" and though it may be true that much of what is dealt with and affected by the Act is within the province, yet in the result it would affect if not property at least civil rights existing beyond the province, namely, for instance, the rights of the bondholders and it is urged that the case of *Dobie* v. *Temporalities Board*, 7 App. Cas. p. 136, is authority for the position that the authority of the provincial legislature does not extend to such a case. That case, however, was a case where some not merely of the civil rights but of the property involved was beyond the limits of the province. Where the entire property is within the province it seems to me, concurring as I do with the opinion of Osler, J., in *Jones* v. *Canada Central R.W. Co.*, 46 U.C.R. 250, that the legislative authority of the provincial legislature is not excluded, even though civil rights having in law an extra-provincial *situs* are incidentally also affected.

The only remaining question which it seems to me calls for consideration, is the interest at 3½ agreed to be allowed by the bank.

This was an arrangement made, as I have pointed out, not with the provincial treasurer, whom I have held to be the customer and the creditor of the bank, but with the construction company, a beneficiary under the provincial treasurer. This being so, it seems to me that it was a transaction not essentially relating to banking, nor covered by any provision of the Bank Act and that it is, therefore, one subject to the authority of the provincial legislature. The Guarantee Act expressly contemplates interest arising on the fund and the Forfeiting Act can only refer to interest so arising. The result is, that, in my opinion, the Act which is impeached in this action is not *ultra vires* of the provincial legislature and is effective according to its purport.

I cannot, however, refrain from adding in conclusion that I have a strong repugnance to the Act on ethical, political and economic grounds, and that it is with so much regret that I feel constrained to come to the conclusion which I have expressed, that I should be glad to find the conclusion is wrong.

The result, however, as I now view the various questions involved, must be that the appeal should be dismissed.

ALTA.
S. C.
1912
THE KING
v.
THE ROYAL BANK.
Simmons, J.

SIMMONS, J.:—The appellants, the Royal Bank of Canada, the Alberta and Great Waterways Railway Company and the Canada West Construction Company, claim that the statute of Alberta of 1910 is *ultra vires* because:—

(*a*) It invaded the field of Dominion legislation, to wit, the Bank Act of Canada, in that it changes a time deposit into a demand deposit, and also it purports to take away from the bank a security the bank had on the deposit by way of lien for advances made to the Canada West Construction Company, Limited, assignees of the Alberta and Great Waterways Railway Company, or, in the alternative, it took away from the bank a security for advances made to the construction company on the security of an assignment to the bank by the construction company of the interest of the company in said moneys when earned by them.

(*b*) That it purports to raise a revenue by a method which is not direct taxation.

(*c*) The Act purports to deal with property and civil rights outside of the province, and consequently beyond provincial legislative control, and does not, therefore, come within sub-sec. 16 of sec. 92 of the British North America Act as dealing with "generally matters of a merely local or private nature within the province."

The general rules of construction for determining whether any particular subject of legislation comes within the exclusive jurisdiction of Dominion legislation as defined under the heads of sec. 91 of the British North America Act or the exclusive jurisdiction of provincial legislation under sec. 92 or under the class of subjects to which the term overlapping of the respective Dominion and provincial legislation applies has been defined on frequent occasions by the Law Lords of the Privy Council.

The full extent to which Dominion legislation will extend its arm is aptly put in *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, where it is laid down that "the legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sec. 91 of the British North America Act, is paramount authority even though it trenches upon the matters assigned to provincial legislatures under sec. 92," while on the other hand the plenary powers of the provincial legislatures in matters distinctly assigned to the provinces under sec. 92 are exemplified in *The Attorney-General of Manitoba* v. *The Manitoba License Holders Association*, [1902] A.C. 73.

The last case is a clear exposition of the doctrine that once a subject is clearly a matter of a merely local nature in the province within the meaning of sub-sec. 16 of sec. 92 of the British North America Act then the jurisdiction of the provincial legislature is paramount even though in its practical working out the provincial legislation must necessarily interfere with matters

allocated to the Dominion field. The Manitoba Liquor Act interfered with Dominion revenue, a subject exclusively reserved to the Dominion under sec. 91 and indirectly, at least, interfered with business operations outside the province and also with the trade and commerce of the Dominion, although these subjects are specifically reserved under sec. 91. Lord Macnaghten in this judgment observes: "Matters which are substantially of local or private interest in a province—matters which are of a local or private nature from a provincial point of view—are not excluded from the category of matters of a merely local or private nature because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on a particular trade. Its primary and essential feature is the suppression of the liquor traffic in the province."

In *The Bank of Toronto* v. *Lambe*, 12 A.C. 575, at p. 586, the same principle is enunciated. The question under review was whether a tax imposed by the Quebec Legislature upon banks was *ultra vires* on the ground that it trespassed upon the Dominion field which was, under sub-sec. 15 of sec. 91, reserved to the Dominion, "banking, incorporation of banks, and the issue of paper money." The general rule is laid down by Lord Hobhouse as follows:—

> To ascertain whether or not the tax is lawfully imposed it will be best to follow the method of inquiry adopted in other cases; first, does it fall within the description of taxation allowed by class 2 of section 92, of the Federation Act, viz., "direct taxation within the province in order to the raising of a revenue for provincial purposes"; secondly, if it does are we compelled by anything in section 91 or the other parts of the Act to cut down the full meaning of the words in section 92 that they shall not cover this tax. This bank is found carrying on business there and on that ground alone it is taxed . . . There is no attempt to tax the capital of the bank any more than its profits. The bank itself is directly ordered to pay a sum of money . . . Whether the method of assessment is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the Province it is for the legislature and not for the Courts of law to judge of its expediency. . . . If they find that on the due construction of the Act a legislative power falls within section 92 it would be quite wrong of them to deny its existence because by some possibility it may be abused or may limit the range which would otherwise be open to the Dominion Parliament.

The general rule of interpretation to be followed was clearly set out by Lord Fitzgerald, delivering the opinion of the Board in *Hodge* v. *Regina*, 9 A.C. 117, namely, that the British North America Act conferred powers as plenary and as ample within

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL
BANK.

Simmons, J.

the limits prescribed by sec. 92, as the Imperial Parliament in the plenitude of its powers possessed and could bestow.

The examples quoted above illustrate the general rules adopted by the Board that in order to ascertain to which class a particular legislative Act belongs the true nature and character of the Act must first be determined.

It is not seriously contended that the Acts of the Legislature of Alberta, *viz.*, chapters 46 and 16 of 1909 are *ultra vires* the powers of the province. The legislature, in order to encourage the building of a railway into the northern part of the province, incorporated certain persons as a company with powers to construct a line of railway from Edmonton to Fort McMurray, as set out in chapter 46. In order to assist the railway company in financing the scheme, the legislature enacted chapter 16, providing for the guaranteeing of the bonds of the railway company to the extent of $20,000 per mile and $400,000 for terminals at Edmonton. These enactments surely come within sub-sec. 16 of 92, as "matters of merely local or private nature within the province."

Section 20 of ch. 46 goes so far as to provide that the government may, at its option, purchase the whole undertaking of the company, including all its rights, franchises, powers, real and personal property, at a fair valuation as a going concern.

The Guarantee Act, being chapter 16 of 1909, provides for the absolute control by the Lieutenant-Governor in Council of the forms and terms of the bonds and mortgage securing the same; for the payment of the proceeds of sale of the bonds to be paid into a bank or banks approved by the Lieutenant-Governor in Council to the credit of a special account in the name of the provincial treasurer; also, that the balance at the credit of the special account shall be credited with interest at such times and such rate as may be agreed upon between the company and the bank holding the same; it also provides two alternatives as to the times and manner of payment out, under sec. 5 either of which may be selected at the option of the company.

The appellants, the Royal Bank of Canada, in the course of their banking business, agree to receive a part of the purchase price of these bonds and to pay out the moneys so received in accordance with this Act and with the Orders-in-Council issued thereunder by the executive of the province. They do so with full knowledge that the company and all rights, powers and privileges of the company is the creature of the provincial legislature and liable at any moment to have all its rights, powers, franchises, moneys, and even its existence, determined by the same power which created it. To assert anything less, it seems to me, would do violence to the rule laid down again and again by the Privy Council, namely, that the scheme of legislative distribution contemplated that the powers of the Canadian legis-

latures, each in its sphere, are plenary powers of legislation. "Jurisdiction conceded, the will of the legislature is omnipotent, according to British theory, and knows no superior:" *Hodge* v. *Regina*, 9 A.C. 117. The "jurisdiction conceded" is a mixed question of law and fact, and it is the duty of the Courts to define the jurisdiction. The claim of the appellants that the legislature, in purporting to deal with the moneys in the bank as a matter solely under provincial jurisdiction, has infringed upon the rights and powers conferred upon the bank by the Bank Act (ch. 29 of 1906) could only occur if (*a*) the subject matter has ceased to be merely local or provincial and has become a matter of national concern so as to bring it within federal jurisdiction; or (*b*) that while still a matter of essentially local or provincial concern the legislature has by way of incidental or ancillary legislation encroached upon the Dominion field.

Look upon it from whatever viewpoint you may, the provincial company and the provincial liability cannot be brought within (*a*) as a matter of national concern. The money was obtained on the credit of the province, the purpose was the construction of a provincial railway, the Act required the money to be deposited in the name of the provincial treasurer and to be paid out by him only as provided by the Act and the Orders-in-Council thereunder. Surely, if any matter could be essentially a matter of local or provincial concern, this was one.

The crux of the matter is apparently whether it comes under (*b*) as legislation upon a matter of merely local or provincial concern but which incidentally has gone too far and trespassed upon the federal jurisdiction. The argument of counsel for the appellants was principally directed to the substantiation of this contention. It is said that the bank has a lien on the deposit for moneys advanced to the construction company, that the bank has an assignment by the construction company of these moneys to secure their advances—that a time deposit has been turned into a demand deposit—that the legislature in seizing upon the moneys has deprived the bank of a security for advances made by the bank. Section 77 of the Bank Act provides that the bank shall have a privileged lien for any debt on the shares of its own capital stock and any unpaid dividends of the debtor or person liable to the bank. The bank may not retain these shares but must sell them within twelve months. Section 78 provides for the sale by the bank of stocks, bonds, debentures or securities held as collateral securities. Section 96 provides that "the bank shall not be bound to see to the execution of any trust, whether express, implied or constructive, to which any deposit under the authority of the Bank Act may be subject." Sub-section 2 of the same section provides that "except only in the case of a lawful claim by some other person before repayment the receipt of the person in whose name the deposit stands shall be a sufficient discharge."

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

SIMMONS, J.

Section 95 indicates one such lawful claim, *viz.*, a claim made upon money deposited by a person under disability as to contracting; other lawful claims might arise in the case of an executor or administrator provided for in section 97, and other lawful claims might arise out of attachment proceedings or executions against the depositor's funds.

The banks are the recognized mediums of transmission of moneys from one place to another; they are largely the repositaries of the savings of the people and largely the mediums of payment between traders and their customers. The Parliament of Canada, in the above sections, have provided that the bank shall have special privileges and special immunities in the matter of receiving and paying out of the moneys of customers. Parliament has thus recognized that the banks, being the medium of circulation of moneys, should be as far as possible untrammeled in their transactions, especially in the matter of paying out moneys deposited by customers. The Federal Parliament did not deem it necessary that a banker's lien on moneys or securities deposited with it should have any special rights or privileges. The banker's lien then is a common law right arising out of the law merchant.

In *Brandao* v. *Barnett*, 12 Cl. & F. 787, it was held that the general lien of a banker is part of the law merchant and is to be judicially noticed like the negotiability of bills of exchange. It does not arise upon securities deposited with it for a special purpose.

In *Davies* v. *Bowsher*, 5 T.R. 481, at p. 591, Lord Kenyon says:—

> Bankers have a general lien on all securities in their hands for their general balance unless there is evidence to shew that any particular security was received under special circumstances which would take it out of the common rule.

Falconbridge on Banks says: "The general lien exists only for debts due the bank."

In *Foley* v. *Hill*, 2 H.L.C. 28, the relation of a banker and his customer is defined: "The money paid into the bankers is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own" "he is, of course, answerable for the amount because he has contracted, having received that money, to repay to the principal an equivalent sum to that paid into his hands."

There is no doubt but that the position of the provincial treasurer was that of trustee for the contingent interest of the company in the money as and when earned and also for the province which was liable on the guarantee, and also interested in seeing that the moneys were used for the purpose provided in the Guarantee Act. The Guarantee Act specially provided that

the money should be paid into a bank designated by Order-in-Council. There was plainly a power in the executive to take the whole or part of the moneys out of any one particular bank and place it in another. There was provision for the contingency that the company might not implement its undertakings to construct the road, and the right was reserved to both the bondholders and the province to foreclose upon the works of the company. There was the contingency that the company might go into compulsory winding up proceedings. The province, wisely, I think, for its own safety against these contingencies provided that the money should be deposited in a bank to the credit of its own treasurer and subject to the will of its own executive as to time and manner of paying out, not inconsistent with the Act.

In the face of this the bank proceeded to enter into an arrangement with the construction company, the assignee of the railway company, whereby the bank agreed to make advances to the construction company and take an assignment of the interest of the construction company in these moneys as and when earned. The bank does not contend that any of the moneys were earned in the sense that any sum ever became due and payable out of the fund to the construction company. The appellants say, however, that having made this bargain with the construction company and having advanced moneys that they became *ipso facto* entitled to a prior lien or equitable claim, even as against the province. The logical result of such a contention would be that the bank might have advanced to the construction company the whole $7,400,000 on the security of their assignment and in the event of the construction company making default in their undertaking the bank would step in and say we are entitled to the money as we advanced it on the security of our assignment, and if the province does not pay us our money advanced out of the fund in their possession it will be robbing us of our security and contravening rights inuring to us under a Federal Act and, therefore, the Act of the province is *ultra vires*.

The appellants completely fail to indicate any intention in the Bank Act dealing with such a banker's lien. They insist, however, that their assignment from the construction company is a security which they are entitled to take under the Bank Act —the Bank Act has prohibited the bank from taking certain classes of securities—this is not in the prohibited class—therefore, the Bank Act has authorized the taking by the appeal bank of such a security. I do not for a moment dispute their contention that they were within their rights and within the legitimate scope of banking business in taking security on what was plainly a contingent interest of the construction company. Such interests are by law assignable. Their assignment from the con-

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Simmons, J.

struction company says "and when earned," while the assignment from the railway company to the construction company recites: "do assign, transfer and set over, when and as earned, under the terms of the statutes in that behalf and the agreement for the construction of the railway made," etc. The assignment to the bank cannot transfer anything beyond what the assignment from the railway company to the construction company contained so far as transferring an interest in the moneys.

The appellants are driven back to the statutes of 1909, and the agreement therein authorized as the creator and author of whatever potentiality attaches to their assignment. But, before the appellants are upon firm ground they are driven to asserting that the provincial legislature, having created an expectancy which if of some value and the property in which has passed to the bank by way of collateral security, cannot extinguish its own creation, because in so doing it will trespass upon the claims of the bank, a creature of Dominion creation and powers.

The fallacy of this contention seems to me to lie in this—that the application of such a rule would reduce the powers of the provincial legislature to such an extent as to make it a subsidiary and dependent institution, subservient on every hand to the federal power whenever any provincial legislative Act created conditions which brought about any business relations or transactions of the provincial subject and the Federal subject. Such a narrow limitation of provincial powers would defeat the whole scheme of the Act, which was essentially a division of legislative jurisdiction.

The appellants claim that a time deposit was changed into a demand deposit fails on the same ground. The Guarantee Act and the Orders-in-Council issuing thereout fixed the conditions of the deposit, and in no manner did the legislature indicate that the deposit should remain in any one particular bank or be subject to any conditions arising out of contractual relations between the company and any bank receiving the deposit, save that rate of interest was to be such as agreed upon between the bank and the company. It is urged by the appellants that Mr. Rutherford, provincial treasurer, and Mr. McLeod, his deputy, were parties to the agreement whereby the bank agreed to make advances and that these advances were to be made in consideration of the bank receiving the deposit. Neither Mr. Rutherford or his deputy had any power to alter the conditions of the deposit either by way of contractual relation or otherwise. Neither could the executive government deal with it except as authorized by the statutes.

The plea that the Act of 1910 is *ultra vires* because it is a means of raising a tax by indirect taxation and unauthorized under sub-sec. 2 of 92, does not seem to me tenable.

The Act impugned is essentially a confiscatory Act in the same sense that it takes away from the railway company and its assignee, the construction company, rights and interests created by the province and arising directly from the provincial legislation of 1909. The statute of the province, as indeed the statutes of all the provinces of Canada, contain legislation in abundance of a confiscatory character affecting property and civil rights in the province, with the result that the owner is divested of his ownership and possession, both of which pass to the province. Having conceded legislative jurisdiction over property and civil rights, the plenary power inherent in the provincial jurisdiction includes necessarily the lesser power to confiscate. But, though the confiscated property vests in the province, it does not follow that the confiscatory Act comes within sub-sec. 2 of 92 as being direct taxation within the province.

The evidence of ex-Premier Rutherford indicate that the legislation of 1909 was the subject of agitation and criticism, both within the legislature and with the public, during the session of 1910—that there had been a general election in the meantime and that the executive over which he presided had resigned.

The Act itself, even outside of this seems to indicate clearly the intention of the legislature, namely, that the moneys arising out of the sale of the railway company bonds, and for which the province was liable, should be removed from the control of the railway company and its assigns, and that the said companies should be divested of all rights and interests therein, and the railway company relieved of any liability thereon.

Section 5 of Alberta, 1906—an Act respecting the treasury department—recites that all revenues from whatever source arising over which the Legislative Assembly has power of appropriation, shall form one general revenue fund. The public accounts of the province indicate many sources of revenue which do not arise out of direct taxation or licenses. These all go into the general revenue fund.

The claim of the appellants that the Act affected property and civil rights outside the province was not so strongly argued before this Court as the claim that the Act infringed upon banking legislation. The debt was incurred by the province through its own legislative Act, the money was on deposit in a bank at the city of Edmonton, and was there for the purpose of being paid out in accordance with the statute and Orders-in-Council issuing thereunder, and the same reasons which I have indicated as applying to the claim that it was banking legislation apply here. The different parties whose residence or place of business happened to be outside the province must be presumed to know the law and deal with the province with the full knowledge that any substantive rights or interests which the province can create can be taken away by the province. The assumption that the

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Simmons, J.

acts of the legislative Acts cannot be valid so far as affecting the rights of extra-territorial persons or companies which said rights have arisen out of provincial acts, or contracts, arising thereout, made by the province with non-resident persons or companies if once assented to would go much farther and would invalidate the whole transaction—to wit, the sale of the bonds outside the province—the assignment by the railway company, a provincial concern, to the construction company, a Dominion concern, and the incorporation by the legislature of Mr. Clarke and others, non-residents of the province, as a railway company, to carry on business in the province.

The appellants say, however, that the Act is invalid because the recitals as to default made by the company are untrue. The authorities are clear that this Court cannot impugn the recitals of fact by the legislature.

Chief Justice Robinson in *City of Toronto and Lake Huron Ry. Co.* v. *Crookshank*, 4 U.C.R. 309, at p. 318, observes: "So far as this Act is concerned the legislature stating the fact is conclusive." To impugn the truth of the recitals by the Court would be an unwarranted assumption by the Court of legislative jurisdiction. The tribunal to deal with this subject so far as passing upon the good faith of the recital is the electorate of the province.

In regard to the question of interest it resolves itself into a mixed question of law and fact, *viz.*, did the bank in pursuance of an agreement with the construction company credit the principal moneys deposited with it, with interest from time to time so that the interest became a part of the fund which the construction company could legally insist as against the bank should be paid out to the company in pursuance of the Guarantee Act. The Guarantee Act provides "that the balance at the credit of the special account shall be credited with interest at such times and at such rate as may be agreed upon between the company and the bank holding the same" . . . and that "the balance if any of the proceeds of such bonds which may remain after the completion of the said lines of railway and Edmonton terminals shall be paid over to the company or its nominees." The Act of 1910 does not further describe the amount of interest, but describes it as "accrued interest." The Court must decide what the amount of "accrued interest" is. The only evidence of an agreement between the bank and the construction company by which rate of interest and times of credit of same is the letter of Mr. Neil, the general manager, of October 23rd, 1909, to Bertrand R. Clarke, the president of the construction company. The Act, having left the matter of rate of interest and times of credit of same to be agreed upon solely by the bank and the construction company, Mr. Neil quite properly specified what this agreement should be. Mr. McMillan on page 29 of

the case says: "There were no credits of interest . . . that the items under the heading of interest in red ink are an estimate of our profits," . . . and "that there has been nothing credited to the account." This is part of the plaintiff's case, and the plaintiff has put in Ex. 5 which is the ledger sheet referred to by the witness. The memorandum at the top of Ex. 5 is "allow 3½ per cent."

The learned trial Judge has not found as a matter of fact whether interest was credited to the account in pursuance of Mr. Neil's letter of October 23rd or not. I think a fair interpretation of the letter of Mr. Neil, of October 23, 1909, (Ex. 33) is this—the bank will pay 3½% on the deposits under certain conditions stipulated for in the letter. The plaintiff-respondent submits Mr. McMillan's evidence that the bank has not received the collateral advantages, and this is one reason why the conditions of the deposit have not been carried out. The evidence from which it is claimed a different conclusion should be drawn is the fact that the entries in red ink are computations at the rate of 3½% which would be credits for interest if the bank carried out its part of the agreement. The plaintiff-respondent has made the evidence in this regard of Mr. McMillan and Ex. No. 5 as explained by him a part of its case, and it seems to me they are bound by it in the absence of any contradictory evidence.

It appears to be quite consistent with the terms of the Guarantee Act that the legislature intended that the construction company should have the interest on these deposits, while the road was under construction for the purpose of retiring a part, at least, of the interest which was accruing on the bonds during construction, and not for the purpose of being added to the fund which was to be paid out on the ten mile estimates.

Section 5 of the Guarantee Act provides that the account may be dealt with in alternate ways, and the company selected the second alternative. The first alternative says:—

> The balance at the credit of the special account or accounts shall be credited with interest at such times and at such rate as may be agreed on between the company and the bank holding same, and the said balance shall from time to time be paid out to the company or its nominee in monthly payments,

while the alternate plan selected by the company says: "The moneys so paid into the bank shall be paid out——." Then follows the general provision:—

> The balance, if any, of the proceeds of such bonds which may remain after the completion of the said lines of railway and Edmonton terminals shall be paid over to the company or its nominees.

The last clause quoted would clearly in a grammatical sense apply to either alternative, but as the last one was selected it governs it in regard to the payment out "of the moneys so paid

ALTA.

S. C.
1912

THE KING
v.
THE ROYAL BANK.

Simmons, J.

into the bank." The result is that if the first alternative of payment had been selected by the company, provision was made for the payment of the balance (principal and interest) in monthly payments, while the second method selected by the company provides only for payment out of "the moneys so paid into the bank," and no provision is made for the payment out of interest which may have been added from time to time on the balance, unless it is taken to be included in the general clause, "The balance, if any, of the proceeds of such bonds . . . . the completion of the said respective lines and terminals."

My conclusion is that the judgment appealed from should be allowed in regard to the items of interest from the dates of the different deposits to the date of passing of the Act of 1910. The question of interest subsequent to that date was in the discretion of the trial Judge and should not be disturbed.

The result is that there will be judgment for the plaintiff for six million and forty-two thousand and eighty-three dollars and twenty-six cents ($6,042,083.26), and interest at 5 per cent. thereon from December 16th, 1910.

In accord with judgment of this Court on the interlocutory application herein there will be no costs to the respondents, and the appellants having failed on the main part of their appeal should have no costs.

Judgment for plaintiffs.

N.B.—An appeal has been taken from the above decision to the Judicial Committee of the Privy Council.

QUE.

S. C.
1912

May 7.

BANK OF BRITISH NORTH AMERICA v. HART et al.

Quebec Superior Court. Trial before Saint-Pierre, J. May 7, 1912.

1. BILLS AND NOTES (§ VI B—158)—ACTION ON ORIGINAL NOTE—EFFECT OF RENEWAL.

When a note is renewed the fact of such renewal does not operate as a novation and it is immaterial whether the holder sues on the original note or on the renewal note; the remedy on the original note is merely suspended until the maturity of the new one.

[See Annotation to this case.]

2. BILLS AND NOTES (III B—64)—LIABILITY OF ENDORSER—RENEWAL—CANCELLATION OF ENDORSEMENT WITHOUT AUTHORITY.

The fact that the endorsation on the original note has been erased after a renewal has been given does not result in novation and does not release such endorser from liability thereon in the event of non-payment of the renewal, when such cancellation has been made unintentionally or without the authority of the holder (*e.g.*, by an assistant manager of a bank acting without instructions).

3. BILLS AND NOTES (§ III C—75)—DISCHARGE OF ENDORSER—RENEWAL OF NOTE—ALTERATION IN TIME TO RUN.

Where a renewal note endorsed by the same endorser as the earlier note is altered by a change in the time it was to run made after its

endorsation and without the endorser's consent, the endorser is discharged from liability on the earlier note as well as on the renewal note.

H. J. Hague and *C. J. Heward*, for plaintiff.
Lawrence Macfarlane, for defendants.

SAINT PIERRE, J.:—C. B. Hart is the son of his co-defendant, Lewis A. Hart, a well-known notary in Montreal.

On the 10th of September, 1908, C. B. Hart who, for the sake of brevity, I shall designate as Hart, junior, obtained from the Bank of British North America, the present plaintiff, a loan to the amount of $2,500, upon a note for that amount at four months, signed by Hart, senior, payable to his (C. B. Hart's) order, and endorsed by him.

When this note became due on the 13th of January, 1909, it was renewed by another four months' note for the same amount, but this time signed by Hart, junior, as maker, payable to his own order and endorsed by Hart, senior. This last note was again renewed at maturity on the 17th May, 1909, and the one given on that date by another bearing date 20th September of the same year.

When this September note was about to become due in January, 1910, the following incident took place:—

Hart, junior, the maker of the note, was then living in New York City. Knowing that this note was about to mature he, on the 20th January, wrote to his father at Montreal enclosing in his letter a renewal note, dated January 24th, 1910, for $2,500, together with a cheque for the same amount intended to cover the note about to become due. Hart, senior, endorsed this renewal note, and took it, together with the cheque, to Mr. Elmsly, the manager of the bank.

Here, however, Mr. Hart met obstacles in his way which apparently he had not anticipated. Mr. Elmsly told him that the bank could not consent to any more renewals on the same conditions which had been accepted in the past, and that some means must be resorted to in order to pay the bank's claim and reduce the amount mentioned in those renewed notes. Mr. Elmsly, however, said that, though he was unwilling to take any more renewal note at four months, he would this time consent to accept one at two months, and that if the note now offered was altered into a two months' note, by striking off the word "four" and substituting thereto the word "two" upon it, he would discount it.

This, says Mr. Elmsly, was agreed to by Mr. Hart, senior, and it was understood that the note would be at once sent back to Hart, junior, in order that the suggested alterations might be made. As Mr. Elmsly was about to write to Hart, junior, in reference to some other affairs connected with the bank, he kept the note in his possession, and enclosed it in his letter. The

QUE.
S. C.
1912
BANK OF BRITISH NORTH AMERICA v. HART.
St. Pierre, J.

note came back in due time with the word "four" crossed and the word "two" inserted in it and initialled by Hart, junior. It was at once put to the credit of the latter, both in his bank book and in the ledger of the bank. The cheque of Hart, junior, which was in Mr. Elmsly's hands, was then used to cover the amount of the September note, and the whole transaction was closed.

The September note having become due pending the exchange of letters between Mr. Elmsly and Hart, junior, Hart, senior, who was the endorser on it, consented to waive protest.

A few days later, after the January note had been received and discounted, Mr. Hart, senior, again called at the bank and got Mr. Ambrose, the assistant manager, to obliterate his name on the back of the September note, the reason given being that as said note had been renewed, his liability as endorser upon it was now at an end.

This note, however, remained in the possession of the bank, along with the previous renewal notes which had also been retained.

When the January note became due, no payment nor renewal being offered, it was protested in due course, and a few months later, the present action against the two Harts, father and son, was taken out for the recovery of the sum of $2,500 with interest from the 24th January, 1910, and the costs.

For reasons which will be better understood later on, the bank instead of suing upon the January note of 1910, based its action upon the previous one, that is upon the September note of 1909, at the same time tendering to the defendants the January note.

The two defendants, having severed in their defence, I shall give in substance the ground set up by each of them.

The plea of Hart, senior, may be condensed as follows:—

He alleged: (1) That he was but a *prête-nom* for the bank, and that he had only acted as its agent. There having been no attempt made to substantiate this pretension by proof, I shall take no further notice of it; (2) that the September note now sued upon had become extinct by the renewal note of the 24th of January, 1910; and as proof that "novation" had actually taken place, he points to his name as endorser on said September note which was erased by the bank; (3) that in any event this September note had been paid off by the cheque of Hart, junior, said payment being shewn by the entry made in his (Hart junior's) bank book; (4) that the terms of payment on the January note were altered from "four months" to "two months" without his consent or knowledge, and that as his endorsation of said note had been written prior to said change, said endorsation had become null and void, and he in consequence had been discharged and was now freed from any lia-

bility, not only on said January note but also on the September note now sued upon as well.

The plea of Hart, junior, is limited to two grounds only: He claims (1) that the September note had become extinct by the acceptance of the renewal note of the 24th January, 1910; and (2) that in any event, said September note was paid by his cheque of $2,500, which cheque was charged to him in his account at the time of the renewal.

As the reasons urged by Hart, junior, are included in the plea of Hart, senior, I shall deal with both pleas together as one.

In the first place I must state that the defendants are clearly in error when they assert that the renewal of a note has the effect of extinguishing the old note and of substituting a new debt in the place of the old one; in other words, that it creates what is known in law as "novation." All the text-writers and all the precedents agree on this point.

"When a renewal bill is taken," says Maclaren, (On Bills and Notes and Cheques, 4th edition, page 338) "the original one is not discharged, unless there is a special agreement to that effect. . . . The remedy on the original bill is suspended until the maturity of the new one; if that is paid or discharged, so is the original one. If the new one is dishonoured, the original liability revives."

> The acceptance of a renewal note is a conditional payment, and while it is current, an action will not lie on the original one.

Murray v. *Gastonguay* (1880), 13 N.S.R. [1 R. & G.] 319:—

> The receipt of a cheque which is subsequently dishonoured is not a payment and is not a novation of the original debt.

Corporation of Kingsey Falls v. *Quesnel* (1888), 19 R.L. 470.

Girouard (On Bills and Notes, p. 213):—

> The acceptance of a renewal note does not operate novation and discharge, unless there is an express intention to that effect.
>
> When the holder retains the original bill, a renewal operates no novation.
>
> A payment by cheque or bill operates no novation, and the old debt is not discharged, if such cheque or bill be dishonoured.
>
> The intention (to operate novation) is presumed from the surrender of the original note.

Maclaren (at page 338): "The renewal or new bill will operate as a discharge if the parties have so agreed. If the holder has retained the old bill, the presumption will be that such was not the intention of the parties."

In the present case, however, the contention of Hart, senior, is that the intention of the bank to discharge his endorsation on the September note was made manifest by the fact that his name on the back of it was erased by one of the officers of the bank.

QUE.
S. C.
1912
BANK OF BRITISH NORTH AMERICA v. HART.
St. Pierre, J.

The answer to this contention is to be found in sec. 144 of the Act relating to Bills of Exchange, Cheques and Promissory Notes (53 V., ch. 33).

This article is in the following terms:—

> A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative.

Now, we have it in evidence that assuming that said cancellation was made by Mr. Ambrose, as pretended by Hart, senior, that gentleman had no authority from the bank to do anything of the kind, and said cancellation, if made by him, must have been the result of a misunderstanding or of some error.

The next reason urged is that the September note now sued upon was paid by the cheque given by Hart, junior, and used at the time of the renewal to cover up that note.

It is clear that this other contention cannot prevail. The evidence shews that after the January note was discounted and the proceeds of it were put to the credit of Hart, junior, in his bank book and in the ledger of the bank, the cheque was used to cover up the old note with the proceeds of the new. This was not a payment, it was but the shifting of the sum of $2,500 from one side of the ledger sheet, containing the account of Hart, junior, to the other, and nothing more. It was a mere matter of bookkeeping. If the use of the cheque, under the circumstances here mentioned, may be called a payment it was one for the ledger keeper alone, and for nobody else in the world.

The last reason urged is a personal one to Hart, senior; he alleges that the note after its being signed and endorsed was altered so as to read as a note payable at two months instead of one payable at four, as originally drawn up, and that such change was made without his knowledge and consent.

This pretension of Hart, senior, involves two questions: first, one of law; and second, one of fact.

The question of law is the following one:—

Admitting that what Hart, senior, says is well founded in fact, could he have been sued upon the January note? My answer is that he could not.

It has been held in the case of *La Banque Ville-Marie* v. *Primeau*, 4 Legal News, 19, and L.C.J. 20, and also in that of *The Quebec Bank* v. *Ogilvie*, 3 Q.R., 200, and 5 L.N., 183:—

> That where a promissory note bears on its face a manifest alteration of date, the holder who had discounted the notes for the maker could not recover from the endorser, without shewing either that the alteration was made before the endorsation or that it was made with the endorser's consent.

Section 145 of the Bills of Exchange Act is to the same effect.

For the sake of argument, I for the moment, will take it as granted that the note in question was actually altered without

QUE.

S. C. 1912

BANK OF BRITISH NORTH AMERICA v. HART.

St. Pierre, J.

the knowledge and consent of Hart, senior, and this at the time when his endorsation was already written on the back of the note. It is clear from the two above decisions, as well as from the terms of sec. 145, that he could not be held liable on the January note.

Could he be held liable, however, on the September note which preceded it? My answer is equally in the negative, for the plain reason that a renewal note being a conditional payment, if the endorser is released on the renewal note, then he is discharged from any liability for all intents and purposes. "Release" *quoad* the party benefited by it, is equivalent to "payment," and it needs no argument to demonstrate that the party who had paid is free from any further liability.

I, therefore, have no hesitation in coming to the conclusion that if Hart, senior, could not be held liable on the January note he could not any more be held liable on the September one, which preceded it.

But now comes the question of fact:—

Is it true that the January note was altered without the knowledge and consent of Hart, senior, who was the endorser of it?

On this point I have no hesitation whatever in saying that not only did he know all about it, but that he clearly assented to its being altered in the manner suggested by Mr. Elmsly.

At the trial of the case I expressed my surprise that the action had not been based on the January note, which was the last one issued, instead of the September one. The answer was that the September note had been chosen in preference in order to obviate such difficulties as might be raised by Hart, senior, in reference to his pretensions with regard to the alteration of the note.

But it is clear to me that this shifting from one note to the other changed absolutely nothing in the respective rights of the parties, and that if Mr. Hart's contention is correct as to the January note, it is equally so as to the September one.

As I find, however, that the two defendants were in no way prejudiced by the election made by the bank with regard to the note, which they decided to use as the basis of their action, and for the reasons I have given above I hold that they are equally liable, whether they were sued on the September note or on the January one.

Judgment, therefore, will go against the two defendants, jointly and severally, for the sum of $2,500, with interest from the 24th January 1910, less, however, a sum of $316 and interest accrued thereon since the 3rd November, 1910, for which a retraxit was filed at the close of the enquête.

Judgment for plaintiffs.

N.B.—See Annotation, page 816.

QUE.

Annotation

Bills and notes—Effect of renewal

Annotation—Bills and notes (VI B—158)—Effect of renewal on original note.

A clear and succinct statement of the general rules of law upon the question here offered for discussion as established in Canada by the decisions of the Courts is found in Falconbridge, Banks and Bills of Exchange, 576:—

A creditor who takes a bill for a pre-existing debt presumably takes it as conditional payment of the debt, the condition being that the bill so taken is paid at maturity. If the bill is dishonoured and the requisite proceedings on dishonour are taken or waived, then the original debt revives. The same principles apply to the renewal of a bill. When a bill is given in renewal of a former bill, and the holder retains the former bill, the renewal, in the absence of special agreement operates merely as a conditional payment of the former bill: *Noad* v. *Bouchard* (1860), 10 L.C.R. 476, 8 R.J.R.Q. 473; cf. *Lewis* v. *Lyster* (1835), 2 C.M. & R. 704; *Lumley* v. *Musgrave* (1837), 4 Bing. N.C., at p. 15: If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged: *Dillon* v. *Rimmer* (1822), 1 Bing 100; but if the renewal bill be dishonoured, then the liabilities of the parties to the original bill (other than a surety who has been released by the extension of time given to the principal) revive, and they may be sued thereon: *Ex parte Barclay* (1802), 7 Ves. Jr. 597; *Norris* v. *Aylett* (1809), 2 Camp. 329. Renewing a bill or note operates as an extension of the time for paying it. Hence, if a bill be renewed without the assent of all parties liable thereon as sureties, the parties so liable are discharged: Cf. *Oriental* v. *Overend* (1871), L.R. 7 Ch. 142; (1874), L.R. 7 H.L. 348; *Torrance* v. *Bank of B.N.A.* (1873), L.R. 5 P.C., at p. 252.

Where the plaintiff deposited money with a banking firm composed of two partners and received as an acknowledgment thereof a promissory note of the firm for the amount payable one month thereafter and allowed the note to stand for six years when he accepted a new note similar in all respects except the date and a slight difference in the amount, which note was signed in the name of the firm by the surviving partner, the other having died in the meantime, there being no introduction of a stranger into the contract, or a new term or condition incorporated therein so as to create a novation, and thereafter the surviving partner failed in business, the plaintiff was entitled to claim against the deceased partner's estate four years after his death, his estate being still unsettled and it not appearing that those interested had been in any way prejudiced by the delay, and no proof being given to an express agreement or of facts and conduct on the part of the parties from which an agreement could be fairly inferred that the plaintiff in taking the new note intended to discharge the deceased partner's estate: *Re Estate at Ives, ex parte Campbell*, 19 N.S.R. (7 R. & G.) 108, 7 C.L.T. 146.

Where a company executed notes which were renewed from time to time and were finally consolidated into one note given to the same payees by a third party personally, whose business had been carried on in the name of the company before its incorporation, and whom the Court found to be a surety only as to the original debt, the third person's note was not taken in satisfaction of the earlier notes of the company and it operated only to suspend the right of action on them during the currency of the renewal made by the third party, and therefore such payees were allowed recovery on

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

QUE.

Annotation.

Bills and notes—Effect of renewal

the original notes signed by the company though they had made claim against the estate of the third person, he having died in the meantime, applying the rule that, the company being the principal debtor of the notes and the third person a surety only, proof against the surety's estate was no bar to an action against the principal debtor: *Baldwin Iron and Steel Works (Ltd.)* v. *Dominion Carbide Co.*, 2 O.W.R. 6.

No recovery can be had on a note by the payee against the maker thereof in an action begun on the same day on which the note having become due, the payee accepted a renewal note for a part thereof and agreed to wait until the next morning for the maker to pay the balance in cash, the payee still holding the renewal note: *Murray* v. *Gastonguay*, 13 N.S.R. (1 R. & G.) 319.

In *Rockwell* v. *Wood*, 39 N.S.R. 423, in which it was held that there was no renewal of the note sued on, the language of Judge Russell would seem to indicate that he was of opinion that if a payee of a note which with his consent was renewed kept both notes in his possession, it would be clear that he did not mean to discharge the original note.

The acceptance of a note in renewal of one previously made is not a novation unless there be an expressed intimation to that effect; if the maker of a renewal note intends to effect a novation he should demand the return of the original note from the holder thereof: *Noad* v. *Bouchard*, 10 L.C.R. 476, 8 R.J.R.Q. 473.

For a note given in renewal of an earlier one to operate as a novation, a difference between them is necessary: *Brown* v. *Maillioux*, 9 L.C.R. 252, 7 R.J.R.Q. 218; the Court quoted Pothier, Obligation No. 596, Contract de change No. 189, to the effect that although it is expressly declared in the new instrument that the party intended it to be a novation it is necessary in order to make it such that it contain something different to the original obligation.

Where a note executed by the maker by way of accommodation was discounted by the payees who, at its maturity, delivered to the holder by way of renewal a note purporting to be made by the same maker, which note the holder on that faith accepted and delivered up the old note, the fact that the renewal note was not signed by the same maker, the payees having fraudulently substituted for his signature that of another person of the same name, did not discharge the maker from his liability on the original note: *Irwin* v. *Freeman*, 13 Grant 465.

Where a defendant joined in a promissory note, as the payees knew, for the accommodation of his co-maker and upon its maturity the latter tendered a renewal note purporting to be signed by the defendant, but which was in fact forged, which the payees, induced by the fraud of the maker, accepted, and gave up the original note stamping it "paid," the plaintiffs nevertheless retained the right to recover in equity from the defendant on the original note: *Matthews* v. *March*, 5 O.L.R. 540, 2 Com. L.R. 399. The same conclusion was reached in almost identical circumstances in *McIntyre* v. *McGregor*, 21 C.L.T.O.C. 25.

A surety on a note is discharged where, without his knowledge or consent, the holder accepted a new note in renewal thereof, on the understanding that he would not proceed on the original note, which he retained,

QUE.

Annotation.

Bills and notes—Effect of renewal

Annotation (*Continued*)—**Bills and notes** (VI B—158)—**Effect of renewal on original note.**

unless the new note was not paid at maturity: *Shepley* v. *Hurd*, 3 O. A.R. 549.

Where a woman signed a note in blank, and gave it to her son "to be used as he liked," and he filled it up for a specified amount and made it payable in three months and signed it and transferred it to the plaintiff who was not made aware of the circumstances under which it had been signed, and it was renewed twice by the son alone without his mother's signature, the original remaining in the plaintiff's hands, the authority given by her to the son as to using the note as he liked did not extend to his keeping it afloat without her knowledge and, being only a surety as to the first note, she was discharged by the acceptance of the renewal notes: *Devanney* v. *Brownlee*, 8 O.A.R. 355.

Where a mother made a note at eighteen months in favour of her son, and for his accommodation, and gave it to her son without any restriction as to its use and the son transferred the same to the plaintiff and at the same time gave the plaintiff his own note of the same date at three months, and took from the plaintiff a receipt stating that he had received from the mother her note and that it was given only as collateral security for the payment of the son's note, and stipulating that when the son's note was fully paid the mother's note should be returned, and less than a month after the execution of the note a statement of account took place between the plaintiff and the son, when the son took up his note by giving the plaintiff another note for a like amount due three months from the date of its execution, the true construction of the agreement was that the son should have eighteen months, or so much thereof, as the plaintiff might choose to give him in which to pay off his own note; that his note might be renewed from time to time so long as payment was not extended beyond eighteen months; and that under the circumstances the new note could not be deemed to have been taken as a payment of the original note: *Healy* v. *Dolson*, 8 O.R. 691.

So indorsers of a note, who give their consent to its renewal, are liable on the first note notwithstanding the insolvency of the maker thereon: *Woodbury* v. *Garth*, 9 L.C.R. 438, 5 R.J.R.Q. 421, affirming *Garth* v. *Woodbury*, 5 R.J.R.Q. 420.

The company respondents sued on a promissory note signed by the appellant and payable to the order of the respondents for value received. The respondents admitted that they paid no cash consideration to the appellant for this note, but stated that it was given in partial renewal of a previous note for a similar amount, which appellant executed in favour of one S., and which was indorsed and transferred to respondents, with another of like amount, in settlement of the overdrawn account of S., who was their general manager. It was held: (1) Where the connection between the first note, for which valid consideration was received, and the notes given in renewal thereof is clearly established, want of consideration is not a valid defence to an action by the payee against the maker on a renewal note in which the latter acknowledges to have received value. (2) Such connection may be proved, as in this case, by a consecutive and uninterrupted series of dates in the payee's books in regard to the transaction, together with the probability that the payee

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

QUE.

Annotation

Bills and notes—Effect of renewal

would not have surrendered a valid note without receiving a valid renewal. (3) Even in the absence of positive proof that the first note was indorsed by S. to the company, the Court may reasonably presume that such was the case from the fact that it was delivered to the company and was in the custody of the company's cashier, together with the fact that the note now sued upon was given by the appellant for the value received and was payable directly to the company: *Ross* v. *Western Loan and Trust Co.*, 11 Que. K.B. 292.

It is well settled that if an original note is voidable for failure of consideration, no amount of renewing will cure the defect, unless some new consideration is introduced, and that a mere compliance with the maker's request to renew does not constitute such consideration: *Bullion Mining Co.* v. *Cartwright*, 10 O.L.R. 438.

Where certain persons after they had made and filed their declaration of intention to form a company and before the incorporation was completed, executed notes in the name of the company about to be formed for the payment of certain debts contracted after the declaration of such intention to incorporate, and the notes after the completion of the incorporation were renewed by other notes signed by the company and were surrendered altogether, the original obligations were novated and paid: *Brewster* v. *Chapman*, 19 L.C.J. 301.

The indorser of a note is entitled to the benefit of the extension of time given to a maker by a renewal of note: *Molsons Bank* v. *Cooke*, Q.R. 27 S.C. 130 (C.R.).

The English decisions upon the questions discussed in this annotation are governed by the same principles of law as the Canadian cases.

Primâ facie, the giving of a new instrument in place of an existing one, has the effect not of discharging the instrument then existing but of being a conditional substituting of it, so that if the new instrument is duly paid at maturity the first instrument is discharged; but if not then the dormant rights of the first instrument are revived: 2 Halsbury's Laws of Eng. 553.

When a bill is given in renewal of a former bill, and the holder retains such formal bill, the renewal, in the absence of special agreement, operates merely as a conditional payment thereof. If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged; but if the renewal bill be dishonoured, then, subject to the preceding rule as to principal and surety, the liabilities of the parties to the original bill revive, and they may be sued thereon: Chalmers, Bills of Exchange, 6th ed., 227. See also Byles, Bills, 17th ed., p. 251.

Bills in lieu of which other bills were given if permitted to remain with the holder and the latter bills are not paid, may be enforced: *Ex parte Barclay*, 7 Ves. 597.

Where the holder of a bill becoming due, agrees to receive another bill in renewal of it, his remedy on the first is suspended till the second is dishonoured, as well for expenses incurred by non-payment of the first as for its amount: *Kendrick* v. *Lomax*, 2 Tyr. 438, 2 Ch. & J. 405, 1 L.J. Ex. 145.

To a declaration by an indorsee against the maker of a note for £420, the maker pleaded, that after it became due, he gave the plaintiff two

QUE.

Annotation.

Bills and notes—Effect of renewal

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

bills for £210 each, to take up the note, and in lieu thereof; that the defendant was a party to the bills, and liable thereon to the plaintiff, and that they were not due, and were outstanding in his hands. The defendant gave in evidence a memorandum signed by the plaintiff, stating that the defendant had given him two bills for £420; and one of the bills was overdue and unpaid at the commencement of the action. It was held that it was a question for the jury whether the bills were given in lieu of and satisfaction of the note, or only to gain time for payment; if the former, it was a defence to the action, although the defendant did not prove the latter allegation of the plea; if the latter, it was no defence, unless he proved that both the bills were outstanding at the commencement of the action: *Goldshede* v. *Cottrell*, 2 Mees. & W. 20, 6 L.J. Ex. 26.

The payment of a bill given for the renewal of an earlier bill, and for the same sum, does not prevent the action on the old bill for the recovery of interest thereon left unpaid at the time of the renewal: *Lumley* v. *Musgrave*, 4 Bing. N.C. 9, 5 Scott 230; *Lumley* v. *Hudson*, 4 Bing. N.C. 15.

Where the holder of two bills about to fall due agreed with the drawer to renew them by bills to be accepted by the drawer of the old bills alone, on condition that a certain person guaranteed the new bills, and the holder wrote to such person to that effect who replied that he guaranteed payment by such drawer of the two bills which the holder intended to renew for him, giving their respective amounts and the dates on which they were respectively due, and two bills were drawn by the holder on the drawer of the old bill, both dated the same day, for amounts differing from the former bills but for the same amount in the aggregate, and these bills were not met when due, it was held that the true construction of the letters between the holder of the original bill and the person desired as guarantor did not call for the bills to be renewed in the strict sense of that term that the new bills should be for the same amount and between the same parties, but was that the third person had guaranteed the payment of the aggregate amount of the old bills: *Barber* v. *Mackrell*, 2 Rep. 72, 68 L.T.N.S. 29, 41 W.R. 341.

Where the holder of a dishonoured bill agreed to take a portion thereof in cash and another bill for the balance and the drawer of the old bill accordingly drew another bill upon the same acceptor for the balance, and, while the new bill was in the hands of the drawer, the acceptor without the knowledge of the drawer altered the date and vitiated the bill, the new bill was a nullity, the first was not discharged and the drawer was liable upon it: *Sloman* v. *Cox*, 1 Cr. M. & R. 471, 5 Tyr. 174, 4 L.J. Ex. 7.

Recovery was allowed on a bill of exchange where its holder upon its being dishonoured received part payment, and for the residue, took another bill of exchange drawn and accepted by persons not parties to the original bill, in the absence of a shewing that the first bill was discharged: *Bishop* v. *Rowe*, 3 Maule & S. 362.

Where it was agreed in an action by the payee of the bill against the acceptor that the defendant should pay the costs then incurred, give a warrant of attorney and renew the bill, and the defendant, though he performed the last two conditions, failed to pay the costs, the plaintiff had a right to begin a fresh action on the first bill while the second was outstand-

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

QUE.

Annotation.

Bills and notes—Effect of renewal

ing in the hands of an endorsee: *Norris* v. *Aylett*, 2 Camp. 329 (1809). Here the substituted bill was dishonoured when due and was retired by the plaintiff before trial and remained unsatisfied in his possession.

Where it appeared that the defendant being indebted to the plaintiffs on a bill which was dishonoured gave another bill and also a warrant of attorney to confess judgment in case the second bill would not be paid when due and agreed to pay the expenses of executing the warrant of attorney and duly honoured the second bill but failed to pay such expenses, the plaintiff had no right to sue the defendant on the original bill which had been retained by him, since the second bill having been paid when due operated as a discharge of the first and altogether extinguished the plaintiff's right to sue thereon: *Dillon* v. *Rimmer*, 7 Moore 427, 1 Bing. 100, 1 L.J. (O.S.) C.P. 3 (1822). Recovery of the expense of the warrant of attorney, however, was permitted on the common counts of the declaration, the jury having found a general verdict for the plaintiffs thereon.

Recovery was denied on a note executed by the defendant to the plaintiff where it appeared that upon the note being dishonoured the plaintiff agreed to accept one quarter the face value of the note to be secured by the acceptance of a bill for that amount by the defendant's brother, which was accordingly given, it being agreed that the original note should remain in the plaintiff's possession and revive if the acceptance was not honoured, and the bill was not paid when due though on the following morning the defendant tendered to the plaintiff the amount of the bill with the acceptance thereon which the latter refused to accept: *Soward* v. *Palmer*, 2 Moore 274, 8 Taunt. 277, 19 R.R. 515.

In an action by the indorsee of a bill against its acceptor, a plea that the drawer indorsed to another who indorsed it to a third person in whose hands it remained until due, when he being unable to obtain payment of it, returned it to his indorser who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to the holder another bill drawn for a greater amount by the same party and accepted by the defendant which the holder of the original bill received in discharge and satisfaction thereof, is a sufficient answer to the action, although it does not appear that the second bill was payable to order: *Lewis* v. *Lyster*, 2 Cr. M. & R. 704, 4 D.P.C. 377, 1 Gale 320, 1 Tyr. & G. 185.

In *Wynne* v. *Callender*, 1 Russ. 293, bills of exchange made in France in substitution of earlier bills made in England for a gambling debt were ordered to be delivered up as illegal and unenforceable.

Where a note was made without consideration and was renewed from time to time for an increased amount at each renewal without any further consideration, the last note so renewed was void for want of consideration: *Edwards* v. *Chancellor*, 52 J.P. 454.

Where a bill of exchange affected by usury came into the hands of an innocent holder who, on being informed of the usury, took a fresh bill in lieu of it, drawn up by one of the parties to the original usury and accepted by a third person for the accommodation of the other party to the usury, such holder can not maintain an action against the acceptor of the substituted bill: *Chapman* v. *Black*, 2 B. & Ald. 588.

QUE.

Annotation.

Bills and notes—Effect of renewal

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

But if the payee of a note given for a usurious consideration arrests the maker and to procure his liberation a third person joins the maker in another note for the amount of the debt, the usury which affected the first note cannot be set up as a defence to the second: *Turner* v. *Hulme*, 4 Esp. N.P.C. 111.

The American cases upon the question of the effect of substituting one note or bill of exchange for another, are legion and no attempt to collect them all is here made. The great majority of them support the rule that the renewal of a note or bill is not a payment of the original instrument in the absence of an agreement or an intention on the part of the parties to that effect, and that the substitution of one note or bill for another will merely suspend the original note or bill until the maturity of that given in renewal: *Peter* v. *Beverly*, 10 Pet. (N.S.) 532, 9 L. ed., 522; *Lee* v. *Hollister*, 5 Fed. 752; *Crockett* v. *Trotter*, 1 Stew. & P. (Ala.) 446; *Anniston Loan and Trust Co.* v. *Stickney*, 108 Ala. 146; *Triplett* v. *Mansur-Tebbetts Implement Co.*, 68 Ark. 230, 82 Am. St. Rep. 284; *Daniel* v. *Gordy*, 84 Ark. 218; *First Nat. Bank* v. *Newton*, 10 Colo. 162; *Gresham* v. *Morrow*, 40 Ga. 487; *Belleville Savings Bank* v. *Borman*, 124 Ill. 200; *Jansen* v. *Grimshaw*, 125 Ill. 468; *Chisholm* v. *Williams*, 128 Ill. 115; *Union Nat. Bank* v. *Post*, 93 Ill. App. 339, affirmed without reference to this question, 192 Ill. 385; *Adams* v. *Squires*, 61 Ill. App. 513; *Union Nat. Bank* v. *Post*, 64 Ill. App. 404; *Tyler* v. *Hyde*, 80 Ill. App. 123; *Ross* v. *Skinner*, 107 Ill. App. 579; *Bailey* v. *Robinson*, 123 Ill. App. 611; *Stevenson* v. *Anderson*, 30 Ind. 391; *Hill* v. *Sleeter*, 58 Ind. 221; *Bristol Milling and Manufacturing Co.* v. *Probasco*, 64 Ind. 106; *Weston* v. *Wiley*, 78 Ind. 54; *Reeder* v. *May*, 95 Ind. 164; *Bank of Commonwealth* v. *Letcher*, 3 J. J. Marsh (Ky.) 395; *Hobson* v. *Davidson*, 8 Mart. O.S. La. 422, 13 Am. Dec. 294; *Woods* v. *Halsey*, 42 La. Ann. 245; *Williams* v. *National Bank*, 72 Md. 441; *McMorran* v. *Murphy*, 68 Mich. 246; *Miller* v. *McCarty*, 47 Minn. 321; *Keyser* v. *Hinkle*, 127 Mo. App. 62; *Reynolds* v. *Schede*, 131 Mo. App. 1; *Hill* v. *Marcy*, 49 N.H. 265; *Jones* v. *Rider*, 60 N.H. 452; *First Nat. Bank* v. *White*, 60 N.J. Eq. 487; *Olcott* v. *Rathbone*, 5 Wend. N.Y. 490; *Bates* v. *Rosekrans*, 37 N.Y. 409; *Jagger Iron Co.* v. *Walker*, 76 N.Y. 522; *Weakley* v. *Bell*, 9 Watts Pa. 273; *Farmers Nat. Bank* v. *Marshall*, 9 Pa. Super. Ct. 621; *National Bank* v. *Gunhouse*, 17 S.C. 489; *Moses* v. *Trice*, 21 Gratt. 556; *Boston Nat. Bank* v. *Hose*, 10 Wash. 185; *First Nat. Bank* v. *Fink*, 100 Wis. 446; *Croker* v. *Huntzicker*, 113 Wis. 181; *Lowry* v. *Milwaukee Nat. Bank*, 114 Wis. 311. See also 2 Daniel, Negotiable Instruments, sec. 1266 *et seq.*

But the following cases seem to be opposed to this rule and to support the proposition that the giving of a renewal note is presumptively the payment of the earlier note: *Cornwall* v. *Gould*, 4 Pick. Mass. 444; *Butts* v. *Dean*, 2 Metc. (Mass.) 76; *House* v. *Alexander*, 2 Metc. (Mass.) 157; *Citizens Commercial and Savings Bank* v. *Platt*, 135 Mich. 267; *Hill* v. *Bostick*, 10 Yerg. (Tenn.) 410; *Nichol* v. *Bate*, 10 Yerg. (Tenn.) 429; *Cable* v. *Hardin*, 67 N.C. 472; *Slaymaker* v. *Gundacker*, 10 Serg. & R. (Pa.) 75; *Draper* v. *Hitt*, 43 Vt. 439.

And in *Ward* v. *Howe*, 38 N.H. 35, it was declared that in Massachusetts the law was that it was presumed that a renewal of a note paid it.

But there is a Massachusetts case which seems opposed to this doc-

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

QUE.

Annotation.

Bills and notes—Effect of renewal

trine. In *Woods* v. *Woods*, 127 Mass. 141, where the payee took a note for the same amount, signed by additional persons not parties to the old note, and retained the old note, it was held that there was no presumption of law that the payee received the new note in payment of the first note in the absence of an agreement to that effect.

In the following cases an express agreement that the renewal note was to extinguish the first note was said to be necessary in order to give the renewal note that effect: *Griffin* v. *Long*, 96 Ark. 268; *Savings Bank* v. *Central Market Co.*, 122 Cal. 28; *Bonestill* v. *Bowie*, 128 Cal. 511. But this is rather an extreme statement of the rule.

The three following cases offer illustrations of circumstances under which the old notes will be held discharged.

Where notes for similar amounts are given in substitution of an earlier note or notes for the purpose of enabling the holder to sue in a justice court and judgments were had on the new notes the original note or notes were cancelled and the new ones substituted therefor: *Re Dixon*, 13 Fed. 109.

Where the payee of a note indorsed the same in blank and placed it in the hands of another who in lieu thereof took a note from the maker for the principal and interest and surrendered the old note, the old note was extinguished: *Yates* v. *Valentine*, 71 Ill. 643.

Acceptance of a note of a third person for the full amount due on the note of the debtor discharges the old note: *Booth* v. *Smith*, 3 Wend (N.Y.) 66.

The renewal of a note for the payment of which collateral security is pledged is not such payment as to discharge the security in the absence of an agreement to that effect: *Collins* v. *Dawley*, 4 Colo. 138; *First National Bank* v. *Miner*, 9 Colo. App. 361; *Partridge* v. *Williams*, 72 Ga. 807; *Williams* v. *National Bank*, 72 Ind. 44; *Bank of America* v. *McNeil*, 10 Bush (Ky.) 54; *Aillet* v. *Woods*, 24 La. Ann. 193; *Buck* v. *Wood*, 85 Me. 204; *Watkins* v. *Hill*, 8 Pick. (Mass.) 522; *Pomeroy* v. *Rice*, 16 Pick. (Mass.) 22; *Taft* v. *Boyd*, 13 Allen (Mass.) 84; *Dodge* v. *Emerson*, 131 (Mass.) 467; *Christian* v. *Newberry*, 61 Mo. 446; *Holland Trust Co.* v. *Waddell*, 75 Hun. (N.Y.) 104; *Kidder* v. *McIlhenny*, 81 N.C. 123; *Barrington* v. *Skinner*, 117 N.C. 47; *Allston* v. *Allston*, 2 Hill (S.C.) 362.

Where the holder of a note was fraudulently induced to accept in renewal thereof a note upon which the name or names of parties charged on the old note were forged, such parties are not thereby discharged from their liability on the old note: *Allen* v. *Sharpe*, 37 Ind. 67, 10 Am. Rep. 80; *Loringer* v. *First National Bank*, 81 Ind. 354; *Sandy River National Bank* v. *Miller*, 82 Me. 137; *Central National Bank* v. *Copp*, 184 Mass. 328; *Bass* v. *Wellesley*, 192 Mass. 526; *Emerine* v. *O'Brien*, 36 Ohio St. 491; *Ritter* v. *Singmaster*, 73 Pa. 400; *West Philadelphia National Bank* v. *Field*, 143 Pa. 473; *Second National Bank* v. *Wentzel*, 151 Pa. 142; *Goodrich* v. *Tracey*, 43 Vt. 314.

A note given in renewal which was induced by fraud has no effect upon the old note: *Sawyer* v. *Wiswell*, 9 Allen (Mass.) 39; *Miller* v. *Wood*, 21 Ohio St. 485, 8 Am. Rep. 71; *Adams* v. *Ashman*, 203 Pa. 536.

Thus, a note given for the personal debt of the maker is not discharged by a note given in renewal executed without authority in the name of a

QUE.

Annotation.

Bills and notes—Effect of renewal

Annotation (*Continued*)—Bills and notes (VI B—158)—Effect of renewal on original note.

partnership to which the maker belonged: *Williams* v. *Gilchrist*, 11 N.H. 535.

A renewal by a usurious note of a note untainted with usury will not affect the earlier valid note: *Bank of Malvern* v. *Burton*, 67 Ark. 426; *Hughes* v. *Wheeler*, 8 Cow. (N.Y.) 77; *Winsted Bank* v. *Webb*, 39 N.Y. 325, 100 Am. Dec. 435; *Edgell* v. *Stanford*, 6 Vt. 551.

Where a note is renewed without the consent of a party charged thereon, such as a surety or endorser, he is discharged from liability on the old note: *Bailey* v. *Baldwin*, 7 Wend. (N.Y.) 289; *Platt* v. *Stark*, 2 Hilt (N.Y.) 399; *Wolf* v. *Fink*, 1 Pa. 435; *Maple* v. *Hicks*, 3 Pa. Law J. 17; *Hill* v. *Bostick*, 10 Yerg. (Tenn.) 410; *State Savings Bank* v. *Baker*, 93 Va. 510.

Indeed, the rule as to the discharge of a person charged on the former note by any change in the contract in the renewal note was carried to such an extent in *Crutcher* v. *Kentucky Bank*, 4 Litt. (Ky.) 436, that a renewal note was held not to be binding on accommodation endorsers on the old note where the order of their names as found on the old note was changed on the new without their authority.

As to the effect of a surrender or retention of the old note on its being renewed the American authorities do not seem in accord. In *Hadden* v. *Dooley*, 34 C.C.A. 338, 92 Fed. 274, reversed on other grounds, 179 U.S. 646, 45 L. ed. 357, the rule that a mere renewal of a note is not sufficient to extinguish the old note, is limited to cases where the original note is retained by the holder.

Where a note is surrendered and destroyed and a new note given in its place the old note will be no longer in force for any purpose: *Wickenhamp* v. *Wickenhamp*, 77 Ill. 92.

A new note intended as payment of an old one will be given that effect even if the old note was not surrendered: *Woodbridge* v. *Skinner*, 15 Conn. 306; *French* v. *French*, 84 Iowa 655, 15 L.R.A. 300; *First National Bank* v. *Getz*, 96 Iowa 139; *Gardiner* v. *Levasseur*, 28 La. Ann. 679; *Sage* v. *Walker*, 12 Mich. 425; *Dixon* v. *Dixon*, 31 Vt. 450, 76 Am. Dec. 129.

On the other hand it has been held that the acceptance by a holder of a bill of exchange before maturity of another bill with the understanding that it was received in payment therefor is not sufficient to establish payment where the old bill was not surrendered: *Bright* v. *Judson*, 47 Barb. (N.Y.) 29.

Where a bank holding notes for collection surrendered same to the maker and accepted other notes from him payable to the bank for the principal sum and credited the bank of the payee therewith, no credit as to borrowed money being given the account of the maker and no cash passing, there was no payment of the earlier notes in the absence of express authority from the payee thereof to the bank to take the renewal notes for that purpose: *Scott* v. *Gilkey*, 153 Ill. 168.

The surrender of a note and the acceptance by the holder of a new note in lieu thereof with new parties extinguishes the old note: *Dennis* v. *Williams*, 40 Ala. 633; *Horne* v. *Young*, 40 Ga. 193; *Gresham* v. *Morrow*, 40 Ga. 487.

QUE.

Annotation

Bills and notes—Effect of renewal

Annotation (*Continued*)—**Bills and notes** (VI B—158)—**Effect of renewal on original note.**

Whether a note given in renewal of an earlier note, to which the maker had a defence, is a subject to such defence, is a question frequently arising, and the following cases offer illustrations of its solution.

Where there is a dispute between the maker and payee of a note depending on an honest difference of opinion between them as to their respective rights, and they agree to a compromise by which among other things a renewal of the note is made, no defence valid against the old note can be urged against the new: *Northern Liberty Market Co.* v. *Kelley*, 113 U.S. 119; *Piper* v. *Wade*, 57 Ga. 223; *Turner* v. *Pierson*, 93 Ga. 515; *Tyson* v. *Woodrough*, 108 Ga. 368; *Compton* v. *Patterson*, 28 S.C. 117.

Though a note given by a married woman was then invalid against her on account of her coverture, a note given in renewal thereof after the disability had been removed is valid: *Bank of New Hanover* v. *Bridgers*, 98 N.C. 67; *Brooks* v. *Merchants' National Bank*, 125 Pa. 394.

But where a note is because of its illegality void against the maker or invalid against him because of some facts connected with the original transaction, its renewal without any additional consideration, and under the same promise that induced the original obligation will not make the renewal note valid: *Bragg* v. *Channell*, 3 Ala. 275; *Pearson* v. *Bailey*, 23 Ala. 537; *Kelly* v. *Allen*, 34 Ala. 663; *Lawson* v. *Miller*, 44 Ala. 616, 4 Am. Rep. 147; *King* v. *Perry Ins. Co.*, 57 Ala. 118; *Scudder* v. *Thomas*, 35 Ga. 364; *First National Bank* v. *Black*, 108 Ga. 538; *Safford* v. *Vail*, 22 Ill. 327; *International Bank* v. *Van Kirk*, 39 Ill. App. 23; *Beckner* v. *Willson*, 68 Ind. 533; *Tyler* v. *Anderson*, 106 Ind. 185; *Nutter* v. *Storer*, 48 Me. 163; *Hill* v. *Buckminster*, 5 Pick. (Mass.) 391; *Holden* v. *Cosgrove*, 12 Gray (Mass.) 216; *Comings* v. *Leedy*, 114 Mo. 454; *Exeter National Bank* v. *Orchard*, 39 Neb. 485; *Copp* v. *Sawyer*, 6 N.H. 386; *Cutler* v. *Welsh*, 43 N.H. 497; *Kidder* v. *Blake*, 45 N.H. 530; *Gammon* v. *Plaisted*, 51 N.H. 444; *National Bank* v. *Lewis*, 75 N.Y. 524; *Geiger* v. *Cook*, 3 Watts & S. (Pa.) 266; *Campbell* v. *Sloan*, 62 Pa. St. 481; *Schutt* v. *Evans*, 109 Pa. 625; *Mason* v. *Jordan*, 13 R.I. 193. See also 1 Daniel, Negotiable Instruments, secs. 205-207.

Thus, where the indorser of a bill of exchange based on a usurious consideration and upon which another was acceptor, gives the creditor a new bill upon which he is acceptor, in payment of the original debt, whereby the original acceptor is discharged, he may, if no other consideration has intervened, set up the defence of usury: *King* v. *Perry Insurance Co.*, 57 Ala. 118.

But where the maker of a note invalid against him because of failure of consideration or fraudulent misrepresentation, etc., signs a renewal thereof with full knowledge of the defence, or with knowledge of circumstances that should have put him on inquiry, he cannot assert against the new note the defence that he had against the old note: *Odbert* v. *Marquet*, 163 Fed. 892; *Cameron* v. *Hall*, 3 Ala. 158; *Gee* v. *Bacon*, 9 Ala. 699; *Padgett* v. *Lewis*, 54 Fla. 177; *Hyer* v. *York Manufacturing Co.*, 58 Fla. 283; *Windham* v. *Doles*, 59 Ga. 265; *Montford* v. *American Guano Co.*, 108 Ga. 12; *Hogan* v. *Brown*, 112 Ga. 662; *Smith* v. *Smith*, 4 Idaho 1; *Calvert* v. *Williams*, 64 N.C. 168; *Grier* v. *Wallace*, 7 S.C. 182.

Thus, where a note given for a balance due upon a contract for the purchase of personal property was renewed by the maker with the same

QUE.

Annotation.

Bills and notes—Effect of renewal

sureties, the maker then having full and complete knowledge of certain defects in the property, neither the maker nor the sureties can defeat a recovery on the new notes by setting up the defence of failure of consideration based upon the existence of such defects: *American Car Co.* v. *Atlanta St. R. Co.*, 100 Ga. 254.

But the rule laid down in the cases just cited seems to have been repudiated in *Wheelcock* v. *Berkeley*, 130 Ill. 153, in which it was held that the giving and acceptance of a subsequent note, in lieu of a prior note taken up and cancelled, was not a waiver of the defence that the consideration of the prior note was a warranty which had been broken, though the maker of the new note at the time of giving it knew of the breach of the warranty.

A note given in renewal of another note which was void against the maker, is good if supported by a new and distinct consideration: *Tenney* v. *Porter*, 61 Ark. 329; *Hynds* v. *Hays*, 25 Ind. 31.

No recovery can be had on a renewal note calling for usurious interest, even though the original note was not tainted with usury: *Heffner* v. *Brownell*, 82 Iowa 104; *McDonald* v. *Beer*, 42 Neb. 237; *Seneca County Bank* v. *Schermerhorn*, 1 Denio (N.Y.) 133; *Le Baron* v. *Van Brunt*, 9 Daly (N.Y.) 349.

BLACK v. TOWNSEND.

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C. A. 1912

Jan. 17.

Ontario Court of Appeal, Moss, C.J.O., Meredith, Maclaren, and Magee, JJ.A. January 17, 1912.

CONTRACTS (§ II A—127)—SIGNATURE OF TWO ONLY OF THE THREE PARTIES—CONSTRUCTION.

An agreement of three persons relating to property and dealing with matters in which all three were interested, to be binding on any one of them must be executed by all, and where such a contract is signed by two only, the third refusing to sign, and one of the two signers proceeds to do what is required of him by the contract, he cannot recover from the other signer for any damages suffered by reason of the latter's failure to perform his part.

APPEAL by the defendant from the judgment of Falconbridge, C.J.K.B., *Black* v. *Townsend*, 2 O.W.N. 1273, awarding the plaintiff damages for an alleged breach of contract, the nature of which is shewn in the judgment.

The appeal was allowed.

Messrs. *R. R. McKessock*, K.C., and *W. N. Tilley*, for the plaintiff.

Messrs. *F. E. Hodgins*, K.C., and *W. R. Wadsworth*, for the defendant.

MOSS, C.J.O.:—The learned Chief Justice was apparently of opinion that the agreement in writing which was signed by the plaintiff and defendant was binding upon the defendant, and that, under the circumstances, he was liable for the damages the plaintiff claimed to have suffered by reason of the failure of the defendant to perform his part of it. But, when the matter is examined in view of the evidence, the agreement, so-called,

ONT.

C. A.

1912

BLACK v. TOWNSEND.

MOSS, C.J.O.

does not appear to have been binding upon any of the parties to it. Upon its face it was to be an agreement between three parties, the defendant, one John Annes, and the plaintiff. It related to property and dealt with matters in which all three were interested; and it is plain that it could not be carried into effect unless all three were parties and became bound to its performance. The plaintiff was not bound, and could not be held bound by it, nor could he have been compelled to do any act towards giving effect to its provisions, until it was executed by John Annes; and he knew, at the time he executed it, that Annes had not agreed to its terms, and that it was essential to its validity and binding effect as an agreement that Annes should agree to its terms and execute it as a party thereto. He knew, for he had been so advised by a solicitor, that the defendant had not authority from Annes to make such an agreement on his behalf—that the power of attorney which the defendant had from Annes was not broad enough to cover the agreement, and that it was necessary that Annes should act for himself. And he was willing to trust the defendant to get Annes to enter into the agreement and execute the writing; but in this he was mistaken. The defendant seems to have acted in a manner far from commendable. He appears to have led the plaintiff to suppose that he would do more than he intended to do towards inducing Annes to enter into the agreement. But he went no further; and the plaintiff did not understand him as going beyond an assurance of his belief that Annes would execute the agreement. In the very nature of things, the plaintiff could not believe that the defendant could or would force Annes to agree. All he could expect was, that the defendant would endeavour to persuade Annes to agree. If, in these circumstances, he chose to proceed as if the agreement was completed, he must be treated as having done so at his own risk.

Further, he must have intended that, if Annes did agree and did execute the writing, it was to be returned to him when so completed. It was not intended that the defendant should retain the writing after it was executed by Annes. And when, after the lapse of sufficient time to enable him to receive it back, no word of it came to him, he should have at least considered that he was put upon inquiry as to whether it was executed or not. But he allowed months to elapse without inquiry; and even when, in March, 1907, he met the defendant and Annes, he did not bring the matter to the point of ascertaining definitely the position of affairs. He appears to have chosen to leave the matter at loose ends. Whether the reason of this conduct on his part was, that he considered that what he was doing in the way of sending in supplies was something that he was obliged to do in any case in order to maintain his own position with regard to the properties, does not appear to be

ONT.

C. A.
1912

BLACK
v.
TOWNSEND.

MOSS, C.J.O.

material, though the testimony seems to point to that conclusion.

The plaintiff has failed to establish liability under the so-called agreement in writing or otherwise; and the action should be dismissed.

The appeal must be allowed and the action dismissed, both with costs.

MEREDITH, J.A.:—The judgment in appeal cannot be supported upon the grounds upon which it was put by the trial Judge; the agreement never having been delivered; never having indeed been completed, cannot afford any right of action; nor is one liable in damages for persuading another not to enter into a contract, though he may be for inducing another to break an existing contract.

Until the agreement was executed by the party of the second part to it, it had no force or effect, although signed and sealed by the parties of the first and third parts to it; either of whom might have withdrawn from it at any time before it was signed and sealed by the other party and then delivered; there was no question of an escrow; the writing was merely an incompleted thing, and one which never could be complete until executed by all the parties to it; that is very plain upon its face.

But it was alleged by the plaintiff in his pleadings, and it is now contended, that there was a verbal contract between the plaintiff and defendant that the defendant would procure the execution of the agreement by the party who has not executed it and that the plaintiff is entitled to damages from the defendant for breach of that contract.

In this respect the plaintiff is not at all aided by any finding or adjudication at the trial; if any inference were to be drawn from the judgment pronounced at the trial it would rather be that the plaintiff had failed upon his branch of his claim, as, in my opinion, he ought.

If all that the plaintiff testified to were to be accepted as the very truth, without exaggeration or suppression, I cannot think that either party made, or intended to make, any contract apart from or independent of that contained in the writing. The plaintiff was plainly not a witness who would fail to make the most of his case in the witness box; and it is thus, exercising the fullest liberty of speech, that he stated his case in this respect:—

> Mr. McKessock: Q. You decided to have Mr. Annes sign himself? A. Yes.
>
> Q. What did you do with the agreement? A. I gave Mr. Townsend one copy and kept the other and asked him to have the agreement signed by Annes. I also gave him money to make the trip to get Annes' signature.
>
> Q. What did he tell you regarding getting Annes' signature? A. I said to Townsend in my own house, the afternoon before he left,

"Now, Townsend," or words to that effect, "I am going on to spend money on this property, I want to feel that you will trust me and I will trust you. I am doing this on your word of honour that you will have Annes sign." I said to him that the power of attorney he had was not sufficient for a mining deal of this magnitude and I was going back to Cobalt to my work there and I would not likely see him for some time. I was sending them from Cobalt into the property by way of Temagami Lake, which would cost me considerable money; it was getting late in the fall, and for that reason I went on with the work so that we could get the property in shape for the next spring.

Q. Did Townsend say anything in answer to that regarding what you might do? A. Yes. Mr. Townsend was standing in my room, at least, in the room that I use as an office in my house, to the left hand of my desk, and he waved his arms and said, "there never was a dishonest Townsend and you can trust me in this matter, I can assure you," or words to that effect, "that Annes will sign the agreement; you can go on and do all the work you want to." I took his word of honour and did so.

"I am doing this on your word of honour" and "I took his word of honour" are the key-notes of the situation; and that again crops out unmistakably in his cross-examination in these words:—

Q. "Should the said Black fail to acquire the other interests as above stated then this agreement shall be void"; what have you to say to that? A. I was probably foolish enough to take Mr. Townsend's word of honour that Annes would sign the agreement and went on and did the work.

Q. You knew perfectly well? A. After Mr. Townsend failed to have Annes' signature brought to me, I realized that I was up against it.

Q. You knew perfectly well that Townsend could not compel Annes to sign this? A. I knew perfectly well he could; he has the reputation of influencing Annes towards doing anything that is reasonable. He gave me his word of honour he would have Annes sign, in fact he had a power of attorney from Annes which was not broad enough for a deal of this kind.

Q. That did not help you? A. No.

I am quite sure that neither party ever thought of making any independent collateral agreement. Why should they? The plaintiff was quite satisfied that the defendant had the power to, and would, procure the completion of the writing, the parties knew each other and had faith in one another, based upon the knowledge and upon other dealings.

Then that which the plaintiff was about to do immediately was not work upon the defendant's property and which would benefit him only if the agreement were not completed; the plaintiff had an interest in the same lands also and, more than that, in acquiring his own interest in them had contracted to do work of the same character upon them, and so was obliged to do it, in his own interests, if the agreement in question had never been thought of. And it is instructive to observe that the first two items of the particulars of his claim in this action are for money

ONT.
C. A.
1912
BLACK
v.
TOWNSEND.
Meredith, J.A.

paid, for work of this character, done before the date of the agreement in question.

As I understand the evidence, the taking in of the supplies was not due until the month of March, nearly six months after the date of the agreement; so that the plaintiff had had abundance of time to find out that the agreement had not been and would not be completed; but it is not an extraordinary thing in mining camps, or indeed elsewhere, for men of the evident capabilities of the parties to this action, and especially of the plaintiff, to "jolly the thing along" or to "bluff it through."

One must not let the conduct of the defendant, in inducing Annes not to execute the writing, even if he had pledged his honour to get it executed by him, warp his views of the legal rights of the parties; one must not forget that the defendant had no need to induce Annes not to execute it, that he would have been quite within his legal rights, and guilty of no great dishonour, if he had said the next day, for instance, that on thinking it over he was not satisfied with the agreement and that unless it was changed to suit his changed views it must fall to the ground.

I am quite sure that the plaintiff had no right of action on the incomplete writing; and am also of opinion that plaintiff has not satisfied the onus of proof of an independent collateral verbal agreement which the defendant unequivocally denies and which I cannot think that the plaintiff under oath really asserts; if he have any cause of action against the defendant or against the Golden Rose Mining Company in trespass or trover, it can be better, and should, I think, be prosecuted in another action to which that company may be a party.

I would allow this appeal, and dismiss this action.

MACLAREN and MAGEE, JJ.A., concurred in the result.

Appeal allowed.

DOMINION FLOUR MILLS CO. v. MORRIS.

ONT.
D. C.
1912
Feb. 17.

Ontario Divisional Court. Boyd, C., Latchford, and Middleton, JJ. February 17, 1912.

1. TRADEMARK (§ II—9*a*)—DESCRIPTIVE WORD.

The claim of any person who seeks to adopt and use exclusively as his own a merely descriptive term will not be favoured by the Court, for if a person employing a word or term of well-known meaning and in ordinary use to describe his goods were entitled to appropriate it and prevent others from using it he would acquire a right of more value than either a patent or a registered trademark.

[*Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326, specially referred to.]

2. TRADEMARK (§ II—9*a*)—DESCRIPTIVE WORD—FRAUD.

No merely descriptive name should be interdicted as deceptive unless in circumstances involving fraud on the part of the user.

[*Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326, applied.]

3. TRADEMARK (§ IV—17)—"PASSING OFF" CASES—SECONDARY MEANING.

Upon a claim to prevent the passing off of the goods of one manufacturer for those of another based upon the use by both of the same unregistered mark or brand, ex gr. "Gold Medal," an alleged secondary meaning said to have been acquired in respect of the words of the brand for a particular class of goods, ex gr. flour, must be supported by evidence that no other manufacturer in the country was making similar goods with the same mark or brand and the claim will not be supported even as to a single city or district by shewing that a customer at that place asking for that brand of goods would have been supplied with goods of the plaintiff's manufacture before the alleged interference and passing off complained of, if in fact the same mark was being used in other parts of the country by the defendants without any intention of passing off and with equal claim with the plaintiff to an independent right of user.

[*Leather Cloth Co.* v. *Am. Leather Cloth Co.*, 11 H.L.C. 523; *Batty* v. *Hill* (1863), 1 H. & M. 264; *Tallerman* v. *Dowsing Co.*, [1900] 1 Ch. 1; and *Taylor* v. *Gillies* (1874), 59 N.Y. 331, specially referred to.]

4. EVIDENCE (§ II J—307)—TRADEMARK—SECONDARY TRADE MEANING—ONUS OF PROOF.

The onus is on the user of a merely descriptive word or term, not registered as a trademark, to shew, in his action to prevent sales of similar goods by others using the same mark as a "passing off" of their goods as his, that the mark as used by him had acquired a secondary technical and superinduced meaning denoting his goods as distinguished from the natural meaning.

APPEAL by the plaintiffs from the judgment of FALCONBRIDGE C.J.K.B., dismissing the action, which was brought to restrain the defendants from selling flour in bags with the mark "Gold Medal" thereon, which, the plaintiffs alleged, was a mark used by them for many years as applied to the flour sold by them and by which it was known

W. S. McBrayne, for the plaintiffs. The plaintiffs' business has been built up around the name "Gold Medal," in Hamilton and the vicinity, ever since the year 1886, in which it was used by their predecessors in title. The plaintiffs' flour has been asked for as "Gold Medal Flour" in the district mentioned during the last twenty-five years, and the name should be recognised as a mark applied to their flour by which it is known, and with which the defendants have no right to interfere. He referred to *Borthwick* v. *The Evening Post* (1888), 37 Ch.D. 449, *per* Cotton, L.J., at p. 461, and *per* Bowen, L.J., at p. 464, where these learned Judges clearly indicate that in such a case as that now before the Court, the plaintiffs should succeed, as here there is direct competition between the article supplied by the plaintiffs and that supplied by the defendants. Reference was also made to the following cases: *Lee* v. *Haley* (1869), L.R. 5 Ch. 155; *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83; *Robinson* v. *Bogle* (1889), 18 O.R. 387; *Wheeler* v. *Johnston* (1879), L.R. 3 Ir. 284; *Crawford* v. *Shuttock* (1867), 13 Gr. 149; *Edelsten* v. *Edelsten* (1863), 1 DeG. J. & S. 185; *Burgess* v. *Burgess* (1853), 3 DeG. M. & G. 896.

ONT.

D. C.
1912

DOMINION FLOUR MILLS CO.
v.
MORRIS

Boyd, C.

G. Lynch-Staunton, K.C., and *W. M. McClemont*, for the defendants, referred to the following authorities: *Lee* v. *Haley*, *supra*, L.R. 5 Chy. 155, at p. 162; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, [1894] A.C. 275; *Robinson* v. *Bogle*, (1889) 18 O.R. 387; *Partlo* v. *Todd* (1888), 17 Can. S.C.R. 196; *Wheeler* v. *Johnston*, (1879) L.R. 3 Ir. 284.

February 17. The judgment of the Court was delivered by BOYD, C.:—This is a case of alleged passing off goods by the sale of flour in bags impressed with a trade mark (unregistered) which, it is said, is used by the defendants to the plaintiffs' detriment. The words used which are complained of are "Gold Medal;" and, as the mark is not registered, the onus is on the plaintiffs to shew that the defendants have been attempting to sell and have been selling the bags of flour they deal in as those made by the plaintiffs. The plaintiffs are millers, and manufacture this brand of flour at Hamilton; the defendants are dealers in flour, wholesale and retail, and sell flour manufactured at Caledonia in bags stamped with the same words as are found on the plaintiffs' bags, *i.e.*, "Gold Medal."

And next the onus is on the plaintiffs to shew that the term "Gold Medal" has acquired, as used by the plaintiffs, a secondary meaning, denoting their flour only.

The words "Gold Medal" are ordinary words capable of a well-understood meaning, and are applicable to articles which have gained a prize at some exhibition or competition. They are in no way descriptive of flour, nor can they properly be used as a trade mark if they are misdescriptive and misleading, in this sense, that the flour of the plaintiffs never had the "Gold Medal" awarded to it.

But, apart from this aspect of the case, suppose a legitimate use of the words, it lies upon the plaintiffs to prove that these merely descriptive words (implying success at some exhibition) have acquired a technical and superinduced meaning distinct from the natural one and applicable only to this particular flour. That is the proposition to be established, and it must be so by convincing evidence. Whereas here it is in evidence that the words "Gold Medal" are applied to flour all over the country (although the only makers who have heretofore supplied Hamilton under that name appear to be the plaintiffs).

The reasons against allowing an exclusive expropriation (so to speak) of the words "Gold Medal" to a particular kind of flour are more cogent than in the case of simply descriptive words. As to the latter class of words, I quote from Lord Shand: "If a person employing a word or term of well-known signification and in ordinary use . . . is yet able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods, and to shut others out from the use of this

descriptive term, he would really acquire a right more valuable than either a patent or a trade-mark. . . . That being so, it appears to me that the utmost difficulty should be put in the way of any one who seeks to adopt and use exclusively as his own a merely descriptive term:" *Cellular Clothing Co.* v. *Maxton & Murray*, [1899] A.C. 326, at pp. 339, 340.

The origin of these words "Gold Medal," in reference to flour, is not as clear as might be in the evidence, but the use did not originate with the plaintiffs or their predecessors. It came from the United States, and spread since 1880 over many parts of Ontario. The evidence would lead me to say that it came to be used as a synonym for excellence. It was first applied to flour from Ontario wheat; but afterwards, as the trade developed, it came to be applied to a mixture of Ontario and Manitoba wheat. It came to mean an excellent blended flour of these components. Any good miller would know how to make a good blend—say 40 parts of Manitoba to 60 parts of Ontario product. But there was no standard or settled rule; and, as made by the plaintiffs, there were from year to year variations depending on the season, the yield, and the price. Various grades of the Manitoba wheat were used by the plaintiffs and their predecessors, and all sold in bags stamped "Gold Medal;" and so all along in other parts of the Province the same blend was sold in bags having impressed the same words. In brief, the words were used as a vague euphemistic term, serviceable as a sort of catch-word with the public, but of no significance as meaning the flour made by the plaintiffs any more than that made all over the country (outside of Hamilton).

In passing off cases it is not essential that fraud should be proved in case it appears that there is an intention to sell one man's goods as and for another's. The language in *Lee* v. *Haley*, L.R. 5 Ch. 155, cited by the Chief Justice, appears to be open to some modification in this respect (see judgment of Lord Westbury in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1863), 4 DeG. J. & S. 137, affirmed in the same case (1865), 11 H.L.C. 523). But it is a matter of almost controlling significance if there is an absence of direct evidence to shew that any one has been deceived. I would again quote from Lord Shand's judgment a significant sentence which he commends from the judgment of Lord Kyllachy: "I do not myself remember a case in which the use of a merely descriptive name has been interdicted as deceptive, unless in circumstances which truly involved fraud on the part of the user: *Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326 at p. 341.

In the case in hand there is no evidence that any one was deceived by the defendants' use of the words, nor that any confusion had arisen or was likely to arise by purchasers of flour. Barring the use of the words in common ("Gold Medal") everything else in the defendants' advertisements and labels and bags appealing to the eye is clearly and distinctively

ONT.

D. C.
1912

DOMINION FLOUR MILLS CO.
v.
MORRIS

Boyd, C.

different from those used by the plaintiffs. The defendants have made no attempt to deceive the public, or, if they have so attempted, no attempt has been made to shew it in evidence. The plaintiffs' trade may be affected by the defendants' business, but not more so than will arise from fair and ordinary competition.

The whole situation is cleared by what is said as to the source of the paper bags which held the flour. These have been prepared at the Lincoln Mills Paper Company's mills, stamped with the brand "Gold Medal," as far back as 1885, before the plaintiffs' predecessors were in the field, and these bags were supplied indiscriminately throughout Ontario. The company had a stock block with these words on, and various people would buy the bags so stamped without any name of flour-maker on. It was considered a stock pattern when so turned out without any name beyond "Gold Medal" on. Then, if makers' names were to be put on, the company would arrange and differentiate the printing so that one would not interfere with another. Supplies of bags made up with makers' names were furnished in this way in earlier years to Lake & Bailey, under whom the plaintiffs claim, as well as to the defendants in later years. This method of supplying and obtaining paper and other bags stamped "Gold Medal" takes all the point out of the supposed attempt to interfere illicitly with the plaintiffs' trade. The plaintiffs' suit is a vain attempt to impose a tertiary meaning on "Gold Medal," importing the particular blend of the plaintiffs' flour sold at Hamilton, and so exclude all competitors selling mixed wheat flour from the benefits of Hamilton trade. It is impossible thus to insulate Hamilton by reason of a supposed local meaning attaching to the mark "Gold Medal," and thereby give the plaintiffs a monopoly in that place.

The slender evidence to support this fabric is exposed by what is said by Lord Davey in a case already quoted from. For instance, a dealer in Hamilton says that, before the defendants began to sell "Gold Medal," if he had been asked for that brand, he would have sold the plaintiffs' flour. Naturally so, for the obvious reason that the plaintiffs' "Gold Medal" was then the only flour under that name sold in Hamilton. Of such kind of evidence Lord Davey said: "Unless the gentlemen who give evidence of that kind know that there are other manufacturers making similar classes of goods, there is no subject of comparison:" *Cellular Clothing Co.* v. *Maxton*, [1899] A.C. 326 at p. 346.

As to the right to use "Gold Medal" by the plaintiffs, it is matter for serious consideration. If these words connote the same idea as "Prize Medal," and if there is no foundation in fact for their use, the cases of *Batty* v. *Hill* (1863), 1 H. & M. 264, 270, and *Tallerman* v. *Dowsing Radiant Heat Co.*, [1900] 1 Ch. 1, 9, go far to shew that the plaintiffs would be outlawed for misrepresentation; but the matter may be left undisposed of on the present record. I have assumed everything in favour of the plaintiffs' title, going back to 1885.

ONT.

D. C.
1912

DOMINION FLOUR MILLS CO. v. MORRIS

The brief sum of the whole is, that the plaintiffs have signally failed to prove that the defendants have sought to palm off their flour as the flour of the plaintiffs; and the result is, that the judgment should be affirmed with costs.

After handing out this judgment, I have found the point which was left undecided by us, decided as to "Gold Medal" in a New York case: see *Taylor* v. *Gillies* (1874), 59 N.Y. 331.

Appeal dismissed with costs.

REX v. MATHESON; Ex parte MARTIN.

N.B.

S. C.
1912

Feb. 23.

Supreme Court of New Brunswick, Barker, C.J., Landry, White, Barry, and McKeown, JJ. February 23, 1912.

1. INTOXICATING LIQUORS (§ III—I—91)—TRIAL OF OFFENDER IN HIS ABSENCE—PRESENCE OF COUNSEL.

A magistrate may try a person in his absence for selling liquor without a license where he has been duly summoned and is represented by counsel at the trial.

2. SUMMARY CONVICTION (§ III—30)—PROCEDURE—SALE OF LIQUOR WITHOUT LICENSE—ABSENCE OF ACCUSED—REPRESENTATION BY COUNSEL.

A conviction will not be quashed on the ground that the magistrate did not comply with sub-sec. (*a*) of 85 of the Liquor License Act of N.B. 1903 by asking accused as to his former conviction of a similar offence where counsel appearing for accused in the absence of the latter, was interrogated thereto, but made no answer.

[*Ex parte Groves*, 24 N.B.R. 57, applied.]

3. INTOXICATING LIQUORS (§ III K—94)—SECOND AND SUBSEQUENT OFFENCES—ORDER OF TIME IN PROVING—LIQUOR LICENSE ACT (N.B.) 1903.

Offering in evidence before an accused person was found guilty of the subsequent offence on a trial for a second offence of selling liquor without a license, of a certificate of his former convictions, is not such a violation of sub-sec. (*a*) of sec. 85 of the Liquor License Act of N.B. 1903, as will oust a magistrate of jurisdiction, where the latter, upon objection to the admission of such certificate, did not proceed further with such inquiry until the accused was found guilty of the subsequent offence, as such provision of the Liquor License Act relative to the order of time to be observed by the Court in proving the first and second offences is directory only except as to the questions to be put to the accused.

[*Rex* v. *Graves* (No. 2), 16 Can. Cr. Cas. 318, 21 O.L.R. 329, followed.]

THIS matter came before the Court upon an order absolute for *certiorari* to remove into this Court and an order *nisi* to quash a conviction made by F. F. Matheson, police magistrate of the town of Campbellton, Restigouche county, against Peter Martin for having unlawfully sold liquor without a license therefor by law required, contrary to the provisions of the Liquor License Act, C.S. 1903, ch. 22. The conviction was made April 13th, 1911, and was for a second offence. The order for *certiorari* was granted upon the following grounds:—

N.B.

S. C. 1912

REX v. MATHESON.

1. The magistrate had no jurisdiction because he did not ask the accused whether or not he had been previously convicted of an offence against the Liquor License Act.

2. The magistrate had no jurisdiction to inquire regarding a previous offence and conviction without inquiring first in regard to the second offence.

3. The magistrate having first inquired in regard to the first or previous conviction he had no jurisdiction to inquire into the subsequent offence.

Statement

The facts are stated in the judgment of the Court delivered by LANDRY, J.

P. J. Hughes, shewed cause:—Section 85 (a) of the Liquor License Act, C.S. 1903, ch. 22, lays down the procedure for entering a conviction for second offence, but the provisions are directory only. It is solely a question of procedure at the trial. The cases of *Ex parte Groves*, 24 N.B.R. 57, and *Ex parte Grieves*, 29 N.B.R. 543, decide that it is not necessary for the accused to be present in person but it is sufficient if he is represented by counsel. Defendant's counsel was present in this case and could have been asked regarding a previous conviction.

[BARRY, J.:—*Rex* v. *Thompson*, [1909] 2 K.B. 614, is *contra*.]

Hughes:—It is claimed that the magistrate was prejudiced because a certificate of conviction of a previous offence was received in evidence before the magistrate had decided on the offence in question but he could not have been prejudiced because the first conviction was made by himself.

[LANDRY, J.:—The policy of the Act is that subsequent offences should be tried without reference to a previous conviction.]

Hughes:—In *Reg.* v. *Brown*, 16 O.R. 41, it was held that similar provisions in the Canada Temperance Act were directory only. The Court will not quash the conviction in any case because it could reduce the conviction to one for a first offence.

Phinney, K.C., in support of the order *nisi*:—The magistrate is to inquire into the subsequent offence only.

[BARKER, C.J.:—If a magistrate asked a question and there was no answer, would he lose his jurisdiction. In Ontario and in Nova Scotia they held this section 85(*a*) to be imperative: *Rex* v. *Nurse*, 7 O.L.R. 418, 8 Can. Cr. Cas. 173; *Reg.* v. *Edgar*, 15 O.R. 142; *Rex* v. *Graves*, 16 Can. Cr. Cas. 318, 21 O.L.R. 329, 346. The magistrate loses his jurisdiction when he inquires into the first offence before the subsequent offence.]

[MCKEOWN, J.:—The only thing done here was to put in a certificate of conviction.]

Phinney:—I cite *Reg.* v. *Salter*, 20 N.S.R. 206; *Reg.* v. *Porter*, 20 N.S.R. 352; *Charnock* v. *Merchant*, [1900] 1 Q.B. 474; *Rex*

v. *Coote*, 22 O.L.R. 269, 17 Can. Cr. Cas. 211. The sections of the Act which cover irregularities in procedure do not affect sec. 85 (*a*) because this matter goes to the jurisdiction.

P. J. Hughes, in reply.

February 23, 1912. The judgment of the Court was delivered by

LANDRY, J.:—The question involved in this case is the jurisdiction or power of the magistrate to convict of a second offence against the Liquor License Act, C.S.N.B. 1903, ch. 22, under the following conditions:—

Martin was summoned to answer a charge of a second offence of having unlawfully sold liquor without license. On the day of the hearing Martin himself was not present, but appeared by counsel. The magistrate on opening the case, first received evidence to shew that Martin had no license. Then the prosecution offered in evidence a certificate proving that Martin had been convicted of a former offence. To this certificate the accused's counsel objected on the ground of irrelevancy, but did not suggest the objection that at that stage it was not permissible to enter into the proof of the first offence. The magistrate proceeded no further with the enquiry into the first offence, but went on to hear the evidence on the second offence. Having heard all the evidence, and the accused offering no evidence, the magistrate found him guilty of the second offence. Then he asked the counsel of the accused,—the accused being absent—if Martin had previously been convicted as alleged in the information. Counsel offered no answer as to that. Then the certificate establishing the conviction of the first offence against the accused as charged was offered in evidence, and received subject to the following objection: "The magistrate has no jurisdiction to convict, inasmuch as the provisions of section 85, sub-section (*a*) of the Liquor License Act have not been complied with, but the magistrate has enquired into the first offence before enquiring into the subsequent one, and therefore the magistrate has no jurisdiction to convict. The objection was overruled, and the accused convicted of the offence as charged.

The further ground of objection was taken on obtaining the order that the accused being absent he could not be proceeded against.

Sub-section (*a*) of sec. 85 of the Liquor License Act, C.S. N.B. 1903, ch. 22, reads as follows:—

> The justices or police magistrate shall, in the first instance, inquire concerning such subsequent offence only, and if the accused be found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the information, and if he answers that he was so previously convicted, he may be sentenced accordingly; but if he denies that he was so previously con-

N.B.

S. C.
1912

REX
v.
MATHESON.

Landry, J.

victed, or stands mute of malice, or does not answer directly to such questions, the justice or police magistrate shall then inquire concerning such previous conviction or convictions.

This question in several forms has been before the Courts of Ontario, Nova Scotia and New Brunswick. In *Rex* v. *Nurse* (1904), 7 O.L.R. 418, 8 Can. Cr. Cas. 173, a case which I judge from the report was conducted exactly as this one, the Divisional Court unanimously held that the magistrate having, before enquiring into the second offence, received improper evidence, ousted himself of his jurisdiction, and that he could not restore such jurisdiction by striking out the wrongly admitted evidence and thereafter proceeding regularly. In *Ex parte Groves,* 24 N.B.R. 57, under a provision in the Canada Temperance Act, worded as this is, it was held that the accused person could be proceeded against in his absence from the Court, and that his counsel might be asked for him if he was previously convicted as charged. The Supreme Court of Nova Scotia in *Regina* v. *Salter,* 20 N.S.R. 206, held just the reverse.

The reasons given by Allen, C.J., in *Ex parte Groves,* 24 N. B.R. 57, seem to me quite sufficient to support the decision handed down in that case. By that decision then our Court has held that the accused need not be present if counsel represents him. In the case before us, he was represented by counsel for all purposes, so that point cannot avail him.

There remains to dispose of, the ground taken, that evidence having been given touching the first offence before enquiring into the second offence, the jurisdiction was ousted and could not be restored. On this point decisions of the Ontario and Nova Scotia Courts prevent my arriving at the conclusion I have, with the assurance I would feel were it not for those decisions.

It is to be observed here that the wording of the statute in which are to be found the words, "he shall then and not before," apply specifically to the question to be asked the accused and does not in terms refer to the enquiry into the first offence in other respects. It is only by inference and not in positive words that the time is fixed for enquiring into the first offence by the magistrate. In the case before us neither the accused nor his counsel was asked about the first offence before the enquiry and finding on the second offence. All that was done, was that by mistake or inadvertence, the magistrate admitted in evidence a certificate of a conviction for a first offence before he heard all the evidence and concluded in the matter of the second offence. Objection being taken to this course on the ground of irrelevancy he proceeded no further with the enquiry as to the first offence till he had concluded the evidence and decided as to the second offence. And having done this he proceeded in the way indicated by the statute having

no regard to the certificate put in evidence by inadvertence and in effect withdrawn as to the first offence. He asked the counsel of the accused if the accused had been previously convicted for a first offence, and on receiving no reply, proceeded to prove the conviction for the first offence by receiving the evidence necessary to establish it.

I do not think the mere receiving of a certificate of a conviction for a first offence under the conditions of this case, virtually withdrawn when an objection is taken to it, not acted upon in any way either in the consideration of the second offence or in the proving of the first after the second has been pronounced upon, affects the jurisdiction of the magistrate. What there is in sub-sec. (*a*) of section 85 before cited as to the order of time to be observed by the Court in proving the first and second offences outside of the question to be put to the accused, seems to me to be directory only. The question to be addressed to the accused, it is true, must be asked after the accused has been found guilty of the second offence, "and not before." That was done in this case. It has been held in Ontario (*Rex* v. *Graves*, 16 Can. Cr. Cas. 318, 21 O. L.R. 329, at pp. 346, 347), that with the words "and not before" struck out of the Act the balance of the sub-section is directory only and not imperative. If that is a correct interpretation, and I believe it is, that which was done in this case and insisted upon as ousting the magistrate of his jurisdiction, viz., the receiving of a certificate of a previous conviction before the adjudication was had on the second offence, was not done in opposition to an imperative direction in the statute. It therefore amounted to an irregularity only, and was wholly cured by disregarding it afterwards, and by a proper procedure to the end thereafter. If the offence as charged, viz., a second violation, was not clearly proven, and if there could be a reasonable question of the guilt of the accused, this Court might perhaps in the exercise of its powers set aside the conviction for irregularity of proceedings in regard to the certificate; but I cannot believe that such irregularity affects the jurisdiction.

The order *nisi* to quash should be discharged.

Order nisi discharged.

YOUNGSON v. DOTY et al.

Ontario High Court. Motion before His Honour Judge Holt, Local Judge at Goderich. February 24, 1912.

1. PARTIES (§ II B—115)—PRINCIPAL AND AGENT BOTH JOINED AS DEFENDANTS—RIGHT OF PLAINTIFF TO ELECT.

Under Ontario Rules 186 and 192 (Con. Rules of 1897), an alleged agent may be joined in an action on a contract made by him, ostensibly on behalf of the principal, for the purpose of claiming

ONT.

H. C. J.
1912

YOUNGSON
v.
DOTY.

against the alleged agent alternative relief in case it should be found that he made the contract on his own behalf.

[*Tate* v. *Natural Gas Co.* (1898), 18 P.R. 82, followed; *Andrews* v. *Forsythe* (1904), 7 O.L.R. 188, distinguished.]

APPLICATION by the defendant to compel the plaintiff to elect which of the two defendants he will proceed against.

The application was refused.

C. Garrow, for plaintiff.

W. Proudfoot, K.C., for defendant.

HOLT, L.J.:—The statement of claim has been delivered and in it the plaintiff claims relief against the defendant company on a contract made as the plaintiff alleges by the defendant, Doty, acting as its agent and by paragraph 7 of the statement of claim, claims in the other active relief against the defendant Doty in the event of its being found that the contract made with the plaintiff was made by the defendant Doty alone and on his own behalf and not as agent of the defendant company.

It appears that the defendant Doty is the president of the defendant company, and that the contract sued on is contained in correspondence between the plaintiff and the defendant Doty.

In *Andrews* v. *Forsythe* (1904), 7 O.L.R. 188, it was held that there could not be a joinder and that the plaintiff must elect which defendant he would proceed against, but the facts in that case are entirely different from those that exist in the present case. In the case cited there were two independent actions relating to the same subject-matter and no connection otherwise between the parties, here there is one action and ample connection between the parties. The plaintiff has a single claim but is in doubt as to which of two defendants is liable to satisfy it.

In my opinion, Rules 186 and 192,* should, when practicable, be given the widest possible application and so avoid the costs of two separate actions to decide which of these two defendants is liable. It surely must be that this was the intention of the framers of the Rules. The case of *Tate* v. *Natural Gas Co.* (1898), 18 P.R. 82, resembles very closely the present case and is a judgment of the Divisional Court approved of by the Court

*Rules 186 and 192 of the Consolidated Rules of Practice, 1897, are as follows:—

186. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and, without any amendment, judgment may be given against one or more of the defendants, according to their respective liabilities.

192. Where the plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants, in order that the question as to which, if any, of them is liable and to what extent, may be determined as between all parties.

ONT.
H. C. J.
1912
YOUNGSON
v.
DOTY.
Holt, L.J.

of Appeal and without quoting in full the words of the Chief Justice of the Common Pleas Division I refer to those to which he gives expression on pages 86, 88, and 89 of the report (18 P.R.). From these expressions and what I have been able to gather from the different cases I have referred to, my conclusion is that the joinder is proper and that the plaintiff should not be compelled to elect as to which of the two defendants he should proceed against.

Application dismissed with costs to the plaintiff in any event.

Motion dismissed.

McCONNELL v. VANDERHOOF.

Ontario High Court, Falconbridge, C.J.K.B. March 6, 1912.

ONT.
H. C. J.
1912
March 6.

1. DAMAGES (§ III A—45)—ADVERTISING CONTRACT—BREACH.

Where a written contract between the plaintiffs and the defendants by which the former were to place the latter's advertising, which contained nothing as to the time it was run, though there was a verbal contract that it should continue for a year, was unjustifiably cancelled by the defendants, the plaintiffs are not entitled to the commission which would have been earned on a year's business, but may recover a reasonable allowance for the services rendered by them.

ACTION by advertising agents against manufacturers of druggists' special preparations to recover damages for breach of an advertising contract and moneys expended.

There was judgment for the plaintiffs with costs.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiff.
W. J. Elliott, for the defendants.

FALCONBRIDGE, C.J.:—The plaintiffs are advertising agents; the defendants are manufacturers of "standard pharmaceutical preparations," which is translated by a witness as meaning patent medicines.

The plaintiffs allege that their "client" gets the advantage of their expert knowledge, and that it does not cost him, "the client," any more—the newspaper paying the agent a commission averaging twenty per cent.

The plaintiffs and defendants had had some business relations for about two years before August, 1910; but the defendants had been doing much or all of their advertising through a rival firm (A. McKim Limited); and a contract was entered into by the defendants with the plaintiffs, dated the 8th or 9th August. . . .

The plaintiff McConnell swears that this contract was to run for a year; and I find this to be a fact; but he did not take the trouble to make this part of the written contract, which the plaintiffs must abide by.

E. S. Vanderhoof swears that the agreement was, that the "ads," as they call them, were to be given the same position or

ONT.

H. C. J. 1912

MCCONNELL v. VANDERHOOF.

Falconbridge, C.J.

of the same class as with McKim. The defendants, in turn, must abide by the writing, which says *as good positions* as are now being given.

The ostensible ground of complaint put forward by the defendants is, that they preferred the advertisements to appear *as* reading matter, whereas the plaintiffs inserted them *among* the reading matter, with display headings. The reading matter costs more, but the plaintiffs had no interest in this. They got their commission, less the five per cent. which they were to allow the defendants.

If it is at all material, there is no evidence to shew me which form of advertisement is more likely to attract purchasers or customers; nor were any copies of newspapers produced in illustration.

Personally, I should rather buy from the man who frankly heads his advertisement with the display than from the one who, under false pretences, induces the unwary to peruse half a column of more or less interesting matter and to come suddenly on an announcement of the merits of a patent medicine. Against this person one feels a certain amount of resentment.

I find, therefore, that the defendants had no real grievance; but that, coming into touch again with the McKim company (whose agent, saying that their interests were identical, promised that McKim would see that the defendants "got through the suit"—"would see them through") unreasonably assumed to cancel this contract.

The plaintiffs contend, alternatively, that the contract is to last as long as the defendants have any advertising to do. I do not so hold; but I think that the defendants ought to have presented their alleged grounds of complaint and asked that they be remedied, and, in default of remedy, after a reasonable time, proceeded to cancel.

As to damages, the plaintiffs claim the commission which they would have earned on the year's business. This I do not allow. All the arrangements are very loose. No newspaper has held or tried to hold the plaintiffs on their alleged contracts for the year.

But the plaintiffs ought to get a reasonable allowance for their personal trouble and expert knowledge in making the initial contracts with the newspapers—and otherwise in getting matters going. The year's work would have gone through automatically through the medium of the clerical staff in their office.

I am awarding them a modest sum when I give them $250 for this. The judgment will be for this sum, plus the amount paid into Court—with costs all through on the High Court scale.

I refuse the defendants' application to plead the Statute of Frauds. I do not think it would help them.

Judgment for plaintiff.

VILLAGE OF BRUSSELS v. McKILLOP TELEPHONE SYSTEM; VILLAGE OF BLYTH v. McKILLOP TOWNSHIP.

ONT.

C. A.

1912

March 6.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A., March 6, 1912.

1. TELEPHONES (§ I—2)—JURISDICTION OF ONTARIO RAILWAY AND MUNICIPAL BOARD—COMPULSORY SERVICE—ONTARIO TELEPHONE ACT, 1910.

Notwithstanding the provisions of the Ontario Telephone Act, 1910, there is no jurisdiction in the Ontario Railway and Municipal Board to make an order directing "connection, inter-communication, joint operation, reciprocal use and transmission of business," involving the expenditure of money upon capital account, by the subscribers to a telephone system, constructed and installed under the provisions of the Ontario Local Municipal Telephone Act, 1908.

2. TELEPHONES (§ I—7)—GOVERNMENTAL REGULATION—ORDER APPROVED BY ONTARIO MUNICIPAL BOARD—PROCEDURE TO ALTER OR VARY.

While the Ontario Railway and Municipal Board may "review, rescind, change, alter or vary any rule, regulation, order or decision" made by it, it should not make an order having the effect of interfering with an agreement entered into between two telephone systems or companies to which the approval of the Board had already been given, except on a properly framed application for the purpose, and upon due notice to the parties interested to appear and state their objections; the Board has no power or jurisdiction to alter or vary such approved agreement except upon an application of which due notice has been given to the interested parties.

3. TELEPHONES (§ I—7)—STATUS OF INCORPORATORS UNDER LOCAL MUNICIPAL TELEPHONE ACT, 1908.

The construction and installation of a telephone system under the provisions of the Ontario "Local Municipal Telephone Act, 1908" by an association of individual subscribers, even when operated under a certain name, does not constitute them a corporate body or legal entity, and their telephone system and equipment used in connection therewith become vested in the municipality in trust for the benefit of the subscribers. (*Per* Moss, C.J.O., and Garrow, J.A.).

APPEALS in two separate matters from orders of the Ontario Railway and Municipal Board.

The first appeal was by the McKillop Municipal Telephone System from two orders made by the Board.

The first order was made on the 10th March, 1911, on the application of the Municipal Corporation of the Village of Brussels, who named as respondents "The McKillop Municipal Telephone System," and was as follows:—

Upon the application of the said applicants, and upon hearing what was alleged by counsel for the applicants and respondents, and for the Bell Telephone Company of Canada, and the Board having referred this application for consideration and report to its expert, upon consideration of the said expert's report:—

The Board, under and in pursuance of sec. 9 of the Ontario Telephone Act, 1910, orders connection, intercommunication, joint operation, reciprocal use, and transmission of business between the applicants' and respondents' telephone systems or lines.

The Board further orders and directs the applicants to construct, build, and maintain a trunk telephone line from their

ONT.

C. A.
1912

VILLAGE OF BRUSSELS v. MCKILLOP TELEPHONE SYSTEM.

Statement

switch-board in their central office in the village of Brussels, to a point on the gravel road half-way between the village of Brussels and the town of Seaforth.

The Board further orders that the applicants shall bear all the cost of building, constructing, and maintaining the said trunk line, and of equipping and operating the switch-board in the central office in the said village of Brussels, and shall allow the use of the same and of all their lines to the respondents, or any of them, on the basis of a charge of five cents for each call or connection.

And it is further ordered that the respondents shall build, install, maintain, and operate a switch-board in or adjacent to the town of Seaforth, and construct, build, and maintain a trunk telephone line therefrom to the above-mentioned point on the gravel road, half-way between the town of Seaforth and the village of Brussels, being the point up to which the said applicants have been hereinbefore directed to construct their line as aforesaid.

And it is further ordered that the respondents shall bear and pay all the cost of building, constructing, and maintaining the said trunk line, and of equipping and operating the said switch-board in a central office in or adjacent to the said town of Seaforth, and shall allow the use of the same and of all their lines to the applicants, or any of them, on the basis of a charge of five cents for each call or connection.

And it is further ordered that, should any person who is not a subscriber to either the system of the applicants or the respondents, desire to avail himself of the use of the said switch-board and lines, or any of them, then that a charge of twenty cents shall be made and collected therefor, together with messenger service, if any, which sum or sums shall be paid in to the office from which the call originated, and that the said charge of twenty cents, exclusive of messenger, shall form a common fund, and be divided monthly between the applicants and the respondents, equally, share and share alike.

And it is ordered that the said switch-boards and trunk line shall be built, constructed, and equipped and the connection between the telephone systems and lines of the applicants and respondents shall be made and completed, all within the space of two months from the date of this order.

And it is further ordered that the terms of this order for connection, intercommunication, joint operation, reciprocal use, and transmission of business between the systems of the applicants and respondents may be superseded with the approval of this Board by a mutual agreement in writing to be made by and between the applicants and respondents.

The McKillop Municipal Telephone System applied to the Board to set aside or vary the order of the 10th March, 1911; and that application was dismissed by the Board by order made

on the 5th May, 1911. This was the second order appealed against.

The second appeal was by the Municipal Corporation of the Township of McKillop from an order of the Board, dated the 20th June, 1911, made on the application of the Municipal Corporation of the Village of Blyth, naming the township corporation as respondents, for an order directing connection, intercommunication, etc., between the telephone systems of the applicants and the respondents.

The order directed, amongst other things, that the township corporation should build, maintain, and operate a switch-board in or adjacent to the town of Seaforth, in the county of Huron, and should construct, build, and maintain a trunk line from the town of Clinton on the main gravel road between that town and the village of Blyth to a point on the road distant two and one-half miles north of the town of Clinton, being the point up to which the village corporation were also ordered and directed to construct their portion of the line. The township corporation were also ordered to pay all the cost of building, constructing, and maintaining the trunk line and of equipping a switch-board and a central office in or adjacent to the town of Seaforth, and to allow the use of the same and of all their lines to the village corporation or any of their subscribers, on payment of a charge of five cents for each call or connection.

November 21 and 22, 1911. The appeals were heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

M. K. Cowan, K.C., and *R. S. Hays*, for the appellants. The orders appealed from should be varied or rescinded. The appellants are operating municipal telephone systems under the provisions of the Local Municipal Telephone Act, 8 Edw. VII. (Ont.) ch. 49, but have no switch-board of their own, their switching being done by the Bell Telephone Company, under an agreement approved by the Ontario Railway and Municipal Board, in accordance with the provisions of sec. 10 of the Ontario Telephone Act, 1910. By the terms and conditions of the orders appealed from, the appellants' systems will be required to terminate their agreements and connections with the Bell Telephone Company, and so lose the rights and benefits they now enjoy, as well as being saddled with great additional expense. We submit that, under sec. 6 of 6 Edw. VII. (Ont.) ch. 31, the hearing of this case on the 24th February, 1911, in the presence of only one member of the Board, was irregular and illegal, and that the Board had no power or authority to make any order based upon such a hearing. The facts adduced do not disclose the necessity of an order as asked for by the respondents. The provisions of sec. 9 of the Act of 1910 are not intended to be imperative, requiring the Board to make an order in every case applied for. If the phraseology of that section appears to be imperative, its spirit is dis-

ONT.

C. A.

1912

VILLAGE OF BRUSSELS v. MCKILLOP TELEPHONE SYSTEM.

Argument

cretionary. Such discretion is a judicial and not an arbitrary one. We further submit that the Board has no jurisdiction whatever to make or to enforce the carrying out of the orders appealed from; and, moreover, the appellants have no power or authority to raise further moneys for the purpose of reconstructing the systems in compliance with the orders of the Board. The appellants' systems are not complete systems, having each one central switch-board and main trunk lines running therefrom, within the meaning of secs. 8 and 9 of the Act of 1910.

H. D. Gamble, K.C., for the respondents the Corporation of the Village of Blyth. The orders appealed from are right, and should be affirmed. They do not interfere with any agreement between the Bell Telephone Company and the appellants. See the Ontario Railway and Municipal Board Act, 1906, sec. 17, sub-secs. 2 and 3. Moreover, the appellants do not of necessity lose connection with adjacent townships, and they may agree to connect their system with that of such townships, under sec. 8 of the Act of 1910, or, in case of refusal, connection may be ordered by the Board under sec. 9 of the same Act. The language of the Act of 1910, sec. 9, is imperative; and the Railway Board has no option in the matter of ordering connection; but the terms and conditions upon which such connection is brought about are in the sole discretion of the Board. Nothing turns upon the fact that the agreement between the Bell Telephone Company and the appellants was ratified by the Board, when it is observed that, by the order ratifying, the Board reserves the right to rescind or vary it in any way they may desire. The question of expense of building and maintaining the necessary switch-board and other appliances for connection between the appellants' and respondents' systems, be the expense much or little, does not give any right to appeal. This expense is only a question of fact, part of the terms and conditions imposed upon the appellants, and the Board's decision upon all matters of fact is final and conclusive. See sec. 41, sub-sec. 3, of the Ontario Railway and Municipal Board Act, 1906. As to the proceedings before the Board on the 24th February, 1910, we submit that the appellants have no cause of complaint, because, after the order had been made, a rehearing of the application was granted them, whereat the whole evidence was gone over, and every opportunity was given the appellants to present their case fully. As to the objection that there is no authority in the statute by which the expense of installing the necessary equipment may be provided for in order to comply with the order of the Board, we submit that under sec. 11, sub-sec. 1*b*, and sec. 13, sub-sec. 6, of the Act of 1908, the appellants may pass the necessary supplementary by-law and levy the cost upon the subscribers; but, if these sections do not confer the right, then the order of the Board carries with it the necessary authority to raise the money, and the Board may, under sec. 20 of the Ontario Railway and Municipal Board Act, 1906, build the

appellants' portion of the line, construct and establish the necessary switch-boards to complete the connection, and assess the amount against the appellants; and, what the Board may do for the appellants, they may do themselves.

W. M. Sinclair, for the respondents the Corporation of the Village of Brussels. The arguments advanced on behalf of Blyth apply with equal force to the Brussels case. As to the jurisdiction of the Board, see sec. 30 of the Ontario Railway and Municipal Board Act, 1906, and sub-sec. 3 of sec. 11 of the Local Municipal Telephone Act, 1908. Section 43 of the Ontario Railway and Municipal Board Act, 1906, does not allow appeals on questions of fact; and, therefore, the appellants have no right to be here.

Hays, in reply.

March 6, 1912. MOSS, C.J.O.:—These are appeals from orders or decisions pronounced by the Ontario Railway and Municipal Board. So far as the respondents to the appeals are concerned, the matters are separate and distinct; but substantially the same questions are involved; and the appeals, which were heard during the same sittings of the Court, may be conveniently dealt with together.

The first two in point of time of the orders complained of were pronounced upon an application made by the Corporation of Brussels, on which they named as respondents "The McKillop Municipal Telephone System." This was not a proper proceeding. While it seems that there is an association of individual subscribers who for convenience act under that name, it does not appear that there is any corporate body or company known to the law capable of responding by that name to the application made by Brussels to the Board for the orders now in question. Having been constructed and installed in 1908, under the provisions of the Local Municipal Telephone Act, 1908, the system and all works and property acquired, erected, or used in connection therewith, became vested in the Municipality of McKillop in trust for the benefit of the subscribers. The opposition to the application was made through the municipality; but it may be questioned whether, in the form in which the proceedings now stand, the orders made could be effectively enforced, if capable of enforcement under any circumstances.

But more formidable objections appear when the substantial questions between the parties are examined.

The respondents the Corporation of the Village of Brussels, as trustees for the subscribers of the local telephone system known as the Brussels Morris and Grey Telephone System, made application in October, 1910, to the Ontario Railway and Municipal Board for an order for connection, intercommunication, or reciprocal use in the transmission of business between the telephone systems of the respondents and the appellants. The applicants alleged that their system was located in the territory

ONT.

C. A.

1912

VILLAGE OF BRUSSELS v. MCKILLOP TELEPHONE SYSTEM.

MOSS, C.J.O.

immediately adjacent to the appellants'; and that they had been, for some months previous to their application, desirous of entering into an agreement with the appellants for such connection, intercommunication, or reciprocal use; but the latter had declined to do so. Apparently, the application was based upon sec. 9* of the Ontario Telephone Act, 1910—10 Edw. VII. ch. 84—which seems to be the only enactment that affords any warrant for the application.

It is very difficult, however, to give any intelligible meaning to the language of the section. Read literally, it does not comprehend this case; on the contrary, it would seem to be providing for some case of a company or person, as defined by sec. 2 (c)† of the Act, having two or more systems or lines "located in territory adjacent to each other." Doubtless, this was not the intention; but, in the present form of the section, the real intention is not clearly expressed. The order of the Board dated the 10th March, 1911, which directs connection, intercommunication, joint operation, reciprocal use, and transmission of business, purports to be made in pursuance of sec. 9; but, as pointed out above, that section is halting and uncertain in expression; and, in strictness, it does not confer jurisdiction in this particular case.

There still remains the question of jurisdiction dependent upon the existence of an agreement between the appellants and the Bell Telephone Company, substantially for the purposes recognised and authorised by sec. 8‡ of the Ontario Telephone Act, 1910, and which had been approved of by the Board prior to the application by Brussels.

The appellants and the Bell Telephone Company were working under this agreement when the orders now in question were made by the Board. It is said that there was no intention to interfere

*9. Wherever the telephone systems or lines of any company or person are located in territory adjacent to each other and in the event of any company or person owning, controlling, or operating one or more of the said telephone systems, refusing or neglecting to enter into an agreement for any or all of the purposes mentioned in the next preceding section, the Board shall issue an order providing for such connection, intercommunication, joint occupation, reciprocal use, or transmission of business upon such terms and conditions as it may deem advisable.

† 2. (c) "Company or Person" shall mean any Company, Corporation, Municipal Corporation, Association, individual or aggregation of individuals owning, controlling, or operating a telephone system or lines within the Province of Ontario, and not within the legislative authority of the Parliament of Canada.

‡ 8. Subject to the approval of the Board every company or person shall have power to enter into any agreement or agreements with any other company or person for the purpose of providing for connection, intercommunication, joint operation, reciprocal use, or transmission of business as between the respective systems controlled, owned or operated by such companies or persons, and may make such arrangements as shall be deemed advisable for the proper apportionment of expenditures and commissions, the division of receipts and profits, or such other adjustments as may be necessary under any such agreement.

with that agreement, and that there is in fact no interference with it.

But it is obvious that compliance with the order by the appellants does seriously alter their relations with the Bell Telephone Company. It exposes them to the consequences of a breach of the agreement, and may deprive them of the benefits and advantages which they now enjoy under it. And, while the agreement remains as an existing agreement sanctioned and approved by the Board, the Bell Telephone Company are entitled to assert their rights under it and to claim that they should remain undisturbed and unaffected as long as the agreement stands. The Board has undoubted power to rescind the order for good cause, but the jurisdiction to do so should be exercised only upon a properly framed application for that purpose, to which all those who are interested are parties or of which they are properly notified.

At present, the agreement is a valid subsisting agreement; and, while, upon an application regularly framed and constituted as to parties, the Board may determine its true meaning, yet while it stands the Board is without power or jurisdiction to alter or vary it.

And the important question is, whether the Board has, in the present state of the legislation, any power or jurisdiction to order the performance of work of construction and connection with the Brussels system, involving the expenditure of money upon capital account by the subscribers to the appellants' system. There are no express provisions covering such a case; and the different sections to which we were referred by counsel for the respondents fall far short of supplying the necessary machinery for imposing or collecting funds to meet the outlay which obedience to the orders imposes.

Apart from these latter considerations, however, the want of jurisdiction to deal with the application made on behalf of Brussels, based upon the other grounds referred to, is sufficient reason for allowing the appeal.

There is no difference in substance between the case of Brussels and the case of the application by the Corporation of the Village of Blyth. Except as to the form of the application with respect to the parties respondent, all the objections to the power and jurisdiction of the Board apply with the same force as in the Brussels case. The order complained of in the Blyth case is to the same effect as that pronounced in the Brussels case. The appeal is on the same grounds, and the result should be the same.

Both appeals should be allowed, and the orders complained of be set aside with costs to the appellants in each case.

GARROW, J.A., concurred.

MACLAREN, J.A. (Brussels case):—This is an appeal by the Corporation of the Township of McKillop, representing the

ONT.

C. A.
1912

VILLAGE OF BRUSSELS v. MCKILLOP TELEPHONE SYSTEM.

Maclaren, J.A.

subscribers to the municipal telephone system of the township, on leave granted by the Court, from an order of the Ontario Railway and Municipal Board of the 10th March, 1911, ordering the appellants to build and operate a switch-board in or adjacent to the town of Seaforth and a trunk telephone line therefrom to a point half-way between Seaforth and Brussels, there to connect with the Brussels line to that village; and from an order of the said Board of the 5th May, 1911, refusing to vary or rescind the order of the 10th March.

The appellants were organised under sec. 11 of the Local Municipal Telephone Act, 1908, 8 Edw. VII. (Ont.) ch. 49, but have no switch-board of their own, their switching being done by the Bell Telephone Company, in Seaforth, under an agreement which was duly approved by the said Board in accordance with the provisions of sec. 10 of the Ontario Telephone Act, 1910, 10 Edw. VII. ch. 84. Section 11 of this Act provides that no company or person owning such a telephone system or lines shall enter into any contract, agreement, or arrangement with any other company having authority to construct or operate a telephone system or line, restricting competition in the supply of such service, unless the same is just and reasonable, and until such contract, agreement, or arrangement has been submitted to and received the assent of the Board.

The said agreement contained a provision that during its continuance the appellants should not connect their telephone system with the system of any company or persons operating in competition with the Bell Telephone Company, and without the consent of the Bell Telephone Company; and it appeared that the applicants in this matter operated in opposition to the Bell Telephone Company, and that the latter refused the appellants the right to connect their system with that of the applicants.

The applicants relied upon a clause in the approval of the Board, to the effect that the right of revoking or varying the order was reserved; but, in my opinion, such reservation does not confer any greater power upon the Board than is found in the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, sec. 19 (4), which says that "The Board may review, rescind, change, alter or vary any rule, regulation, order or decision made by it."

By sec. 14 of the Ontario Telephone Act, 1910, it is expressly enacted that the Board shall not have the power "to alter or vary any agreement between a municipal corporation and a company, or between two or more companies or persons." What they cannot do directly, I do not think they can do indirectly or by a side wind, as is attempted by the orders now appealed from.

The agreement between the McKillop telephone subscribers, which must have been found by the Board to have been just and reasonable when they gave it their approval, should stand until, after proper notice to the parties, they have an opportunity of stating their objections to the variance or revocation of such

approval. So long as such approval stands unchanged and unrevoked, I am of opinion that the Board is without jurisdiction to pass such orders as are now in appeal.

I do not consider it necessary at present to consider the other matters argued before us, or to express any opinion as to whether or not the orders in question would be a compliance with the provisions of sec. 9 of the Ontario Telephone Act, 1910, even if the above objection did not exist.

In my opinion, the appeal should be allowed.

(Blyth case.) The same objection applies to the order of the Ontario Railway and Municipal Board in this case as in the Brussels case; and, for the reasons given therein, I am of opinion that the appeal should be allowed and the orders set aside.

MEREDITH, J.A. (Brussels case):—The appellants have a local telephone system which satisfies all their needs; and they are naturally opposed to any action which would disturb that system or the very satisfactory arrangements made between them and the Bell Telephone Company, under which the appellants' lines are operated by the company and under which the subscribers to the appellants' system are also given intercommunication with the company's subscribers; and under which arrangements the appellants are bound not to make connection with any other system.

Upon an application made by the respondents to the Ontario Railway and Municipal Board, which was heard by one member of the Board only, an order was made requiring the appellants to connect their system with that of the respondents, and to give intercommunication between the subscribers of each, and, for that purpose, to build and operate a trunk line and a switchboard—which would, of course, necessitate providing also a room, light, and heat sufficient for the purpose. The order, if obeyed, would compel the appellants to break their agreement with the Bell Telephone Company and put an end to all their rights and benefits under it, obliging them to operate their own lines at very considerable continued expense, in addition to the very considerable expense of doing the work ordered to be done by them; entirely reversing their policy in the operation of their lines and making the operation much more costly, as well as depriving them of the benefits of intercommunication with the Bell Telephone Company's subscribers; unless, indeed, that company should see fit to make some other agreement with them, which neither they nor the Board would gave any power to compel.

If the Board had the power to do this injustice, the appellants must submit to it, as well as must the Bell Telephone Company, for in that case there would be no right of appeal; but, if the Board had no such power, this Court can and must relieve the appellants from it: and the power to make such an order

ONT.

C. A.
1912

VILLAGE OF BRUSSELS v. MCKILLOP TELEPHONE SYSTEM.

Meredith, J.A.

ought to be made to appear with very reasonable clearness to be upheld in this Court; but I am unable to find, in all the legislation upon the subject, sufficient authority to support it.

The first question that strikes the mind, in dealing with the case, is: where is the money to come from which must be expended in obeying the order? And it must be borne in mind that, if the power exist, there is no limit of the amount which the Board may thus require to be expended; it may be little in one case, but it may be very great in another, and that quite apart from any damages any one might be compelled to pay for breach of contract such as that involved in this case. I have been unable to find any source from which the money which must be paid out, if the order in appeal is complied with, is to come; and I cannot help thinking that, if the subscribers to such systems could be so made personally liable, they might go a long time without the advantages of a telephone rather than run the risk of being burdened with the cost of doing that which is altogether against their wishes, and that which they believe to be their best interests, upsetting their whole plan of operation, compelling a breach of their contract, with whatever consequences might follow from it, as well as requiring them to do that which they have carefully provided against—operate their own system. The cost of constructing and maintaining a system is to be paid by the "initiating municipality," and may be recovered from the subscribers in the manner provided for in the enactments; but such "cost" must, I think, under the words of the enactment, as well as the reasonableness of the thing, be limited to the construction and maintenance of the system as contemplated and desired by the subscribers, and which they have petitioned the municipality to undertake for them, and not a different system which they do not desire, but which some other system endeavours to force upon them; and, of course, there is no warrant for compelling the municipality to pay without recoupment.

It may very well be that the Board would have power to order connection and intercommunication where the applicants were willing to pay the cost of making the connection and where it could be done without inflicting upon any party such injustice as the appellants reasonably complain of in this case. I can find no sufficient authority for an order which has the effect of the order made in this case; nor is there any need for it.

There is no good reason why the respondents should not make arrangements with the Bell Telephone Company similar to those made by the appellants with that company, arrangements which evidently could be made at much less cost and which would not only give the respondents all they sought in this application, but also intercommunication with the company's subscribers as well; but that they would not, because, I have no doubt, of some feeling against, and concerted opposition to, that company,

to give effect to which the appellants are to be driven from their alliance with it, and compelled, at great cost, to establish switching stations and operate their own lines, as well as to lose the benefit of intercommunication over the Bell system, and take the consequences of a breach of the agreement with the company.

For two other reasons, I am also of opinion that the order cannot stand: (1) there was no power in one member of the Board to hear the application and make the order; and (2) the application should have been made against the municipality, not against the "system," which is not a legal entity: and there is still another reason, which I shall mention in dealing with the like case of Blyth and McKillop.

The order should, I think, be rescinded for want of jurisdiction.

(Blyth case.) This case is quite the same as the Brussels case, in which I have just expressed my opinion, except in these respects: (1) the initiating municipality is properly proceeded against; and (2) the application was heard, and the order made, by the full Board: and, therefore, all that I have said in the other case, except in these respects, applies fully to this case: but I desire to add a few observations now, applicable alike to each case.

The Bell Telephone Company are materially affected by the order; and, according to first principles in the administration of justice, ought to have been given an opportunity of being heard upon the application: they might have desired to oppose it upon the merits, if the Board had jurisdiction: and they might also have desired to contend, and possibly might have been able to convince the Board, that the order sought would be one substantially affecting rights in them, over which, not being a provincial corporation, the Board had no power: see sec. 2 (*c*) of the Ontario Telephone Act, 1910.

This appeal should, therefore, be dealt with in the same manner as the other.

MAGEE, J.A.:—Looking at the provision for extensions in secs. 5, 7, and 11 of the Local Municipal Telephone Act, 1908, and the provisions for connection and switch-boards in secs. 10 and 11, and the amendments in 1910 and 1911 by 10 Edw. VII. ch. 92, secs. 1 and 4, and 1 Geo. V. ch. 56, sec. 2 (13 *a*., (5), (6)), I am inclined to think the council would be entitled to collect from the subscribers the additional cost imposed upon it by law. It would appear to be one of the risks run by those who invoke for their private convenience the authority of the municipality to use the highways for the poles and lines, and break, dig, and trench the same, or private property, that they may be called upon to submit to more extension and expense and a wider connection than they originally contemplated. As the munici-

ONT.
C. A.
1912
Magee, J.A.

pality is, under sec. 10, authorised to enter into agreements for connection with other systems, I would think that, under sec. 4 of the Ontario Telephone Act, 1910, the Board would have power to order it to do so.

But, for the other reasons stated by my Lord the Chief Justice, I agree that the appeals should be allowed.

Appeals allowed.

ONT.
C. A.
1912
March 6.

WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

Ontario Court of Appeal, Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. March 6, 1912.

1. INSURANCE (§ VI B—250)—ACCIDENT POLICY—PASSENGER STEPPING ON CAR—DOUBLE LIABILITY—"RIDING," MEANING OF.

A passenger on a street car who had arrived at his destination and descended to the street, when the car stopped for the purpose on his signal, but seeing an approaching motor car likely to run him down, unsuccessfully attempted to get back on the car then in motion and was injured in so doing cannot claim under the double indemnity clause of an accident insurance policy limited to accidents while "riding as a passenger in or upon a public conveyance."

[*Anable* v. *Fidelity and Casualty Co.*, 63 Atl. Rep. 92, 73 N.J.L. 320, and 74 N.J.L. 686, approved.]

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., 25 O.L.R. 80, in an action upon an accident insurance policy, in favour of the plaintiff's claim for temporary total disability and his further claim for double indemnity, upon the ground that, when he sustained the accident in respect of which he claimed, he was "riding as a passenger" upon a public conveyance.

N. W. Rowell, K.C., for the defendants, argued that the plaintiff was not "riding as a passenger" when the accident occurred. He had alighted, and was merely entitled to the rights of a person on the public highway. The word "passenger" implies an intention to travel, while the plaintiff was at his journey's end, and was on property not controlled by the railway company: Booth's Street Railway Law (1892), sec. 326; see note on p. 445 and case of *Creamer* v. *West End St. R.W. Co.* (1892), 31 N.E. Repr. 391, there cited; also *Platt* v. *Forty-Second St. and Grand St. Ferry R.R. Co.* (1874), 2 Hun. (N.Y.) 124. On the question of intention, he referred to Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 305, and cases there cited, especially *Hendrick* v. *Employers' Liability Assurance Corporation* (1894), 62 Fed. Repr. 893. He referred particularly to the case of *Anable* v. *Fidelity and Casualty Co. of N.Y.* (1906), 63 Atl. Repr. 92, 73 N.J.L. 320, affirmed (1907), 74 N.J.L. 686. He also referred to *Ætna Life Insurance Co.* v. *Vandecar* (1898), 86 Fed. Repr. 282. On the other point in the case, the evidence, while somewhat conflicting, shewed that the

plaintiff was not wholly disabled by the accident, as he assisted his wife in looking after the heating of the premises of which they jointly had a lease, and in the buying of necessary stores, so that he was not entitled to the benefits under the policy arising from total disability: Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 336, and cases there cited.

D. Urquhart, for the plaintiff, argued that there was ample evidence to support the finding of the learned trial Judge that the plaintiff's injury wholly incapacitated him from business: *Young* v. *Travelers Insurance Co.* (1888), 80 Me. 244; *Hooper* v. *Accidental Death Insurance Co.* (1860), 5 H. & N. 546. On the other point, reference was made to *Theobald* v. *Railway Passengers Assurance Corporation* (1854), 10 Ex. 45, as the earliest case on the subject. That case was followed in *Powis* v. *Ontario Accident Insurance Co.* (1901), 1 O.L.R. 54, and shews that a passenger remains a passenger until he has safely landed at his destination. The plaintiff could not be said to have alighted safely from the car until he had got a foot-hold upon the street which he could maintain. Reference was made to the following cases and authorities: Nellis on Street Railways, 2nd ed., secs. 260, 261; *Northrup* v. *Railway Passenger Assurance Co.* (1871), 43 N.Y. 516; May on Insurance, 4th ed., secs. 521, 524-529 (incl.); *Tooley* v. *Railway Passenger Assurance Co.* (1873), 2 Ins. L.J. 275.

Rowell, in reply, argued that the cases cited on behalf of the respondent were not applicable, and that the *Anable* case covered the whole ground. [*Anable* v. *Fidelity and Casualty Co.*, 62 Atl. Rep. 92, affirmed 74 N.J.L. 686.]

March 6. MACLAREN, J.A.:—This is an appeal by the defendants from a judgment of Meredith, C.J., without a jury, awarding the plaintiff $1,300 for 26 weeks' total disability from injuries received after alighting from a street car in Toronto. The defendants had issued a policy in the plaintiff's favour, insuring him against injuries for $25 a week for "temporary total disability;" the amount to be $50 a week if the injuries were sustained "while riding as a passenger in or upon a public conveyance."

The claim was resisted on the ground that the plaintiff's illness and disability were caused not by the alleged injury, but were due to locomotor ataxia or an aneurism. The trial Judge found for the plaintiff on this issue; and, although urged in the reasons for appeal, it was abandoned in the argument before us.

Another ground of defence was, that the plaintiff was a commercial traveller, but before the accident in question he had ceased to be such, and had become the keeper of a boarding-house, and had followed this business during the period claimed for. "Temporary total disability" is defined in the policy as arising from injuries resulting in the "assured being immediately, continuously, and wholly disabled, and thereby prevented from transacting

ONT.

C. A.
1912

WALLACE
v.
EMPLOYERS' LIABILITY ASSURANCE CORPORATION

Maclaren, J.A.

any and every kind of business pertaining to his occupation." The trial Judge found as a fact that the boarding-house business was his wife's, and not his; and that the trifling assistance he gave her was not sufficient to affect his claim. This finding seems to be amply justified by the evidence, and the appeal on this ground should be dismissed.

The third ground of appeal is more serious. It is contended by the defence that, even if the plaintiff were entitled to $25 a week, he is not entitled to $50 a week, or the double allowance, as his injuries were not sustained while he was "riding as a passenger in or upon a public conveyance."

The word "passenger" had been variously defined, and it is difficult to frame a definition that would be of general application. It usually means one who travels or is carried in a vessel, coach, railway or street car, or other public conveyance, entered by fare or contract express or implied. The precise time at which the traveller becomes a passenger or ceases to be such depends upon the facts of the particular case. If the carrier owns or controls the station, platform, or other premises where the journey begins or terminates, the relation of carrier and passenger may begin sooner and terminate later than in the case of a tram or street car, where the carrier has no control over the place of departure or arrival. In the present case we have not to determine whether the plaintiff had ceased to be a passenger with reference to the Toronto Railway Company when he received the injury complained of, but whether at that time he was "riding as a passenger in or upon a public conveyance."

The facts of the case as given by the plaintiff in his evidence are quite simple. He was a passenger on an open street car in the city of Toronto, which stopped to let him off at the regular stopping place, just opposite his home. When he stepped on the ground, an automobile going in the same direction was about to run him down, and to save himself he tried to get on the street car again, which by this time was in motion. He says he reached out to catch hold of the handle of the car, and was jerked around, and fell between the car and automobile, his head striking the side of the car as he fell.

We were not referred to any Canadian or English case precisely in point; but there are a number of American cases that are very similar to the present one.

In *Creamer* v. *West End St. R.W. Co.* (1892), 156 Mass. 320, a passenger had taken one or two steps from where he touched the ground on leaving his car and was struck by another car. The Court said:—

> We are of opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveller upon the highway, and terminates his relations and rights as a pas-

senger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk.

In *Platt* v. *Forty-Second St. and Grand St. Ferry R.R. Co.*, 2 Hun (N.Y.) 124, the plaintiff had left the company's car and was passing the horses which had been drawing it, when one of them injured her. It was held that she had ceased to be a passenger on the car, and that the liability of the company, if any, was not that of a common carrier, but depended upon the principles that apply to all persons lawfully using the highway.

Anable v. *Fidelity and Casualty Co. of N.Y.*, 73 N.J.L. 320 (1906), was an action on a policy in the same terms as the one in this case—providing for double indemnity for an injury "while riding as a passenger in or upon a public conveyance." While the train was at a station, the assured stepped on the station platform to buy a paper. The train started, and the assured grasped the handrail of one of the cars, but fell, and the last car passed over his body, killing him instantly. The trial Judge held that the rights of the parties must be ascertained by the plain natural meaning of the language used; that he was not in a car nor on a car, nor on any part of a train at the time of the injury; that he was insured not simply as a passenger, but was entitled to the double indemnity only if the injury was received while within or on the car or other public conveyance, which was considered a less hazardous risk than while in the act of getting on or off, which might involve a considerable degree of peril. This judgment was affirmed and approved unanimously by the appellate Court of eleven Judges: 74 N.J.L. 686 (1907).

The reasoning in this last case commends itself to my judgment. In the present case the plaintiff was not in fact either in or on the car when he received the injury. If he had been, he would not have been injured. It is common knowledge that the vast majority of street car accidents to passengers occur in connection with entering or leaving the car, injuries to those in or on the cars being limited to the rarer cases of collisions or the car running off the track. I do not think that the language of the policy should be strained so as to cover a risk which does not come within its terms; and a risk for which the proper premium was not paid.

I am further of opinion that the plaintiff was not even a "passenger," within the meaning of the policy, at the time he received the injury. He had fully completed the journey for which he had entered the car and paid his fare. The car had stopped at his request at the very spot at which he desired to alight, and with which he was very familiar, as it was almost at his own door. He had completely separated himself from the car and was securely landed on the roadway. His subsequent attempt to lay hold of the car and get upon its steps was not for the purpose of resuming his journey or again becoming a passenger on the car, and was in no way connected with his having been a passenger

ONT.

C.A.
1912

WALLACE
v.
EMPLOYERS' LIABILITY ASSURANCE CORPORATION

Maclaren, J.A.

a short time previously. His position was the same as that of any foot-passenger on the street who might find himself in the same peril, and might try to take refuge from the deadly automobile. But I do not think it is necessary to decide whether, at the time of the accident, he was a passenger or not; it is sufficient that he was not then "riding as a passenger in or upon a public conveyance."

In my opinion, the plaintiff is entitled only to single and not to double indemnity, and the $1,300 awarded him should be reduced to $650.

There should be no costs of the appeal.

MEREDITH, J.A.:—The first question is, whether the plaintiff, at the time of his injury, was "riding as a passenger in or upon" the street car; and is not the broader one whether, at that time, he might be considered merely a passenger as against the railway company.

He had been a passenger riding in and upon the street car, but had reached his destination, the car had been stopped to let him down, and he had alighted upon the public road, severing entirely all actual connection between himself and it; but, being put in imminent danger by a rapidly approaching motor car, he caught at the street car again, though it had by that time been started again and was in motion; and, in endeavouring to escape injury from the motor car by getting upon the street car, fell, or was thrown down, coming in contact with the moving cars, and so was severely injured. His purpose in trying to get upon the street car again was not to resume his journey; that was ended; nor was it to begin a new journey; it was solely to escape injury by the negligently-driven motor car. It is idle to say that there was negligence on the part of the railway company, if that would make any difference; how could their servants foresee and be blameable for the misconduct of the driver of the motor car? It was at the plaintiff's instance, and upon his signal, that the street car was stopped at this alighting place; an entirely proper place to stop for that purpose; the danger was something not foreseen by the plaintiff or any one else, because doubtless not apparent until the motor car was almost upon him; avoidable, with any sort of care on the part of its driver, up to almost the last moment.

Under these circumstances, it is impossible for me to find that the man was "riding in or upon" the street car when he was injured; if he had been in or upon the street car, he would not have been injured as he was. The case would have been different if he had, after alighting, boarded the car again with the intention of resuming his journey, or of beginning a new one; but nothing like that was the case. Their plain meaning ought to be given to plain words, even though the result be different from that which one would prefer. And such is the effect of the cases in the Courts of the State of New Jersey, which, though very much in point, were not referred to at the trial.

ONT

C. A.

1912

WALLACE v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION

The case, therefore, is not one for "double indemnity" under the policy in question, but for single indemnity; and the amount of the judgment entered for the plaintiff ought to be reduced accordingly.

The appeal upon the other ground fails entirely; there is ample evidence to support the finding that the plaintiff's injury caused him "temporary total disability," within the meaning of those words contained in the policy.

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

Appeal allowed in part.

RICE v. GALBRAITH.

Ontario Divisional Court, Clute, Latchford, and Sutherland, JJ. March 8, 1912.

ONT

D. C.

1912

March 8.

1. BROKERS (§ II B—12)—REAL ESTATE AGENT—SALE BY OWNER DIRECT —AGENT'S PREVIOUS DEALINGS WITH PURCHASER.

If a real estate agent is employed by the owner to sell his property and brings it to the notice of a prospective purchaser, the owner, who subsequently makes the sale himself to the same purchaser without knowing that the purchaser came to him through the agent, is liable to pay the agent's commission if there has been no revocation of the agent's authority, and the contract of employment specified no time limit.

[*Locators* v. *Clough*, 17 Man. L.R. 659, doubted; *Wilkinson* v. *Alston*, 48 L.J.Q.B. 733, approved; *Burchell* v. *Gowrie*, [1910] A.C. 614; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, and *Sagar* v. *Sheffer*, 2 O.W.N. 671, specially referred to.]

APPEAL by the plaintiffs from the judgment of DENTON, Jun. Co. C.J., dismissing an action in the County Court of the County of York for commission on the sale-price of the defendant's land, upon a sale brought about by the efforts of the plaintiffs as the defendant's agents for sale, as they alleged.

G. H. Kilmer, K.C., for the plaintiffs. In the Court below the case was decided in favour of the defendant, on the ground that he did not know, when he sold to the purchaser, that she was the plaintiffs' client. Assuming the facts, which are not open to dispute, that the defendant employed the plaintiffs to sell the property, and that the plaintiffs brought it to the notice of the purchaser, their right to the commission is established, and is not affected by the fact that, when the defendant sold the property, he did not know that the purchaser was the client of the plaintiffs: *Sager* v. *Sheffer* (1911), 2 O.W.N. 671, and the case there cited of *Wilkinson* v. *Alston* (1879), 48 L.J.Q.B. 733; *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614. The learned trial Judge relied on the case of *Locators* v. *Clough* (1908), 17 Man. L.R. 659; but it is submitted that the authorities above cited should be followed in preference to the Manitoba case.

J. J. Maclennan, for the defendant, argued that the Manitoba case was absolutely in point, and should be followed. The agent, in order to be entitled to a commission, must do more than

ONT
D. C.
1912
RICE
v.
GALBRAITH.
Argument

merely say that certain premises are for sale—he must be the efficient cause, the *causa causans*, of the transaction: *Burchell* v. *Gowrie and Blockhouse Collieries*, [1910] A.C. 614, in which case the agent was an active intermediary, and did more than merely introduce the purchaser. *Locators* v. *Clough*, 17 Man. L.R. 659, was an unanimous judgment of the Manitoba Court of Appeal, and shews that the *onus* is on the plaintiffs to shew that but for their intervention the sale would not have taken place. He also referred to *Stratton* v. *Vachon* (1911), 44 Can. S.C.R. 395, *per* Duff, J., at p. 406, where he refers to Lord Atkinson's judgment in the *Burchell* case, at p. 624.

[SUTHERLAND, J., referred to *Singer* v. *Russell* (1912), 25 O.L.R. 444.]

Kilmer, in reply, argued that the plaintiffs had rendered valuable service to the defendant in connection with the sale, and referred particularly to the judgment of Cotton, L.J., in *Wilkinson* v. *Alston*, 48 L.J. Q.B. 733, at p. 736.

March 8. CLUTE, J.:—The action is for a commission on the sale of land. The defendant listed the property with the plaintiffs, real estate brokers, in Toronto, for sale. It is clearly established that the plaintiffs brought the property to the notice of Mrs. Rough, who subsequently became the purchaser. The house was examined by her at the instance of the plaintiffs. Mrs. Rough is under the impression that her attention was first brought to the house at the instance of her brother-in-law, Mr. Blackie; but in this, I think, she is mistaken; and the Judge, while not deciding the point, seemed also inclined to that view.

Subsequently, another brother-in-law of hers got in communication with one of the builders, and so with the defendant, Galbraith, and, acting for Mrs. Rough, finally agreed upon the purchase-price, which was $100 less than the defendant had instructed the plaintiffs to accept.

Upon the evidence, there can be no reasonable doubt that it was through the action of the plaintiffs that the defendant got in communication with the purchaser; and so I think it may be fairly found upon the evidence that the sale would not have been brought about but for the action of the plaintiffs. But it is said, and the judgment below proceeds upon this sole ground, that the sale was in fact made by the defendant without knowing at the time that the attention of the purchaser had been brought to the premises by the plaintiffs. Upon this ground the trial Judge found for the defendant, following *Locators* v. *Clough*, 17 Man. L.R. 659. The judgment is by the Court of Appeal. Phippen, J.A., by whom the judgment of the Court was given, says:—

> I have no doubt that had the defendant sold with knowledge that the property had been introduced to Forrest by the plaintiffs, he would be liable for some commission. I cannot, however, hold that the mere introduction of the property to Forrest without endeavouring

to negotiate or in fact negotiating a sale is itself an earning of the agreed commission, the owner effecting a sale on terms less favourable than those expressed in the commission contract, in ignorance of the plaintiffs' action, and under circumstances which did not place him upon inquiry.

I do not take this to be the law. A number of the cases bearing upon this point are referred to in *Sager* v. *Sheffer*, 2 O.W.N. 671. It has been held sufficient in most cases that the agent has been instrumental in bringing the purchaser and vendor together, although the negotiations are subsequently conducted exclusively by the parties. "If the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him:" *Green* v. *Bartlett* (1863), 14 C.B. N.S. 681, 685; *Steere* v. *Smith* (1885), 2 Times L.R. 131. "It is sufficient if the purchaser becomes such through the agent's intervention:" *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139. *Wilkinson* v. *Alston*, 48 L.J. Q.B. 733, is a very strong case in the plaintiffs' favour. This was not referred to in the Manitoba case [*Locators* v. *Clough*, 17 Man. L.R. 659].

The recent case of *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, was applied in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395. The last case proceeds upon the ground that the agent had brought the owner into relation with the person who finally became the purchaser, and was, therefore, entitled to the customary commission.

The plaintiffs having brought the parties together and a sale having been effected by their intervention, it is not sufficient, in my opinion, to disentitle them to a commission to say that the vendor had proceeded with his negotiations with the purchaser without the knowledge that the agents had been instrumental in bringing the parties together.

I think this point was involved in the decision in the *Wilkinson* case. After various negotiations, in that case, the sale was finally made by the agent writing a letter to a broker reminding him that the vessel was for sale. The broker took no notice of this letter, and neither the plaintiff nor the defendant was aware that the letter was written, but subsequently the broker wrote to the defendant, and afterwards disclosed the name of the principal for whom he was acting, and the sale was then effected. Bramwell, L.J., put the case very broadly: "The defendant practically said to the plaintiff, 'If you or White can find me a purchaser, and the purchase is completed, I will pay you a commission.' And the expression, 'If you can find a purchaser,' may be explained as meaning, if you can introduce a purchaser to myself, or can introduce a purchaser to the premises, or call the premises to the notice of the purchaser."

The decision of the Commission of Appeals, New York, is to the same effect, *Lloyd* v. *Matthews* (1872), 51 N.Y. 124. There

ONT
D. C.
1912
RICE
v.
GALBRAITH.
Clute, J.

the objection was taken that the seller is entitled to know that the party with whom he is dealing is a customer of the broker, if such be the fact. In dealing with this objection, Lott, Ch. J., said:—

> The sixth proposition is not correct. It is to be understood, in the connection in which it is presented, as declaring that, although a party is brought, through the agency and instrumentality of the broker, into a negotiation and dealing with the owner, which actually results in a sale, yet the broker is not entitled to compensation, unless it is made known to the owner that the purchaser is his customer. That is not true. It is sufficient that the purchaser is in fact such customer.

With respect, I think the judgment appealed from should be set aside and judgment entered for the plaintiffs for the amount of their commission, with costs here and below.

LATCHFORD, J.:—That the defendant employed the plaintiffs to sell the property is found as a fact by the learned trial Judge. The finding is amply supported by evidence, though denied upon oath by Mr. Galbraith. No limit as to time was imposed when authority to find a purchaser was given, nor was that authority ever revoked. It is satisfactorily established that the property was brought to the notice of the purchaser by the plaintiffs. They sent her a list of houses, which included the defendant's, and took her to examine his house. The proceedings subsequent to the introduction of the property to the purchaser were conducted without further intervention by the plaintiffs; and the defendant, when he closed the transaction, was not aware that the purchaser had been introduced to the property by the only agents with whom he had placed it for sale.

The contract between the defendant and the plaintiffs was that he would pay a commission if they would find a purchaser. To apply the words of Lord Justice Brett in *Wilkinson* v. *Alston*, 48 L.J. Q.B. 733, they would in point of law fulfil the contract if they introduced the property to the notice of the purchaser and the latter purchased it in consequence of that introduction, though all proceedings subsequent to that introduction were carried on between the principals without any further intervention by the agents. It would be impossible to find authority more directly in point. The case does not appear to have been cited in *Locators* v. *Clough*, 17 Man. L.R. 659, nor to the trial Judge in this case. It was referred to and followed in *Sager* v. *Sheffer*, 2 O.W.N. 671, and is in principle and authority to be preferred to the decision of the Manitoba Court. See also *Stratton* v. *Vachon*, 44 Can. S.C.R. 395.

I think the appeal should be allowed, with costs here and below.

SUTHERLAND, J., concurred.

Judgment accordingly.

DELYEA v. WHITE PINE LUMBER CO.

ONT

D. C.
1912

March 8.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Middleton, JJ. March 8, 1912.

1. DEATH (§ II A—6)—LUMBERING OPERATIONS—NEGLIGENCE OF SUPERINTENDENT.

The death of a servant is due to the negligence of the master where, for the purpose of lumbering operations, the servant is furnished with a pole and a fellow-servant with an inch board for the purpose of supporting a derrick which the servants were engaged in raising, during the construction of a "log jammer," of which the derrick was a part, and which, in the course of the operation, it was necessary to support for a time by placing the pole and the board under it upon frozen ground, snow and ice, if the superintendent in charge of the work should have known that the board and pole were insufficient supports without proper spikes to prevent slipping, and by reason of their insufficiency the derrick fell when it came on the supports and fatally injured the servant while holding the pole.

2. DAMAGES (§ III I—187)—DEATH OF INFANT SON—PECUNIARY LOSS—REASONABLE EXPECTATION.

In an action for the death of a minor servant due to the negligence of the master, his father's and mother's right to recover must be limited in amount to the pecuniary loss which it could be fairly and reasonably found they had suffered by their son's death.

[*Stephen* v. *Toronto R. Co.*, 11 O.L.R. 19, and *London and Western Trust Co.* v. *Grand Trunk R. Co.*, 22 O.L.R. 262, applied.]

APPEAL by the defendants from the judgment of CLUTE, J., in favour of the plaintiff, in an action tried at Sudbury without a jury.

The appeal was dismissed subject to a reduction of damages.

The action was brought by the administrator of the estate of Frederick Delyea, deceased, under the Workmen's Compensation for Injuries Act and Lord Campbell's Act, to recover damages for Frederick Delyea's death. The deceased was a young man sixteen years of age, employed as a teamster at the defendants' lumber camp.

A. G. Browning, K.C., and *J. W. Heffernan*, for the plaintiff.

R. McKay, K.C., for the defendants.

The judgment of the Court was delivered by MIDDLETON, J.:—The defendants desired to construct a machine called a log jammer. This machine consists of a heavy sled, to one side of which is attached a derrick, consisting of two booms some twenty-five feet in length, united at the apex and separated about six feet at the base. The lower ends are attached by hinges to the edge of the sled, and the derrick is supported as raised by a gin pole hinged at about half height, resting upon the ground. The derrick is also, when in use, supported by guy ropes attached to the apex and fastened to trees or other convenient objects near by. A pulley is attached to the apex, and the machine is used for loading and unloading timber. When it is desired to move the machine, the derrick is inclined over

ONT.
D. C.
1912
DELYEA v. WHITE PINE LUMBER CO.
Middleton, J.

the sled, and there supported by the gin pole, which rests upon the opposite side of the sled.

Rumley, the camp blacksmith, was instructed by the defendants to construct the machine. He had no previous experience in constructing such a machine, but was directed to copy a similar one in use at the camp. There does not appear to have been any defect in his work. In completing the construction, it was necessary to raise the derrick so that it would be supported by the gin pole. Rumley had the right to call upon men working at the camp to assist him in this operation; and, when the machine was ready, he called the deceased and others to help him. Upon the evidence it is clear that, although the deceased might have objected to undertake this work, yet it was right and proper that he should respond when called upon by Rumley.

I think the learned trial Judge was quite right in holding that Rumley, quoad this job, was a person who had superintendence intrusted to him, and also was a person to whose orders or direction the deceased, at the time of the injury, was bound to conform. Once having acceded to Rumley's request, and having undertaken to assist him in raising the derrick, it became the duty of the deceased to obey Rumley's instructions. I do not think the fact of Rumley allowing the officious Fournier to assume the more prominent part relieved Rumley from the responsibility which was justly his.

The men engaged in lifting the free end of the derrick did so by stages. It was allowed to rest upon supports while they changed their position so as to be able to lift more effectively. First a box was used, then a sleigh bunk, and finally the weight was supported by a piece of inch board in the hands of Fournier and a pole in the hands of the deceased. These were placed under the derrick, near its apex, and rested upon the frozen ground, snow and ice. As soon as the weight of the derrick was allowed to come upon these two supports, something slipped, and the derrick fell, striking Delyea upon the head and fatally injuring him. The exact cause of the slipping cannot be ascertained.

The board and pole were quite insufficient for their purpose; and it is clear that there was negligence in not providing better supports. When the derrick came to be lifted on the following day, pike poles were used, with proper spikes, so that there was no danger of slipping, and the derrick was raised without difficulty or danger.

At the time of the accident, a guy rope was not attached to the top of the derrick; but the apex of the derrick had not then been lifted more than ten or twelve feet, and a guy rope would not at that stage of the work have afforded any protection.

ONT

D. C.
1912

DELYEA
v.
WHITE
PINE
LUMBER CO.

Middleton J.

The appeal is based mainly upon the two cases of *Garland* v. *City of Toronto*, 23 Ont. A.R. 238, and *Ferguson* v. *Galt Public School Board*, 27 Ont. A.R. 480. These cases are well distinguished in *Shea* v. *John Inglis Co. Limited*, 11 O.L.R. 124, and 12 O.L.R. 80, not cited upon the argument. There it was held that the superior servant had been in effect intrusted with the superintendence of the whole operation, and that the infant plaintiff was bound to conform to his orders; thus the case was brought within the statute. The Court of Appeal accepted the reasons for judgment as given in the Divisional Court by Mr. Justice Anglin, where speaking of the cases relied upon, he says: "In the former case the injured man was on an equal plane with the workman who gave the direction. Neither the nature of the work in hand nor any exigency arising in its performance required that the other workman should in that case direct the labour of the injured man. It was a case of pure assumption by a senior workman of an authority which he clearly did not possess over his junior. In the latter case the direction to bring the mortar, given by the mason, was held not to be an order or direction within the meaning of the statute. It amounted to nothing more than an intimation by one workman to another that the work of their common employer had reached a stage at which the latter was called upon to fulfill his own well-defined duty to such employer."

The case of *McManus* v. *Hay*, 9 Rettie 425, and *Brow* v. *Furnival*, 23 Rettie 492, afford no assistance. The holding in each case was that negligence had not been established. The fall of the article there being lifted was, upon the evidence, a mere accident and not the result of negligence.

I have more difficulty with the second branch of the appeal. The learned Judge has awarded $1,300 damages. The deceased was earning $30 a month and his board. His father and mother, on whose behalf the action is brought, are people in a humble walk of life; the father earning $2 a day and his board. The age of these parents is not given; all that appears is that the deceased was the eldest of a family of six.

The amount awarded is almost equivalent to the capitalised value of one-half of the young man's earnings for the lifetime of his parents, assuming them to be fifty years of age. Having in mind the risks of life, the possibility of the marriage of the deceased, and endeavouring to apply the principles laid down in *Stephens* v. *Toronto R. Co.*, 11 O.L.R. 19, and *London and Western Trusts Co.* v. *Grand Trunk R. Co.*, 22 O.L.R. 262, I think the damages should be reduced to $950. Subject to this the appeal should be dismissed with costs.

I think we have the right to reduce the damages without directing a new trial, the case having been tried by a Judge and not by a jury.

Judgment below varied and appeal dismissed.

ONT.

D. C.
1912

March 8.

RICH v. MELANCTHON BOARD OF HEALTH.

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. March 8, 1912.

1. MANDAMUS (§ I D—29)—LIABILITY OF BOARD OF HEALTH FOR MEDICAL ATTENDANCE—PUBLIC HEALTH ACT (ONT.)—RECOVERY.

Although a Board of Health appointed under the Ontario Public Health Act, R. 50, 1897, ch. 248, is not constituted a corporation, neither the Board as a whole nor its members individually are to be held liable for the recovery of medical claims as for a private debt, but the remedy is to be sought against the Board as a public body by the prerogative writ of mandamus requiring the Board to issue an order upon the municipality for payment.

[*Ross* v. *Township of London*, 23 O.L.R. 74 and *Mayor of Salford* v. *Lancashire*, 25 Q.B.D. 384, specially referred to.]

2. MANDAMUS (§ II C—88)—WRIT—WHERE IT MAY ISSUE FROM.

The high prerogative writ of mandamus originally confined to the King's Bench alone may now be issued out of any of the Divisions of the High Court of Justice in Ontario.

[*Toronto Public Library Board* v. *City of Toronto* (1900), 19 P.R. 329, approved.]

3. COURTS (§ II A—151)—JURISDICTION OF COUNTY COURT—MANDAMUS TO PUBLIC BODY.

While the Consolidated Rules of Practice, 1897, govern the practice and procedure in County Courts as well as in the High Court of Justice and Court of Appeal for Ontario, the Consolidated Rules confer no jurisdiction on the County Courts, and a County Court has no jurisdiction to entertain an application for the prerogative writ of mandamus to a public body to perform a public duty even where the amount in dispute, if it could be treated as a debt, would be within County Court jurisdiction.

AN appeal by the plaintiff from the judgment of the Judge of the County Court of the County of Dufferin, dismissing an action brought in that Court by a physician to recover $30 for services performed under the direction of the Board of Health of the Township of Melancthon. The plaintiff sought a personal judgment and a mandatory order to enforce it.

W. H. Harris, for the plaintiff, argued that the Board of Health had been properly sued, and cited *Bibby* v. *Davis* (1902), 1 O.W.R. 189, and *Ross* v. *Township of London* (1910-11), 20 O.L.R. 578, 23 O.L.R. 74. The plaintiff was the duly appointed medical health officer of the Board. He did work on the direction of the Board, and should be paid therefor: Public Health Act, R.S.O. 1897, ch. 248, sec. 122.

W. C. Chisholm, K.C., for the defendants, contended that the plaintiff was not properly authorised by the Board of Health. The plaintiff should have notified the Board before undertaking to do the work himself. Then the Board could have compelled the people whose house was cleaned to pay for the disinfection thereof. Besides, the plaintiff's remedy, if any, was by application for mandamus, and not by action. He referred to *Ross* v. *Township of London*, 20 O.L.R. 578, 23 O.L.R. 74, and the cases there cited.

Harris, in reply.

March 8. BOYD, C.:—This is an unfortunate bit of litigation for the plaintiff. He is entitled to be paid $30 for his medical services, rendered at the instance of the Board of Health, but cannot recover it by this method. The miscarriage is not to be wondered at, considering the state of the cases and the vague and rather embarrassing clauses of the Public Health Act—which invite, and are, I understand, about to receive clarifying amendments: R.S.O. 1897, ch. 248.

It is now pretty well settled that the members of the Board are not constituted a corporation, though they have been judicially spoken of as a quasi-corporation; and it is also settled that the Board as a whole is not personally liable nor are the component members thereof individually liable to be sued for the recovery of medical claims as for a private debt. The remedy is to be sought against the Board as a public body, if payment cannot be otherwise obtained—by seeking the grant of a writ of mandamus requiring the Board to issue an order upon the municipality for the amount of the claim, in order that payment may be made out of the funds applicable thereto.

The writ is the high prerogative writ, so-called, available in cases where there is no right of action for the recovery of the claim, and relief is to be sought against a public body who fail to perform statutory or other public duties imposed upon that body, for the benefit of the applicant. This plaintiff by his pleading seeks a personal judgment for the amount, and also asks for a mandatory order to enforce it, and for that purpose sues the public body under the name of the Board of Health for the Township. The personal judgment he cannot get, and for this reason he cannot in and by an action get a mandatory order. Nor could he, in any circumstances, get the mandatory order of the character required from an inferior Court, such as the County Court. The prerogative writ of mandamus, which is the appropriate method of relief, can be issued only by the High Court. Originally confined to the King's Bench alone, it may now be issued by any of the Divisions of the High Court, as was explained in the case reported in 19 P.R. 329, 332, *Toronto Public Library Board* v. *City of Toronto* (1900).

The case of *Bibby* v. *Davis*, 1 O.W.R. 189, which may have misled the plaintiff, is not now to be followed in the light of later decisions: *Sellars* v. *Village of Dutton* (1904), 7 O.L.R. 646; *Ross* v. *Township of London*, 20 O.L.R. 578, affirmed in appeal, 23 O.L.R. 74. See also, as to the writ, *City of Kingston* v. *Kingston, etc., Electric R.W. Co.* (1897), 28 O.R. 399, and in appeal (1898), 25 A.R. 462.

There is an inherent lack of jurisdiction in the County Court to deal with this claim; but the matter was not contested on the line above indicated on the appeal before us. We are all in the dark as to what took place on the trial below; the only judgment given being that the action is dismissed with costs. This curt

ONT.

D. C.
1912

RICH
v.
MELANCTHON
BOARD OF
HEALTH.

Boyd, C.

disposal of appealable cases has often been commented upon as unfair to the suitors and to the Court of Appeal. When reasons are given for the judgment, it enables the dissatisfied litigant to judge whether to appeal or not, and these reasons are a material assistance to the appellate Court. In brief, when reasons for the judgment exist, they should be given; when they are not given, it may be that the rule "*de non apparentibus*," etc., will excuse.

The defendants raised an issue disputing the claim which was vexatious and did not take the vital point on which we decide; so that, while the appeal is disallowed, we think the proper order to make is to dismiss both action and appeal without costs.

This is to be without prejudice to the plaintiff prosecuting his claim as he shall be advised—if the municipality does not provide means for payment.

LATCHFORD, J.:—I agree.

MIDDLETON, J.:—I agree with my Lord the Chancellor, and only desire to add to what he has said, for the purpose of explaining more at length the reason why I think that an action for a mandamus or a mandatory order is not the proper or permissible remedy. Some confusion has arisen from a failure to keep in mind the historical origin of the present jurisdiction of the High Court, and by reason of the term "mandamus" being used to indicate several distinct things.

The Court of Chancery always had jurisdiction to enforce certain rights by means of a mandatory injunction, as well as by specific performance. Prior to the Common Law Procedure Act, the Courts of Law had no such power.

The Court of King's Bench, as one of the Crown prerogatives, had the right to issue the prerogative writ of mandamus. The scope of this writ was very widely different from the mandatory order in Equity.

The Common Law Commissioners of 1834 reported in favour of an amendment by which the Courts of Law should be given the same jurisdiction as the Court of Equity to restrain the violation of legal rights, in cases in which an injunction might issue for that purpose from Courts of Equity. Following this, the Common Law Procedure Act of 1854 provided that a plaintiff at law might claim a writ of mandamus "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." This writ was to have the same force and effect as the peremptory writ issued out of the Queen's Bench. This statute was subsequently enacted here, and in its present form is found as Con. Rules 1081-1083.

One of the cardinal principles governing the issue of the prerogative writ was, that it would never be granted where the applicant had some other remedy open to him. After the passing of the Common Law Procedure Act, it was suggested that the

power conferred upon that Court to award a mandamus in an action practically superseded and rendered obsolete the peremptory writ. In *The Queen* v. *Lambourn Valley R.W. Co.* (1888), 22 Q.B.D. 463, it was said by Pollock, B., that "since the passing of this Act it cannot be said that the plaintiff has no specific remedy to enforce the right which he says has been denied to him;" and by Manisty, J.:—

> In 1854, a remedy which did not exist before was given by the Legislature, viz., an action of mandamus, which is in fact for a decree ordering the performance of the duty which the Court thinks ought to be done, and is a more convenient proceeding than by the prerogative writ.

This view of the effect of the statute has not been generally accepted; and in *Smith* v. *Chorley District Council*, [1897] 1 Q.B. 532, Kennedy, J., collects the subsequent decisions in which it has been commented upon, and adopts as a more accurate statement of the law that found in *Baxter* v. *London County Council* (1890), 63 L.T.R. 767, at p. 771, where Day, J., says: "The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got, is by a prerogative writ of mandamus. When I objected that this was a matter for mandamus, I was answered that this was an action for a mandamus. It is an action for a mandamus based upon the Common Law Procedure Act, 1854, and the action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which a statutable mandamus will be applicable, because no action would lie, and a mandamus is only granted as ancillary to the action, and for the purpose of enforcing the private right in respect of which the private litigation had arisen. It was never contemplated that a private mandamus should be granted in cases in which a prerogative mandamus had, from time whereof memory does not run to the contrary, been alone the effective remedy."

This is quite in accordance with the view taken in other cases by other Judges. In *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102, at p. 122, Brett, L.J., speaking of the mandamus referred to in the section of the Judicature Act corresponding with the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 58, sub-sec. 9—which provides that "a mandamus or an injunction may be granted . . . in all cases in which it shall

ONT.

D. C.
1912

RICH
v.
MELANCTHON
BOARD OF
HEALTH.

Middleton, J.

appear to the Court to be just and convenient"—says that the case before him

> is not brought within the rule that would enable the Court of Chancery to grant a mandatory injunction. It is said that, nevertheless, the defendants are liable to a mandamus to do their duty. Now, supposing they had neglected or refused to do their duty, then I think they would have been liable to a mandamus, but not to a mandamus to be granted by the Chancery Division. It would have been a prerogative mandamus, as it is called, to them as a public body to enter upon and do their duty. That, as it seems to me, under the Judicature Act as it was before, is a remedy that can be granted only in the Court of Queen's Bench. I think the mandamus spoken of in the . . . Judicature Act is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie.

In the case already quoted, Kennedy, J., deals with the series of cases in which an action for mandamus had been successfully brought against public bodies, by stating that they are all cases where there was a debt and "in which the relief by mandamus might properly be termed ancillary relief."

The cases in our own Courts dealing with the right of a physician employed by a Local Board of Health, shew that there is no debt. The situation is analogous to that existing in *The King* v. *Beeston* (1790), 3 T.R. 592, where a mandamus was issued against the churchwardens and overseers directing payment of a sum payable out of certain parish funds, upon a contract which the parish overseers had made under a statutory power—the churchwardens not being "technically a corporation; but as far as concerns the regulation of the poor of the parish they stand in *pari ratione*." Upon the same principle, it is said in *Mayor, etc., of Salford* v. *County Council of Lancashire* (1890), 25 Q.B.D. 384, that an action for mandamus would not lie, because there was no debt, and the plaintiffs' only remedy was by the peremptory writ of mandamus.

Under our practice, the peremptory writ of mandamus having been superseded by the simple procedure of Con Rule 1091,† the convenience urged in some of the English cases in favour of the action of mandamus disappears. Apart from this, the great weight of modern authority is in favour of the view I have indicated, that the mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law.

Consolidated Rule 1091 of the Ont. C.R. 1897, is as follows:—

†1091. Where the High Court has jurisdiction to issue an order of peremptory *mandamus*, application therefor may be made upon affidavit to a Judge of the High Court, upon notice in the ordinary manner to any person who may be affected by the order made.

It should also be borne in mind that the County Court has no jurisdiction to grant a peremptory writ. While the Con. Rules govern the practice and procedure in County Court actions, they do not confer any jurisdiction upon the County Court. The jurisdiction of the County Court must be sought in the County Courts Act; and, while the County Court has jurisdiction in actions for equitable relief, where the subject-matter does not exceed $500, and while it has "as regards all causes of action within its jurisdiction . . . power to grant . . . such relief, redress or remedy . . . by the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case before the High Court,"* it has not the right to entertain an application for the old prerogative writ, this being vested in the High Court only.

Action and appeal dismissed without costs.

GALLAGHER v. KETCHUM & CO., Limited.

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. March 14, 1912.

1. DAMAGES (§ III J—203)—CONVERSION—TROVER.

Where an automobile was delivered to the defendants with authority to make all repairs thereon at a cost not to exceed a specified sum and they put a greater amount of repairs on it and then converted it to their own use they must answer for its value at the time of its conversion and cannot reduce their liability by any increased selling value attributable to the unauthorized repair.

[*Greer* v. *Faulkner*, 40 Can. S.C.R. 399, applied.]

APPEAL by the defendants from the judgment of BRITTON, J., in an action of trover for an automobile.

The appeal was dismissed with costs.

The judgment appealed from was as follows:—

BRITTON, J.:—The plaintiff and one Bannerman had been in partnership in an unsuccessful business in real estate. A dissolution took place on the 7th March, 1911. The dissolution agreement was in writing and was witnessed by the defendant Shaver. By this agreement of dissolution the now plaintiff assumed the liabilities, estimated at $370, and she became the sole owner of the office furniture and of an automobile—the one in question herein. Shaver acted at first in a friendly way for the plaintiff and an agreement was made between the plaintiff and defendant Shaver that Shaver should get the automobile repaired, at a cost of not to exceed $350 and then should sell it for the best price reasonably obtainable therefor, that he should sell the office furniture and should pay all the liabilities of the late firm of Bannerman & Gallagher, and should repay himself

*County Courts Act, 10 Edw. VII. (Ont.) ch. 30, sec. 28.

ONT.

D. C.
1912

GALLAGHER
v.
KETCHUM
& CO.,
LIMITED.

Britton, J.

out of the proceeds of sale of furniture and automobile, and pay over balance, if any, to the plaintiff.

The defendant Shaver says that the above was not the agreement, but that the real agreement was that the repairs were not limited to $350, but that these repairs should be to the extent necessary to put the automobile in a good state of repair and the cost of such repairs should be paid out of the proceeds of its sale, and that Shaver should in addition to the debts, and repairs, be entitled to keep out of the proceeds the sum of $300 which he contended Bannerman owed him.

Shaver was and is connected with a company known as "Ketchum & Co., Limited," and no small part of the business of that company is in automobile supplies and repairs. This company did the repairs on the automobile in question. After the repair-work was commenced Shaver told plaintiff that the cost would be considerably more than $350, and the plaintiff distinctly told Shaver that she would not be responsible for, nor would she authorize any larger expenditure than the $350. A dispute also arose in reference to the $300, which Shaver claimed that Bannerman owed him, and which he stated the plaintiff agreed should be paid out of the proceeds of sale of the automobile. Shaver contends that any agreement he made and that all he did was not for himself, but was for the Ketchum Company, Limited, and on the 21st June the defendant company wrote to the plaintiff claiming $1,342.14 against the automobile. The plaintiff consulted Mr. Grant, her solicitor, and he wrote to the defendant company requesting particulars of this claim and expressly notifying the company not to sell the automobile without her express instructions in writing so to do. The defendant Shaver wrote again and probably sent in the account amounting to $1,411.94. I do not find the letter or a copy of it with the exhibits, but plaintiff's solicitors, Grant and McCarthy, wrote again on 15th July, 1911, addressing their letter to Shaver, c/o Ketchum & Co. repudiating the account in detail as furnished and demanding a return of the automobile.

On the 17th July, 1911, the defendant Shaver wrote apparently on behalf of the company on the company's letter paper, in which he asks that the plaintiff "call at once and pay what is against the car with my charges for settling up the affairs in connection therewith." He promised a bill as soon as the car is taken away. In his reply he does not assert any express authority to sell car, but claims that it was given him by the plaintiff to have repaired, etc.

On the 20th July, 1911, the defendants sold the car to one W. R. Gavin, for $1,398.14, and soon after Gavin got possession of the car it was destroyed by fire.

I have no hesitation in accepting the plaintiff's statement of this transaction, and in rejecting that of defendant Shaver.

The correspondence, all of which is in, but to part of which I have not specially referred, is inconsistent with Shaver's evidence.

In the original statement of defence the agreement is set up that upon delivery of the car to Shaver he would have the necessary repairs made so as to permit the car to be sold, thus enabling him to liquidate the liabilities of the plaintiff for the partnership.

The amended statement of defence states in a somewhat different way the position of the defendant Shaver, and in Shaver's examination for discovery which was all put in by plaintiff as against Shaver, his position is again stated and not quite as stated at the trial.

Upon the evidence the defendants are joint tort feasors and are liable to the plaintiff.

The defendants of their own wrong put repairs as they allege to a much greater amount than $350, but only $350 should be allowed by the plaintiff.

The defendants paid liabilities of plaintiff....	$288.19	
They realized from furniture	100.00	
Balance owed to the defendants		188.19
I assess the damages at $859.95, made up as follows:—		
Defendants sold for	$1,398.14	
Plaintiff should allow for repairs ...	$350.00	
Paid for liability of plaintiff as above.	188.19	
		538.19
		$859.95

There was evidence that the value of the car in its condition before any repair was $750. One witness put the value at considerably less.

The defendants were wrongdoers, even if they had a lien for repairs, they did not assume to sell or attempt to realize the amount of their lien according to law. No proper notice was given to plaintiff, no proper means taken to realize best price.

There will be judgment for plaintiff against defendants for $859.95 with costs. The counterclaim will be dismissed with costs. Thirty days' stay.

The appeal was heard by BOYD, C., LATCHFORD and MIDDLETON, JJ.

W. C. McCarthy, for the plaintiff.

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

The judgment of the Court was delivered by MIDDLETON, J.:—We reserved judgment upon the question of the amount of damages.

ONT.

D. C.
1912

GALLAGHER v. KETCHUM & CO., LIMITED.

Middleton, J.

The defendants were authorized to make repairs to the amount of $350 only, and were bound to return the machine to the plaintiff when demanded, and had no claim against the plaintiff or the machine for more than this sum.

Having converted it to their own use, they must answer for its value at the time of the conversion, and cannot reduce the liability of any increased selling value attributable to the unauthorized repair. Had they returned it, as was their obligation, the amount spent in repairs beyond the sum authorized would have been lost to them, and they cannot better their position by the further unlawful act of conversion.

Greer v. *Faulkner*, 14 O.L.R. 360, 16 O.L.R. 123, and 40 Can. S.C.R. 399, is in point.

Appeal dismissed with costs.

Appeal dismissed.

QUE.

K. B.
1912

March 15.

GRAND TRUNK RAILWAY CO. v. McSWEEN.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll and Gervais, JJ. March 15, 1912.

1. HIGHWAY (§ II D—72)—USE OF STREET ALONGSIDE TRACK—RAILWAY ACT OF CANADA.

A roadway running alongside a railway track used by vehicles and pedestrians is a highway within the meaning of the Railway Act of Canada.

2. RAILWAYS (§ II D—37)—INJURIES TO PERSON WALKING ALONG TRACK—ON WAY TO HIGHWAY.

A railway company will be liable in damages for injuries suffered by a person, who whilst attempting to cross the tracks to reach an adjoining roadway or whilst walking along the tracks with this end in view is struck by a train moving backwards (or engine backing up) when no one has been placed at the forward end of the train to warn persons at the crossings or along the tracks.

3. TRESPASS (§ I A—5)—WHAT CONSTITUTES—PERSON WALKING ON TRACK IN ORDER TO REACH HIGHWAY.

The fact that the person injured was walking on the tracks itself and not alongside will not constitute him a trespasser if his walking on the tracks was incidental to a reasonable attempt on his part to cross the railway at a crossing regularly used by the public without objection or warning on the part of the railway company.

APPEAL from a judgment of the Superior Court for the district of Beauharnois, Mercier, J., of April 24th, 1911, condemning company-appellant to pay plaintiff-respondent the sum of $1,190 as damages resulting from being run over by a locomotive of the G. T. R.

The appeal was dismissed.

R. G. deLorimier, K.C., for appellant:—Plaintiff when the accident occurred was not on the highway but on the private right of way of the company, where he had no business to be; he was, therefore, a trespasser. No negligence whatsoever has been proven against the company, whereas plaintiff contravened

sec. 408 of the Railway Act. Nor was the farm crossing (Dumouchel's) a highway since no street opened from it: *G.T.R.* v. *City of Toronto*, 32 O.R. 120, 1 Can. Ry. Cas. 82; *Royle* v. *C. N. R.*, 3 Can. Ry. Cas. 4; *Canada Atlantic Ry. and Montreal and Ottawa Ry. Co.* v. *City of Ottawa*, 1 Can. Ry. Cas. 298; *G. T. R.* v. *City of Toronto*, 42 Can. S.C.R. 613. See also R.S.C., ch. 37, secs. 255, 295 and 408; *Faucher* v. *North Shore Ry. Co.*, 12 Q.L. R. 88; *Roy* v. *M.S.R.*, 8 Rev. de Jur. 276; *G.T.R.* v. *Anderson*, 28 Can. S.C.R. 541; *G.T.R.* v. *Barnett*, 12 Can. Ry. Cas. 205, 27 Times L.R. 359 (P.C.).

L. Codebecq, for respondent:—Plaintiff met with an accident and suffered serious damages. Who is to bear the responsibility? Plaintiff simply followed the ordinary means of communication between the farm he was visiting and Valleyfield like everybody else; he followed the public road. He acted prudently, as both tracks were occupied, but he could hardly expect a train that was standing still to suddenly back up without warning. Had the statute been observed and a look-out man been on duty no accident would have occurred: Railway Act, sec. 2, par. 11, secs. 274 and 276; *G.T.R.* v. *Daoust*, R.J.Q. 14 K.B. 548; *C.P. R.* v. *Tapp*, R.J.Q. 18 K.B. 552; *C. P. R.* v. *Brazeau*, R.J.Q. 19 K.B. 293.

deLorimier, in reply.

March 15, 1912. The judgment of the majority of the Court was delivered by

ARCHAMBEAULT, C.J.:—This is an appeal from the decision of the Superior Court, district of Beauharnois, of the 24th April, 1911, condemning company-appellant to pay respondent a sum of $1,190 as damages suffered in an accident under the following circumstances:—

Appellant operates a railway through the city of Valleyfield. At the point where the accident happened there are double tracks, the main line and a switch. And it is about here that the company's freight is loaded and unloaded. On either side of the track a roadway runs alongside, and is used both by freight vehicles, other vehicles and pedestrians.

To the north of this roadway and adjoining it there is a group of some seven or eight dwellings built on a cross street, which the public cannot use as the company has placed a barbed-wire fence across its opening where it meets the roadway, running alongside the track. So that in order to reach Valleyfield, only a few yards distant, the inhabitants of "Petit Village" are obliged to follow a path which runs parallel to the aforesaid fence for a little distance and leads to the farm crossing known as Dumouchel crossing. Here they can cross the double tracking and reach the vehicle roadway on the south side

QUE.
K.B.
1912
GRAND TRUNK R. CO. v. McSWEEN.
Archambeault, C.J.

thereof, and follow the same up to the railway station. And not only do the inhabitants of the "Petit Village" follow this itinerary but also their caterers, grocers, butchers, etc.

The public has never been forbidden to use this road or warned against using it.

Now, on the 9th of March, 1909, respondent was crossing back from the farm of one Theoret to Valleyfield. On arriving at the Dumouchel farm crossing he saw a freight train which was stopped, its head turned westward. The rear of the train was closest to respondent, who was to the east thereof, and north of the tracks. And at the same time he noticed on the south track another train moving west rapidly.

So, preferring to walk along the south roadway and being under the impression that the train on the north track was stopped to allow the train on the south track to run westward and that it would thereafter also go west, respondent stepped on the north track, ascertained that the train on this track was still stopped and started on his way. He had gone about half an arpent, and as the train on the south track was just gone by, he was about to step from the north to the south track when he was struck by the rear of the train. It was not a heavy blow as the train was moving slowly at the time. Nevertheless, respondent was unable to keep his balance, he fell on the track, and in spite of his efforts to roll out of danger one of the wheels passed over his left foot, which was crushed badly, so much so that it had to be amputated. Respondent is infirm for life, his earning capacity has been diminished, and the trial Judge has assessed these damages at $1,190.

The majority of this Court is of opinion that respondent was not a trespasser, as argued by appellant, and that the accident occurred in a public highway within the meaning of paragraph 11 of sec. 2 of ch. 37 of the Revised Statutes of Canada (Railway Act), reading as follows: "'Highway' includes any public road, street, lane or other public way or communication." Now, according to sec. 276 of the Railway Act of 1906, every time a train runs along or over a public highway at rail level within the limits of a city, town or village, and is pushed instead of drawn by the engine, the company must have at the forward end of the train, or on the tender, if the tender be ahead, a guard to warn any persons who might be on the tracks or about to cross the same.

Section 274 of the same Act also requires the constant ringing of the bell and the blowing of the whistle, within 80 rods of any crossing. And R.S.Q. 6534 (1909) contains a disposition similar to that of sec. 276 of the Railway Act.

Now, it is established beyond doubt that no one was stationed at the forward part of the train on the north track, at the end

QUE.
K.B.
1912
GRAND TRUNK R. Co. v. McSWEEN.
Archambeault, C.J.

which, when the train was stopped, was apparently the rear end as the engine was headed west. If there had been a guard on duty this accident would never have happened.

The appellant was clearly at fault. It disobeyed a statutory duty imposed by federal and provincial law, and in view of all the facts the amount awarded does not appear excessive, even if allowance were made for the alleged contributory negligence of the respondent.

The judgment of the Superior Court should be confirmed.

LAVERGNE and CROSS, JJ., dissented on the ground that McSween was a trespasser, the railway tracks and crossing at the spot in question not constituting a public highway.

Appeal dismissed with costs.

ANGLO-AMERICAN INSURANCE CO. v. LeBARON.

QUE.
K. B.
1912
March 15.

Quebec Court of King's Bench, Appeal Side, Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. March 15, 1912.

1. INSURANCE (§ III A—47)—ACCEPTANCE OF APPLICATION—LOSS PRIOR TO ARRIVAL OF POLICY—LIABILITY OF COMPANY.

An application for insurance when duly accepted by an insurance company constitutes a valid contract to insure, and if the property covered by such application be destroyed by fire before the arrival of the policy itself, the insured will be entitled to recover the amount of the insurance.

2. PRINCIPAL AND AGENT (§ I—3)—NOTICE OF REVOCATION—SUFFICIENCY OF —PUBLIC NOTICE.

Notice by the company to its agent cancelling his agency is no notice to the public that he is no longer their agent and until such public notice is given, he will be held the regular agent of the company as far as third parties are concerned. (Que. C.C. 1730).

THIS was an appeal from the judgment of the Superior Court for the district of St. Francis, Hutchinson, J., whereby appellant company was ordered to pay to plaintiff, respondent, the sum of $4,000, the amount of a fire insurance policy.

The appeal was unanimously dismissed with costs.

Messrs. *J. E. Martin*, K.C., and *R. Macdonald*, for appellant:—Davidson was no longer agent of the company and no longer entitled to bind it in any way. His instructions were received from respondent and the company declined to issue a short term policy as requested. There was no valid contract, but only preliminary negotiations and statements of intention. *Canning* v. *Farquhar*, 16 Q.B.D. 727; Laverty, the Insurance Law of Canada, pp. 179-180.

C. D. White, for respondent:—Davidson was still the agent of the company as far as renewal business was concerned, and in all other respects was held out to the public as the company's

QUE.
K. B.
1912
ANGLO-AMERICAN INSURANCE CO. v. LEBARON.

agent. Respondent's application was duly accepted by the company's letter of May 12th, which was handed to him by Davidson. This letter was an unconditional acceptance and no other documents were submitted to respondent. Notice to an agent personally is not notice to the world. C.C. 1755. The insurance was, therefore, in force and the company must pay.

Martin, in reply.

The unanimous judgment of the Court was to dismiss the appeal.

CARROLL, J.:—This is an appeal from a judgment condemning the company appellant to pay to respondent a sum of $4,000.

Respondent is proprietor of a summer hotel at North Hatley. In 1908 and in former years he had insured this property with appellant, for a period of three and a half months, to wit, from June 1st to September 15th.

In 1908 the company's agent was one W. A. Davidson, of the firm "Martin & Davidson."

On January 7, 1909, the company notified Davidson that he would no longer be their agent, and that he should return them his blank forms of receipts, supplies and other documents. On the 8th Davidson wrote to the general manager, Harry Blachford, inquiring whether he might renew the contracts then in force. On the 9th Blachford answered in the affirmative.

On May 11th Davidson wrote to Blachford as follows:—

> I beg to enclose application for $4,000, renewing policy No. 108509, G. A. LeBaron, esquire. Kindly let me have this policy as soon as possible and greatly oblige.

Blachford answered the next day:—

> We are in receipt of your application in the name of G. A. LeBaron, for which we thank you, and the policy will be sent to you as soon as possible.

On May 30th Davidson went to see LeBaron, and handed him the interim receipts of other companies and shewed him Blachford's letter. Thereupon LeBaron paid Davidson the premium, amounting to $42.

On May 31st Blachford wrote to Davidson that he would accept the insurance only on an annual basis of $2.75. This letter was received by Davidson on June 2nd only. On June 4th Davidson replied that unless the property were insured for three months and a half (short term) he would be obliged to place the risk in another company.

On June 5th the property is burned.

LeBaron claimed the amount of the insurance. The company refused to pay and claimed that the risk had not been accepted,

that before it had been accepted the object to be insured no longer existed; that the contract was never completed; that Davidson was no longer its agent, and that in the circumstances alleged he was acting as agent for the insured.

It is proven that in 1908 Davidson was the company's agent, and that the company gave to the public reasonable cause to believe that he was still their agent in 1909. This impression is gathered more especially from the correspondence exchanged between the general manager of the company and Davidson on the subject of renewal of contracts, and nothing therein contained can affect the rights of third parties whom the company allowed to believe that their relations with Davidson were the same as in former years.

Under the circumstances, was a contract of insurance effected between the company and LeBaron?

Davidson forwarded the application the application for insurance, and although this document has not been filed of record there can be no doubt but that the conditions were identical with those of the previous year. The general manager for the Province of Quebec acknowledges receipt with thanks and informs Davidson that the policy will be forwarded as soon as possible. Article 2481, C.C., says: "The acceptance of an application for insurance constitutes a valid agreement to insure."

There was, therefore, as between the company and LeBaron a valid agreement to insure this property, and payment of the premium to Davidson, who must be held the regular agent of the company as far as third parties were concerned.

It seems to me that the insurance agreement was completed and that subsequent facts unknown to LeBaron cannot affect his acquired rights.

TRENHOLME, J., concurred on the ground that a valid contract of insurance had been formed by the acceptance of the application and that the property at the time of the fire was duly covered.

ARCHAMBEAULT, J., concurred.

CROSS, J.:—Without regard to the authority or want of authority of Davidson to make complete renewal insurance contracts on appellant's behalf, I consider that the transmission by him to appellant of respondent's application and the general agent's answer thereto of the 12th May, 1909, completed an insurance contract.

It is true that the mandate to an insurer's agent or subagent is often limited to making the contract in a particular form such, for example, as would be shewn by the form of interim or renewal premium receipt in use at the time, but I see no reason to say that the general agent could not validly insure

QUE.

K. B. 1912

ANGLO-AMERICAN INSURANCE CO. v. LEBARON.

Cross, J.

in the way shewn by the application and letter of the 12th May, 1909, or by mere verbal contract for that matter.

But the appellant says that the contract was not an insurance *in præsenti*, but only an agreement by appellant to become an insurer when the terms and conditions would have been settled.

Having regard to the authorities upon which article 2481, C.C., is founded, and to the nature of the contract itself, I consider that the expression "valid agreement to insure" means in general an agreement which puts the insurer on the risk immediately, though it may be that particular language or particular circumstances may establish a different agreement. Here, however, the general agent went so far as to say that the policy would be sent as soon as possible. How can it be said that anything still remained open for negotiation?

There having, therefore, been a completed insurance contract, the remaining question is: Was the contract cancelled?

What amounted to a valid notice of cancellation or renunciation was sent to Davidson, but not to the respondent.

While it is shewn that Davidson had been applied to by the respondent to "place" the insurance, I consider that he was not the agent of the respondent to destroy it and that a notice of cancellation or repudiation to Davidson was not a notice to the respondent. As regards the respondent, I consider that Davidson is to be regarded as having been a contract-broker. It is true that Davidson in his letter of the 4th June, 1909, assumed that he could change the contract or end it, but the respondent would not be bound by what Davidson might do until he had acquiesced in the change.

The respondent had reason to consider the contract in force when the fire occurred. I would dismiss the appeal.

In view of the conclusion above expressed it is unnecessary to express an opinion upon the agreement made for the appellant that Davidson had no authority to make the insurance contract in question because it was not a renewal contract, seeing that the policy previously in force in the appellant company had expired on the 15th September, 1908, but it may be added that the application was sent in as a renewal and was accepted. Besides it could be called a renewal as well as if not with greater propriety than one of a block of six tenements was held to be an "adjoining" shop in *Cave* v. *Hoosell*, 28 Times L.R. 184.

I think that the general agent himself in his testimony inadvertently speaks of it as a renewal.

Appeal dismissed with costs.

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.

Re LIESMER AND PHILP.

Ontario High Court, Middleton, J. March 19, 1912.

DEEDS (§ II C—33)—*Vagueness of Description — Surplus Frontage — Apportionment.*]—An application by the vendors under the Vendors and Purchasers Act. MIDDLETON, J.:—The sole question raised upon this application is the adequacy of the description contained in a conveyance through which the vendors claim title. The land is situated on the south side of Wyndham avenue, near Delaney crescent, in the city of Toronto, and consists of part of lots 1 and 2 according to registered plan B 363. Each of these lots according to the plan, has a frontage of one chain. Upon the ground there is found to be an overplus of two feet six inches. For the purpose of widening Delaney crescent, the city corporation expropriated 8.4 feet along the westerly side of the lot. The Toronto General Trusts Corporation, as owners of the two lots, sold the easterly 45 feet and the westerly 25 feet; which, according to the measurements on the plan, would leave the trusts corporation still the owners of the central 53.6 feet.

When the trusts corporation subsequently conveyed this central parcel, the description commenced 45 feet westerly from the intersection of the easterly limit of lot 2 with the south limit of Wyndham avenue, and proceeded westerly along the south limit of Wyndham avenue 54 feet to a point 25 feet easterly from the intersection of Wyndham avenue and Delaney crescent.

Upon an actual survey, it is found that the purchasers of the 25 feet and the 45 feet have enclosed the amounts granted to them respectively, and that between these parcels there is a frontage, not of 54 feet, but of 58 feet. The objection is based upon this discrepancy.

I think that, upon the facts stated, it is abundantly clear that the trusts corporation intended to convey everything between the two parcels theretofore conveyed, and that the statement of the distance between the two fixed points is erroneous and must be rejected; and, for this reason, the objection to the vendors' title is not well taken.

An order may be made so declaring. No costs. D. C. Ross, for the vendors. H. R. Frost, for the purchaser.

ONT.

H. C. J.
1912

MEMO. DECISIONS.

TREMBLAY v. PIGEON RIVER LUMBER CO.

Ontario High Court, Middleton, J. March 19, 1912.

LOGS AND LOGGING (§ I—8)—*Sorting—Expense of—Apportionment—Damages.*]—An appeal by the defendants and a cross-appeal by the plaintiff from the report of the Local Master at Port Arthur; and a motion by the plaintiff for judgment on further directions and costs. The plaintiff's claim in the action and the defendants' counterclaim arose out of an agreement between them, which was not in writing. All the claims were referred to the Master for inquiry and report. The defendants were the owners of logs and pulpwood with which certain ties were mixed. The plaintiff was to sort and load the ties; and he agreed with the defendants that the ties should be sorted at their sorting jack in the Kam river, and that the expense of sorting should be borne in proportion to the quantity of timber sorted. The Master found that the expense should be shared equally; and upon the argument it was practically conceded that this finding could not be interfered with. Shortly after the making of the agreement, a freshet swept the mingled mass down the river, and carried away the booms of the sorting jack. This jack was afterwards replaced, and all the timber that then remained above it passed through it, and was sorted. The timber below was saved and boomed near the loading jack. The plaintiff sorted out of this the ties for which he was responsible, leaving the logs and pulpwood mixed. The Master disallowed the plaintiff's claim for remuneration for this; and properly so, in the opinion of the learned Judge. Each party made claim against the other for damages for delay; but neither claim was, in the opinion of the learned Judge, sufficiently supported by the evidence. The remaining question was the apportionment of the cost of the operation of the sorting jack. Both parties appealed as to the amount allowed to the plaintiff upon this head. Upon the evidence, the learned Judge found that the amount allowed to the plaintiff by the Master should be increased to $712.13, and the plaintiff's appeal allowed to that extent. The defendants' appeal should be dismissed. The learned Judge found fault with the length of the evidence and the manner in which it was presented. The action could have been brought in the District Court; and the defendants' counterclaim was exaggerated and without foundation. Judgment for the plaintiff for the amount found in his favour, with the costs of the action, including the costs of the motion for judgment on further directions and of both appeals, upon the County Court scale, and with one-half the costs of the reference, also upon the County Court scale; without a set-off of costs in favour of the defendants. C. A. Moss, for the defendants. W. A. Dowler, K.C., for the plaintiff.

RE MILLIGAN SETTLED ESTATES.

Ontario High Court, Sutherland, J. March 19, 1912.

TRUSTS (§ 2 B—48)—*Settled Estates Act—Order Authorising Sale of Lands.*]—Petition under the Settled Estates Act authorising a sale of lands settled by the will of Frederick Milligan, deceased. SUTHERLAND, J., said that a clear case seemed to be made out for a sale to the proposed purchaser of the real estate in question at the price of $28,000, upon the terms set forth in his written offer to purchase. An order should, therefore, be made granting the prayer of the petitioner to that end, and authorising the sale. Following the usual practice, the deposit of $200 and the further cash payment of $2,800 on account of principal moneys, to be made upon completion of the sale, should be paid into Court to the credit of this matter and subject to the trusts of the will, and the mortgage for the balance of the purchase-money, in the terms of the offer, should be made to the Accountant of the Supreme Court, also subject thereto. The agent's charge for commission on the sale, as mentioned in the offer to purchase, and the costs of the petitioner and Official Guardian should be paid out of the corpus. H. Cassels, K.C., for the petitioner. F. W. Harcourt, K.C., for the infants.

IMRIE v. WILSON.

(Decision No. 1.)

Ontario High Court, Cartwright, M.C. March 20, 1912.

PARTIES (§ I B—55)—*Addition of Plaintiff—Person Interested in Commission Claimed by Plaintiff — Discovery — Better Affidavits of Documents.*] — This action was brought by Imrie and Graham to recover $1,315.40 as a commission on the sale of real estate for the defendant. The cause was at issue and all parties had been examined for discovery, as well as one Stinson, who acted in the matter and submitted to be examined by the defendant "as a party interested in the claim sued for in this action." In that examination Stinson stated that he was to have a third of any commission recovered by the plaintiffs, and that the defendant agreed to this with him. Stinson also said that he was in a quasi-partnership with one Douglas, with whom he would divide anything he should get out of this. The defendant moved to have Stinson and Douglas made parties, and also to have the plaintiffs make better affidavits on production and attend for further examination, if required so to do. Stinson asserted positively that he saw Wilson on more than one occasion—that he was recognised by him as an agent for the sale, and that Wilson said he would protect him on the commission in question. This was confirmed by the plaintiff Graham, who said that Stinson

ONT.
H. C. J.
1912
MEMO. DECISIONS.

was a partner and to share in this commission. The Master said that it seemed clear that Stinson was a necessary party to prevent Wilson being harassed by another action, and to have the whole of the matters in controversy disposed of in one action. But this did not apply to Douglas, who could assert no claim against Wilson, but could look only to Stinson. As to the other motion, the Master said that the plaintiffs should make further affidavits. Letters seemed to have passed between them prior to the bringing of the action. On the examination it was objected that these letters were privileged. This, however, must be shewn in the affidavits of the plaintiffs themselves. They should give the dates of these letters so that it may appear whether they were written before action or not. They must also conform to the rule laid down in Clergue v. McKay, 3 O. L.R. 478. Both motions were entitled to succeed, and should be granted with costs to the defendant in any event. F. Arnoldi, K.C., for the defendant. J. R. Roaf, for the plaintiffs.

NEY v. NEY.

Ontario High Court, Cartwright, M.C. March 20, 1912.

PLEADING (§ II L—251)—*Action by Wife against Husband and Others for Conspiracy — Statement of Claim — Depriving Wife of Consortium of Husband—Motion to Strike out Part of Pleading Containing Substance of Claim — Con. Rule* 261.] — This action was brought by the plaintiff against her husband, her husband's father, and another defendant, Reyburn. The plaintiff alleged a conspiracy of these three defendants to break up her home and deprive her of the custody of her two infant children. She claimed damages "by reason of the misconduct of the defendants and for breaking up the domestic relations existing between the plaintiff and the defendant John Ney," her husband. The defendants the Neys moved to strike out pars. 6, 7, 8, 9, and 10 of the statement of claim as embarrassing. The motion was supported by reference to the judgment of the Court of Appeal in Weston v. Perry, 1 O.W.N. 155, following their previous judgment in Lellis v. Lambert, 24 A.R. 653. The Master said that these judgments seemed to support the contention that no action would lie by a married woman for the loss of the consortium of her husband. Her right to support from him in such an event is not taken away. The Master, however, felt the difficulty that to give effect to the motion would be equivalent to a judgment under Con. Rule 261, as the paragraphs attacked were the whole substance of the plaintiff's claim; and he thought it would be best, in the interests of all parties, either to strike out the paragraphs in question and give the plaintiff leave to amend as advised or else

refer the motion to a Judge in Chambers, who could enlarge it into Court and deal with it under Con. Rule 261. The defendants to elect within a week which course they prefer. T. N. Phelan, for the applicants. W. J. McLarty, for the plaintiff.

RE GOLDFIELDS LIMITED.

Ontario High Court, Sutherland, J. March 23, 1912.

CORPORATIONS AND COMPANIES (§ V C—188)—*Refusal to Register — Application for Mandamus Enlarged upon Undertaking of Company to Bring Action for Cancellation of Certificate Issued to Transferor.*]—Application by Homer Mason for an order compelling Goldfields Limited, an incorporated mining company, to register a transfer of 1,000 shares of their stock from the applicant to John Mason and to issue a certificate to John Mason therefor. In answer to the application, the company set up (by an affidavit of their secretary) that they had received no value for the shares issued to Homer Mason, and had given instructions for the bringing of an action against him for the return and cancellation of the certificates issued to him. The learned Judge, in a written opinion, set out the facts at length, and said that, while the company had been dilatory in commencing the action, and while, in ordinary circumstances, the applicant would be entitled to an order such as he asked, yet, in view of the position formerly taken by him and the statement now made in the affidavit of the company's secretary the order should not at present be made. The company offered, on the application, to commence the action at once and speed the trial. This should be done; and the present motion should be disposed of by the Judge at the trial of the action. W. A. McMaster, for the applicant. G. H. Kilmer, K.C., for the company.

WHITE v. WHITE.

Ontario High Court, Cartwright, M.C. March 27, 1912.

DIVORCE AND SEPARATION (§ V B—52)—*Interim Alimony—Refusal—Order for Payment of Disbursements.*]—Motion by the plaintiff for an order for interim alimony and disbursements. She was left with the care of three children, said to have inherited the delicacy of their father, who was apparently dying of consumption, and was being taken care of by his parents. The Master said that all attempts at settlement had failed in spite of the efforts of the legal advisers of both litigants; and, upon the facts as developed on the material, it did not seem that any other order could be made than for payment of $40 for interim disbursements, so that the case could be tried. This could be paid

ONT.
H. C. J.
1912
MEMO. DECISIONS.

out of the $300 still due on the sale of some property of the defendant. The plaintiff appeared to be in possession of more than a fifth of the husband's income—which seemed to prevent any further allowance at present. See Lush, Law of Husband and Wife, 3rd ed., p. 184. Capstick v. Capstick, 33 L.J.N.S. P. & M. 105, shewed that in some cases where the husband had neither property nor earning power the Court would not award interim alimony pendente lite. Here the husband was not only unable to work, but was being cared for by his parents; while the plaintiff occupied the defendant's store and had whatever income was derived from the business which he carried on. It was alleged by the defendant's father that the plaintiff also got $12.50 a month as rent of another adjoining store. The affidavit of the plaintiff in reply did not meet this directly (if at all). Order made for disbursements only. Edward Gillis, for the plaintiff. M. H. Ludwig, K.C., for the defendant.

IMRIE v. WILSON.

(Decision No. 2.)

Ontario High Court, Cartwright, M.C. March 27, 1912.

DISCOVERY AND INSPECTION (§ I—2)—*Production of Documents—Claim of Privilege—Confidential Documents—Preparation for Purpose of Obtaining Solicitor's Advice.*]—In obedience to the order made in this action on the 20th March, 3 O.W.N. 895, *ante* p. 883, the plaintiffs filed a further and better affidavit on production. With this the defendant was not satisfied, and moved for production of the documents set out therein, for which privilege was claimed by the plaintiffs. In the new affidavit the plaintiffs stated that they objected to produce the documents set forth in the second part of the said first schedule, "on the ground that the said correspondence between the plaintiffs Imrie and Graham was had after consultation with the solicitor acting for us in this action and on his instructions, and was for the purpose of obtaining further advice and information in relation to the litigation now proceeding in this action and in view of such litigation, and was had and obtained for the purpose of the facts and information being laid before our said solicitor, as our professional adviser, in view of this litigation, and to obtain his advice; and the said letters contain some of the evidence and names of witnesses; and the said letters, with the exception of the original of that dated the 15th February, 1912, were on receipt placed in the hands of our solicitor for his information and to obtain his advice thereon in relation to the now pending litigation in this action; and we believe he has still has the same." The documents referred to were letters and copies of letters from one of the plaintiffs to another. It was contended that the words quoted were not suffi-

cient to sustain a claim of privilege. It was said that it was defective for not stating that the documents were "confidential." The Master said that he could not accede to this. In Bray's Digest of the Law of Discovery, p. 13, sec. 50, it is said that the true principle is stated by Cotton, L.J., in Southwark Waterworks Co. v. Quick, 3 Q.B.D. 315; and at p. 34 of Bray it is said that this case shews that "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—it need not have been prepared at the instance or request of the solicitor, or have been laid before him." The present action was begun on the 9th February, and it appeared that there was a lis mota as early as the 31st January. The Master said that the affidavit seemed to him to be correctly framed. It sufficiently stated the facts necessary to shew that the documents were *confidential*, i.e., protected from discovery. Motion dismissed with costs to the plaintiffs in any event. F. Arnoldi, K.C., for the defendant. J. R. Roaf, for the plaintiffs.

DUNLOP v. CANADA FOUNDRY CO.

Ontario High Court, Teetzel, J. March 28, 1912.

MASTER AND SERVANT (§ II B 7—175)—*Workmen's Compensation for Injuries Act, sec. 3 (5)—Negligence of Fellow-servant—Person in Control of Machine upon Tramway—Findings of Jury.*]—Action by James Dunlop, an infant, for damages for personal injuries sustained by him, while working for the defendants in their foundry, by reason of a steel girder falling on him and crushing and breaking one of his legs, owing, as he alleged, to the negligence of the defendants or their servants. The action was tried with a jury. The learned Judge said that, in his opinion, there was no evidence to justify a finding of liability at common law; and he also thought that the answers of the jury to the questions submitted did not entitle the plaintiff to judgment at common law. The jury assessed the damages at $1,700 if there was a common law liability, and at $1,500 if there was liability only under the Workmen's Compensation for Injuries Act. The answers of the jury to the 5th and 6th questions entitled the plaintiff to judgment under the Act, because the workman in charge of the hoist was, within the ruling in McLachlin v. Ontario Iron and Steel Co., 20 O.L.R. 335, a person having the charge or control of an engine or machine upon a railway or tramway, within the meaning of clause 5 of sec. 3 of the Act, and that the defendants were answerable for his negligence. The answers of the jury to questions 9 and 10, finding the defendants' sub-foreman guilty

ONT.

H. C. J. 1912

MEMO. DECISIONS.

of the negligence therein stated, entitled the plaintiff to judgment. Judgment for the plaintiff for $1,500 damages and costs. I. F. Hellmuth, K.C., and D. Urquhart, for the plaintiff. G. H. Watson, K.C., and B. H. Ardagh, for the defendants.

McNAUGHTON v. MULLOY.

Ontario High Court, Cartwright, M.C. April 2, 1912.

DISMISSAL AND DISCONTINUANCE (§ I—2)—*Want of Prosecution—Delay—Counterclaim—Terms — Costs.*]—This action—to wind up a partnership and for payment by the defendant to the plaintiff of a promissory note for $500 given in connection therewith—was commenced on the 24th November, 1910. The statement of defence was delivered on the 23rd March, 1911. Since that time nothing had been done, though there had been admittedly three sittings of the High Court at North Bay at which the case could have been entered. The defendant now moved to dismiss the action for want of prosecution. The defendant supported the motion by his own affidavit, in which he said that through the partnership with the plaintiff he had lost all his property, and the costs of defending the action were greater than he was financially able to sustain. He also said that he had made arrangements to remove from Petrolia to a portion of the province of Ontario much less accessible, and that he must move in the course of the next six weeks. The plaintiff in answer said that he had instructed his solicitors to serve notice of trial to proceed with this action (presumably for the sittings at North Bay on the 20th May next); but, in view of the admitted poverty of the defendant, he was willing to discontinue on payment of his costs. Counsel for the defendant did not accede to this disposition of the case—nor did he give a more favourable reception to the Master's suggestion that the plaintiff should be allowed to take a dismissal without costs, and that the whole question between the parties should end now. He offered to discontinue the counterclaim without costs, but pressed for a dismissal of the action with costs. This counterclaim was for completion of an alleged settlement of the partnership, under which the plaintiff was to pay the defendant $500 cash and surrender the defendant's note for $500, the plaintiff taking the assets and liabilities. The Master said that, except in a case where a dismissal would enable a defendant to set up the Statute of Limitations, such an order would be in effect only for payment of all costs forthwith, instead of giving the costs of the motion to dismiss to the defendant in any event, or even forthwith, in some cases. [Reference to *Finkle* v. *Lutz* (1892), 14 P.R. 446; *Milloy* v. *Wellington* (1904), 3 O.W.R. 37.] The best order to make in the interest of both parties,

in the Master's opinion, would be to dismiss both the action and counterclaim without costs, which order the plaintiff should take out. But, if this should not be accepted by the parties within a week, an order should go requiring the plaintiff to set the case down and proceed to trial at the next sittings; and, in default of so doing, the action should stand dismissed without further notice. The costs of this motion in that case to be to the defendant in any event. Grayson Smith, for the defendant. D. Inglis Grant, for the plaintiff.

MORGAN v. GORDON.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Sutherland, JJ. April 2, 1912.

SALE (§ III A—57)—*Action for Balance of Price—Evidence—Set-off—Damages—Findings of Trial Judge—Appeal.*]—An appeal by the defendant from the judgment of the Judge of the County Court of the County of Grey, in favour of the plaintiff, in an action in that Court for the recovery of $152.48, the balance due on a sale of poles by the plaintiff to the defendant. CLUTE, J., who delivered the judgment of the Court, said that, on a perusal of the evidence, and having regard to the credit given by the trial Judge to the evidence of the plaintiff as against the defendant, and taking into consideration the surrounding circumstances, there was nothing which would justify an interference with the judgment pronounced by the trial Judge. The defendant made no demand on the plaintiff to replace the rejected poles, nor did he send the plaintiff any statement of account, nor make any effort to replace the poles when he found those delivered not to be up to contract, nor did he give any evidence as to what it would cost to replace the poles at Dundalk, where they were to be delivered free on board. In short, he made no case which could be sustained in law for a set-off or for damages. Appeal dismissed with costs. R. S. Robertson, for the defendant. W. H. Wright, for the plaintiff.

RAMSAY v. GRAHAM.

Ontario High Court, Cartwright, M.C. April 3, 1912.

MECHANICS' LIENS (§ VIII—68)—*Dismissal of Proceedings to Enforce Lien — Default of Plaintiff in Making Discovery — Rights of Other Lien-holders — Absence of Plaintiff — Opportunity to Proceed.*] — A statement of claim was filed under the Mechanics' Lien Act in December, 1911, the plaintiff seeking to recover about $500 as due to him as a sub-contractor, and to enforce a lien

ONT.

H. C. J. 1912

MEMO. DECISIONS.

therefor. The defendant Graham (the owner) filed her statement of defence on the 2nd January, 1912; and now moved for a dismissal of the action and to vacate the certificates of lien and lis pendens for the plaintiff's default in making discovery. On the argument it appeared that both the plaintiff and the defendant Farrell (the contractor) had left the city of Toronto and could not be found. The Master said that the plaintiff was, no doubt, in default, and in an ordinary action the motion would be entitled to prevail, unless the omission was repaired or accounted for. Here, however, the rights of others, who might be entitled to take the benefit of this proceeding to enforce similar claims, might be injuriously affected. It further appeared that on the 19th January, 1912, an order was made in an action against Ramsay (the plaintiff in this action), whereby the Sheriff of Toronto was ordered to proceed as provided by Con. Rule 1059. The Master said that it did not seem right to impair that order at present. It must, however, be conceded that no party to an action can complain of anything done while he is absent and not keeping in touch with his solicitor. Here, the action could either proceed without the plaintiff or it could not. In the latter case, it must be ultimately dismissed. On the other hand, if the necessary evidence could be given in the plaintiff's absence, there was no reason why the matter should not be prosecuted forthwith. The defendant Graham was entitled to have the matter disposed of one way or the other. Unless this was done in two weeks, or such further time as might be thought just, the action must be dismissed—and with costs. If an appointment should be taken out for trial, the costs of this motion should be to the defendant Graham in any event. The Master added that, in his experience, to ask a plaintiff in such an action to make discovery before service of notice of trial was not usual. In the present case, this course was perhaps adopted to obtain a dismissal, instead of moving to dismiss for want of prosecution. T. Hislop, for the defendant Graham. H. E. Rose, K.C., for the plaintiff.

MEDLAND v. NAYLOR.

Ontario High Court, Kelly, J. April 4, 1912.

ASSIGNMENTS FOR CREDITORS (§ III B—25)—*Intervention by Assignee for Benefit of Creditors—Dismissal of Counterclaim—Leave to Assignee to Intervene.*]—The defendants Cross & Urquhart on the 19th April, 1911, delivered a counterclaim, claiming from the plaintiffs damages for having on the 14th February, 1911, issued an injunction order against the defendants restraining them until the 23rd February, 1911, from moving, selling, or dealing with

a certain stock of groceries sold by the defendants the Naylors to the defendants Cross & Urquhart; the plaintiffs by the injunction order having undertaken, in the usual way in such cases, to abide by any order that the Court might make as to damages. On the 23rd February, 1911, the injunction was dissolved. On the 19th April, 1911, the plaintiffs served notice of discontinuance of their action against all the defendants. No other proceedings were taken in the action until the 15th February, 1912, when notice of trial of their counterclaim was served, on behalf of the defendants Cross & Urquhart, on the plaintiffs' solicitor. The defendants Cross & Urquhart made an assignment for the general benefit of their creditors on or about the 5th February, 1912. Application was now made by the plaintiffs for an order dismissing the counterclaim, on the ground that the defendants Cross & Urquhart, by reason of the assignment made by them, had no longer any cause of action against the plaintiffs or any status to continue the action. KELLY, J., said that, in his opinion, these defendants, since their assignment, had no right to carry on these proceedings; and it had been stated that the assignee declined to take any steps to continue them. He, therefore, ordered that proceedings on the counterclaim should be stayed until further order, without costs; and, if the assignee should not, within twenty days after service on him of this order, intervene and continue the proceedings in his name, the counterclaim should be dismissed with costs against the defendants Cross & Urquhart, including the costs of this application. J. P. MacGregor, for the plaintiffs. F. Slattery, for the defendants Cross & Urquhart.

SCARLETT v. CANADIAN PACIFIC R.W. CO.

Ontario High Court, Cartwright, M.C. April 6, 1912.

DEATH (§ II B—17)—*Two Actions Brought on Account of Death of Same Person—Order Staying one—Actions by Mother and Widow as Administratrix.*]—Two actions were brought under the Fatal Accidents Act, 1 Geo. V. ch. 33 (O.), to recover damages for the death of George Scarlett, who was killed on the 2nd February, 1912. The first action was brought by the mother, on the 15th March. The second action was brought by the widow as administratrix, on the 1st April. The defendants moved to have one of the actions stayed. The Master said that the case did not differ in its facts from Mummery v. Grand Trunk R. W. Co., 1 O.L.R. 622. There the action of the administratrix was allowed to proceed, and the other was stayed. It seemed to have been the opinion of Mr. Winchester, then Master in Chambers, that any person claiming to be beneficially entitled could bring an action immediately after the death if there was no exe-

ONT.
H. C. J.
1912
MEMO. DECISIONS.

cutor or administrator—but that, if a personal representative was appointed, and an action begun within six months of the death, then, apart from long delay in commencing such action, the first action must usually be stayed. The Master thought he was bound by this decision, with which he agreed. He, therefore, made an order directing that the second action should proceed, and the first be stayed until further order. Costs of the motion to be to the defendants in the second action. It was not a case for any costs as between the two plaintiffs. C. W. Livingston (MacMurchy, Spence, & Walker), for the defendants. W. A. Henderson, for the plaintiff in the first action. H. R. Frost, for the plaintiff in the second action.

MACDONALD v. SOVEREIGN BANK OF CANADA.

Ontario High Court, Middleton, J., in Chambers. April 6, 1912.

DEPOSITIONS (§ I—2)—*Foreign Commission — Admission—Order Refusing Commission Affirmed upon Terms.*]—An appeal by the defendants from the order of the Master in Chambers, 3 O.W.N. 849, refusing to direct the issue of a commission to Los Angeles to take the evidence of A. E. Webb. The learned Master refused the order upon an admission by the plaintiff that none of the shares forming the subject-matter of this action were transferred from A. E. Webb & Co. to the plaintiff or to any of his alleged predecessors in title. The learned Judge said that, after hearing counsel for both parties and considering the material, he was not quite clear that this admission was wide enough to protect the defendants. He was, however, convinced that it was extremely unlikely that Webb would be able to give any evidence which would be in any way material to the matters in question in the action. As the plaintiff's counsel had expressed his readiness to submit to any terms that might be deemed proper to protect the defendants, if this view should prove erroneous, and as the case was to be tried without a jury, the learned Judge thought that no inconvenience could be occasioned by the adoption of the course suggested upon the argument, namely, that the action should be allowed to proceed to trial without this evidence, the plaintiff undertaking, in addition to what he had already undertaken, that if, in the opinion of the trial Judge, when the facts came to be developed before him in evidence, Webb could give any testimony that would be of any assistance whatever, the defendants should be at liberty then to have a commission for the purpose of taking his evidence, so that it might be put in before judgment. It appeared to the Judge, on the evidence given in Stavert v. McMillan, 21 O.L.R. 245, and in appeal 24 O.L.R. 456, that there could be no difficulty in tracing the shares held by the plaintiff, and that at the trial it would be found that this commission would be quite useless. If the course

suggested should be productive of any additional expense at the trial, the trial Judge would have ample jurisdiction to deal with it. Subject to these variations, the order was affirmed; costs to be in the cause unless otherwise directed by the trial Judge—this provision as to costs being made because at the trial it might appear that the whole application was misconceived, and in that case a variation of this order might be proper. W. J. Boland, for the defendants. G. H. Kilmer, K.C., for the plaintiff.

JAMES v. CITY OF TORONTO.

Ontario High Court, Cartwright, M.C. April 6, 1912.

JURY (§ I D—38)—*Action against Municipal Corporation—Non-repair of Highway.*]—The plaintiff by the statement of claim alleged that on the 10th October last he was walking on Queen street, Toronto, and, "shortly after passing Bond street, the plaintiff came in sudden contact with a hard, slippery mound of earth, several inches above the level of the sidewalk, and as a result thereof was thrown violently forward, sustaining serious and painful injuries." By the next paragraph, the plaintiff said that the injuries complained of were caused by the negligence of the defendants in placing the mound of earth on the sidewalk and leaving it there, "thus rendering the said sidewalk unsafe for travel by pedestrians." The plaintiff served a jury notice; and the defendants moved to strike it out. The Master said that he was unable to agree with the argument that the present case was distinguishable from Brown v. City of Toronto, 21 O.L.R. 230. There it was said by Riddell, J., at p. 238, in reference to Clemens v. Town of Berlin, 7 O.L.R. 33: "If a plaintiff can make out a case of wrong-doing on the part of a municipality irrespective of their duty, common law and statutory, as to highways, and allege a cause of action not based upon nonrepair of the highways, he may be entitled to hold his jury notice. At all events, the case has no application here, where the injury is undoubtedly due to a defect in the highway itself." This, the Master said, was conclusive; and the jury notice must be struck out, with costs to the defendants in any event. C. M. Colquhoun, for the defendants. Irving S. Fairty, for the plaintiff.

RICKERT v. BRITTON.

Ontario High Court, Cartwright, M.C. April 11, 1912.

COSTS (§ I—14)—*Plaintiffs Residing out of Ontario—Action by Unincorporated Association and Members—Class Action—Addition as Plaintiff of Member Residing in Ontario.*]—Motion by the plaintiffs to set aside a præcipe order for secur-

ONT.

H. C. J. 1912

MEMO. DECISIONS.

ity for costs. The action was brought by the president and eight other officials of the United Garment Workers of America, on behalf of themselves and all other members of the union, and by the union, to restrain the defendants from using the plaintiffs' trade mark. The named plaintiffs were all resident in New York—but many members of the union resided and carried on business in Ontario, and particularly at London, where the defendants resided and carried on business. On the first return of the motion, an order was made allowing the plaintiffs to amend by adding as a plaintiff A. H. Carroll, another officer of this union, who resided at London. Afterwards, the defendants obtained leave to have the matter further discussed, it having been made to appear that Carroll had not any property in the province exigible under execution. The Master said that, as a member of the union, Carroll, no doubt, had an interest in the action; and it was not the case of a merely nominal plaintiff lending his name to enable others, who were the real actors, to escape giving security or any later liability for costs. Here, if Carroll had been originally made a plaintiff, no order for security could have been made: Sykes v. Sykes, 4 U.C.C.P. 645. The decision in Metallic Roofing Co. v. Jose, 12 O.L.R. 200, shewed that, in the converse case, where the unions were the real defendants, all their property and assets were declared by the trial Judge to be "liable to satisfy the claim of the plaintiffs, against the defendants in the action, for damages and costs." This would seem to be a fortiori where the union is plaintiff, as in this case. That judgment was affirmed by the Court of Appeal, 14 O.L.R. 156—that part of it was specially affirmed. Here the union itself, being a plaintiff, must have been so made with the consent of the majority, if not the whole body, of the members, who in that case would, therefore, if necessary, be held liable for costs, under the recent decision in Re Sturmer and Town of Beaverton, 3 O.W.N. 333, 613, 25 O.L.R. 190, 2 D.L.R. 501. Leave to appeal from this was refused: 3 O.W.N. 715, 2 D.L.R. 501, at p. 510. Order to issue as originally made, adding Carroll as a plaintiff, and giving costs of the motion to the defendants only in the cause. J. G. O'Donoghue, for the plaintiffs. Irving S. Fairty for the defendants.

BATHO v. ZIMMER VACUUM MACHINE CO.
(Decision No. 1.)

Ontario High Court, Cartwright, M.C. April 11, 1912.

PLEADING (§ I I—65)—*Particulars—Infringement of Rights under Patent for Invention—Postponement until after Discovery.*]—This action was brought by a patentee, charging the defendants with manufacturing machines "upon the principle of or only colourably differing from the plaintiff's inventions." The defendants demanded particulars before pleading. Some

were furnished. They now moved for more definite particulars of the alleged infringements. They said that the particulars given, namely, "All the machines manufactured or sold by the defendants infringe all the claims in the plaintiffs' patents," are too vague. Counsel for the plaintiff cited and relied on the following authorities as shewing that the particulars already given were sufficient at this stage to enable the defendants to know what was being complained of and to set up such defence as they thought adequate: Frost on Patents, 3rd ed., p. 396, and cases cited; Russell v. Hatfield, 2 Pat. Cas. 144; Mandleberg v. Morley, 10 Pat. Cas. 256. The Master said that he had examined these cases, and was of opinion that the motion was not entitled to prevail at this stage. The order should, therefore, be, that no further particulars be ordered at this stage; but that, after examination of both parties for discovery, the defendants may apply for further particulars, if so advised, or the plaintiff may furnish the same if he desires so to do. The Master drew attention to what was said by Stirling, J., in the Mandleberg case, where the defendants were only sellers: "If a manufacturer is attacked for infringing a patent by a particular process, he does not want to be told in the shape of particulars or otherwise what the process is he is using. But it is a very different thing with respect to a vendor." In Kleinert Rubber Co. v. Eisman Rubber Co., 12 O.W.R. 60, where an order for particulars of breach was made, the facts were not set out, nor was it said at what stage the motion was made, nor what particulars, if any, had already been given. It, therefore, seemed better to follow the authorities, which, if cited in the Kleinert case, were not referred to in the judgment. Costs of the motion to be in the cause. E. G. Long, for the defendants. A. C. McMaster, for the plaintiffs.

UNITED GAS COMPANIES v. FORKS ROAD GAS CO.

Ontario High Court. Trial before Kelly, J. April 11, 1912.

GAS (§ I—3)—*Claim for Gas Supplied by Company to Customers of another Company—Failure of Proof.*]—The plaintiffs alleged that a stopcock intended to shut off the flow of natural gas from their pipes to the pipes of the defendants, and vice versa, was open for many months ending on the 10th March, 1911, and that during that time gas flowed from their pipes into the pipes of the defendants, and supplied the customers of the latter. The plaintiffs asked for payment of $750 for the gas so alleged to have been supplied to and used by the defendants' customers. At the trial, evidence was given that on the night of the 9th March, 1911, when a valve on the plaintiffs' supply-pipe was turned off, the lights in the houses of some of the

ONT.

H. C. J.
1912

MEMO. DECISIONS.

defendants' customers either went out or were reduced, and that on the following morning the stopcock referred to between the two sets of pipes was open, and that a fresh mark as if made by a wrench was found on it. The stopcock in question was situate at or near the line between the highway and the property of Frank Misener, a member of the defendant company; it was above ground and could have been opened by any one with the aid of a wrench. The plaintiffs also contended that, by reason of the defendants' wells (which were only two in number) not having been pumped out for many months, they were incapable of supplying the defendants' customers, and that, therefore, the gas used by them must have been gas which flowed from the plaintiffs' pipes. Frank Misener, in his examination for discovery, extracts from which were put in at the trial, said that the stopcock between the two sets of pipes was not open prior to the morning of the 10th March; that he knew this to be the case from his own personal observations; and that this stopcock was always kept shut. This evidence was uncontradicted. The learned Judge said that the plaintiffs had failed to prove that the stopcock was open at the time for which the claim was made, or that gas flowed from their pipes into the pipes of the defendants during that time. Action dismissed with costs. H. H. Collier, K.C., for the plaintiffs. W. M. German, K.C., for the defendants.

RICE v. MARINE CONSTRUCTION CO.

Ontario High Court, Cartwright, M.C. April 13, 1912.

VENUE (II A—15)—*Convenience—Place where Property in Question Situate — Expense — Witnesses — Bringing Case from Outer County to Toronto.*]—In September, 1911, the plaintiff bought from the defendants a motor-boat for $1,300, which was paid; and the boat was delivered to the plaintiff at Burk's Falls. The plaintiff alleged that this purchase was made in reliance on certain representations made by the defendants' officers or agents about the boat, which the plaintiff said were untrue, and on a guaranty of efficiency, which had not been fulfilled. The plaintiff, therefore, asked: (1) cancellation of the sale; (2) repayment of the $3,000; and (3) $200 for expense and loss to him from the defendants' misrepresentations. The defendants denied making the representations, and counterclaimed for the return of a boat-cover lent to the plaintiff at the time of the sale, worth $25, and for $50.36 for other things, of which $32.86 was still due. The defendants moved to change the venue from Parry Sound to Toronto. The plaintiff resided in the district of Parry Sound, and the boat in question was there also. Parry Sound is distant from Toronto 149 miles. The return fare will be $6.55 in May, and the sittings there is

fixed for the 6th May. The plaintiff had served a jury notice. The affidavit in support of the motion was made by the president of the defendant company. He said that the defendants would require seven witnesses, all resident in Toronto, except one at Buffalo, New York, and that it would be very inconvenient to have to take the company's servants and officers away at their busy time. The plaintiff was away in Florida, and was not able to send an affidavit, but one was made by his solicitor, who stated that several witnesses would be necessary for the plaintiff. The Master said that ordinarily the plaintiff's own affidavit should be made in answer to a motion of this character. But, in the circumstances of this case, the solicitor's affidavit was not to be rejected. It was unnecessary to refer to any of the numerous decisions on motions of this character. They establish that the convenience of witnesses and resulting loss to the business with which they are connected is no ground for a change of venue, except in the case of public officers. See Higgins v. Coniagas Reduction Co. and Ontario Power Co., 2 O.W.N. 953. Here, too, the train service between Toronto and Parry Sound is such that an absence of one or perhaps two days from Toronto will be all that is necessary. The case being on the jury list, if transferred to Toronto, must stand until September, unless the jury notice is struck out. A motion to that effect can be made to the trial Judge, if the defendants still think that a jury at Parry Sound would not be impartial. Other cogent reasons against bringing cases to Toronto from the country are to be found in a judgment of Meredith, J., in Saskatchewan Land and Homestead Co. v. Leadlay, 9 O.L.R. 556. The venue was not laid capriciously in being named at the assize town of the district where the plaintiff resides, and where the boat itself is, in case a view should be thought useful or necessary. Motion dismissed; costs in the cause. A. R. Lewis, K.C., for the defendants. C. A. Moss, for the plaintiff.

FULLER v. MAYNARD.

Ontario High Court, Cartwright, M.C. April 13, 1912.

PLEADINGS (§ I S—149)—*Defence—Action for Specific Performance of Contract—Setting up Facts Justifying Termination of Contract—Embarrassment—Irrelevancy.*]—In this action for specific performance, the plaintiff by the statement of claim alleged a contract made on the 24th July, 1911, to be completed on the 17th September, 1911, time being of the essence of the contract. The time for completion was afterwards extended until the 16th October; and, not being completed on the 10th November, the defendant declared the contract at an end and refused to accept the tender of money and conveyances

ONT.

H. C. J. 1912

MEMO. DECISIONS.

made on that day by the plaintiff in an attempt by him to have the transaction carried out. This action was begun the next day. The statement of claim was delivered on the 6th February and the statement of defence on the 20th March. The plaintiff moved to strike out paragraphs 13, 14, 15, 16, and 17 of the defence, as embarrassing. They set out as facts matters which, it was said, explained the situation and shewed why the defendant was justified in putting an end to the contract after two enlargements of the time originally fixed for completion. They alleged the speculative nature of the property and the desire of the defendant to take advantage of an active and rising market—they also gave the defendant's reasons for alleging that the plaintiff, not being himself the real purchaser, was never in a position to carry out the agreement at any time prior to the 8th November, and was able to procure the money with which to make the tender of the 10th November only by assigning the benefit of the contract (if any still existed), and that such assignment was still in force. The Master said that it was only in the very plainest cases of embarrassment, which in this sense meant irrelevancy, that any part of a pleading, and especially of a statement of defence, could be struck out on the application of the opposite party: Stratford Gas Co. v. Gordon, 14 P.R. 407, and cases cited; Knowles v. Roberts, 38 Ch. D. at p. 27, where Bowen, L.J., said that it is not for the Court to dictate to parties how they should frame their case, so long as they do not violate any of the rules of pleading laid down by the law. Motion dismissed with costs to the defendant in the cause. C. Kappele, for the plaintiff. A. J. Russell Snow, K.C., for the defendant.

SWAISLAND v. GRAND TRUNK R.W. CO.

Ontario High Court, Riddell, J., in Chambers. April 15, 1912.

APPEAL (§ XI—721)—*Discovery.*]—Leave to appeal to a Divisional Court from the order of MIDDLETON, J., 3 O.W.N. 960, was granted to the plaintiff; costs of the motion to be costs in the appeal unless otherwise ordered by the appellate Court. W. E. Raney, K.C., for the plaintiff. Frank McCarthy, for the defendants.

DAY v. CITY OF TORONTO.

Ontario High Court, Cartwright, M.C. April 16, 1912.

PLEADING (§ I I—65)—*Claim—Particulars—Damage by Flooding—Origin of Waters—Specific Ground of Claim—Amendment.*]—The plaintiff in this action sought to compel the defendants to have ashes and refuse placed by the defendants on Ashburnham avenue removed, or to oblige them to construct a

drain which would relieve his premises from flooding in the future. The defendants moved, before pleading, for particulars of the statement of claim so as to shew whence came the waters which, in paragraph 4, were spoken of "as formerly wont to pass the plaintiff's premises." The Master said that the cases cited—Darby v. Township of Crowland, 38 U.C.R. 338; Baggs v. City of Toronto, 23 C.L.J. 7; Ostrom v. Sills, 28 S. C.R. 485—seemed to shew that the defendants were not bound to provide drainage for surface water, coming from other persons' land on to that of the plaintiff. It might be different if the flow of water from the plaintiff's own lands was obstructed. Under the special facts of this case, it seems to be in the interests of both parties to have the ground of the plaintiff's claim made more specific. This could best be done by amendment of the statement of claim. Order directing amendment. Costs in the cause. H. Howitt, for the defendants. C. A. Thomson, for the plaintiff.

McKENZIE v. ELLIOTT.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Riddell, JJ. April 16, 1912.

CONTRACTS (§ II D—188)—*Parol Modification of Written Agreement—Evidence—Onus—Allowance for Materials—Services of Architect—Quantum Meruit.*]—Appeal by the plaintiff from the order of BOYD, C., 2 O.W.N. 1364, setting aside the report of the Master in Ordinary. MEREDITH, C.J., gave written reasons for judgment, in which he said, among other things, that the argument of counsel for the plaintiff failed to satisfy him (the Chief Justice) that the Chancellor erred in his conclusion that the barn was built under the terms of the written agreement, as modified by the subsequent verbal arrangement by which the size of the barn was reduced by 20 feet, and the materials of another barn of the defendant were to be used in the construction of the new barn, and an allowance was to be made to the defendant for the value of those materials, and the services of the architect dispensed with. It was not open to question that at one time there existed a contract in writing between the parties for the building by the plaintiff of a barn for the defendant; and the onus rested upon the plaintiff to establish that it had been, as he contended, entirely abrogated; and that onus was not satisfied. The evidence shewed that the contract was only changed in some of its terms, and there was no ground for the plaintiff's assertion that in doing the work he acted as agent for the defendant. The appeal should be dismissed with costs; but, in order to end the litigation, it would be well for the parties to adopt the suggestion that $8,000 be fixed as the full price of all the work, on the terms mentioned by

ONT.
H. C. J.
1912
MEMO. DECISIONS.

the Chancellor. TEETZEL, J., concurred. RIDDELL, J., dissented, being of opinion that the case turned upon the credibility of the parties; and, as the Master believed the plaintiff, and he was "the final judge of the credibility of witnesses," his finding should not have been reversed: Booth v. Ratté, 21 Can. S.C.R. 637, 643; Hall v. Berry, 10 O.W.R. 954; Fawcett v. Winters, 12 O.R. 232. W. Mulock, for the plaintiff. F. E. Hodgins, K.C., for the defendant.

MOORE FILTER CO. v. O'BRIEN.

Ontario High Court, Cartwright, M.C. April 17, 1912.

PLEADING (§ I S—149)—*Defence—Patent for Invention — Royalties—Agreement—Validity of Patent.*]—Motion by the plaintiffs to strike out paragraphs 3 and 4 of the statement of defence in an action to recover royalties under an agreement. By the paragraphs attacked, the defendants alleged that they were "induced to enter into the agreement by the representation of the plaintiffs that they owned and controlled the letters patent and the invention and improvements referred to in the signed agreement, and that the letters patent were valid and subsisting"—all of which representations were untrue (the defendants said), as the plaintiffs well knew. By the 5th paragraph want of consideration as rendering the agreement sued on void was alleged; and the defendants counterclaimed to have the agreement set aside or declared to be of no force or effect. The Master said that, looking at the whole pleading, it was clear that the first part of paragraph 3 was unobjectionable. Reference to Duryea v. Kaufman, 21 O.L.R. 161. The plaintiffs sought to enforce an agreement which the defendants said they were induced to enter into by untrue representations, and asked to have the agreement set aside, on that ground. The allegation as to the untruth of the representation that the "letters patent were valid and subsisting" was intended to put in issue only their actual existence, and not to attack their validity, in the usual sense. If necessary, it might be recited in the order that the defendants did not attack the validity of the patents in any other sense, as this point should be made clear. Motion dismissed; costs in the cause. D. Urquhart, for the plaintiffs. C. A. Moss, for the defendant.

KUULA v. MOOSE MOUNTAIN LIMITED.

Ontario High Court, Cartwright, M.C. April 17, 1912.

ACTION (§ II B—45)—*Parties—Common Defendant — Distinct Claims of Different Plaintiffs for Damages Arising from Fire Set out by Defendant—Direction as to Trial—Multiplicity*

of Proceedings—Examinations for Discovery.]—Motion by the common defendants in the above action and three others, each brought by a different plaintiff, for an order consolidating the four actions. The actions were brought to recover damages alleged to have been suffered by the respective plaintiffs through a fire set out by the defendants on their own lands in the township of Hutton, on the 10th July, 1911. The amount of damages claimed was different in each case. No details were given of these sums. In each case negligence was alleged. The plaintiffs were all represented by the same solicitors. The statement of defence in each case was a simple denial of the allegations of the statement of claim. The defendants also asked that only one of four proposed examinations of their officers for discovery be allowed to proceed. The Master said that, unless the decision in one of a number of actions, such as those in question, would necessarily dispose of the essential cause of action in the others, no order could be usefully made to stay the rest. And, unless this could be done, the actions could evidently not be consolidated. He referred to Williams v. Township of Raleigh, 14 P.R. 50, 53. The Master also said that it was at least doubtful whether these four plaintiffs could have united in one action—the only thing alleged in common was the fact that a fire or fires were negligently set out by the defendants. This, though, technicality in issue, was probably not denied, so far as the fact of fire being set out was concerned. But what would be sufficient proof of negligence by one plaintiff might not be so in the case of the others—much would depend upon location, direction of wind, condition of the plaintiff's own property, and other circumstances peculiar to each case. The only direction that could usefully be given now was, that the actions should be all set down together, so that any evidence common to all (if such there were) might not be repeated, as the trial Judge would, no doubt, direct. See Carter v. Foley-O'Brien Co., 3 O.W.N. 888, citing the Raleigh case. As to the examinations for discovery, that point, too, was dealt with in Carter v. Foley-O'Brien Co., though there it was the converse case of a plaintiff wishing to have one examination for discovery—to be applicable to all the three actions. Neither of the reliefs asked for here could possibly have been granted if the plaintiffs had not all been represented by the same solicitors. See as to this Conway v. Guelph and Goderich R.W. Co., 9 O.W.R. 369, affirmed 420. For the same reasons, it did not seem possible to interfere with the examinations for discovery. As the plaintiffs' solicitors were the same, it was not to be presumed that, if one examination gave the necessary information, they would proceed with the others—especially as these depositions could not be used at the trial. But, even if they did, that must be left to the trial Judge or the Taxing Officer to deal with. The only way of avoiding more than

ONT.
H. C. J.
1912
MEMO. DECISIONS.

one examination was for the defendants to make admission of such fact or facts as were common to all the cases. But, apart from their own consent, there was no power to control or limit the plaintiffs' proceedings, so long as they were regular. Motion dismissed; costs in the cause to the plaintiffs. R. C. H. Cassels, for the defendants. H. E. Rose, K.C., for the plaintiffs.

LYON v. GILCHRIST.

Ontario High Court, Cartwright, M.C. April 17, 1912.

ACTION (§ II B—45)—*Consolidation—Common Defendant—Distinct Causes of Action—Direction as to Trial.*]—Motion by the defendant in two actions brought against him by two different plaintiffs, husband and wife, for an order consolidating the actions. The Master said that the actions were similar, but they dealt with different lands and with separate contracts with the defendant. Even if the claims of the plaintiffs arose out of the same transaction or series of transactions, they did not involve any common question of law or fact, within the meaning of Con. Rule 185. As between the husband and the defendant, the question was, whether the property he assigned was to be re-assigned on payment of the admitted loan of $190. As between the wife and the defendant, the question was, whether her assignments were for anything more than a collateral security for the $190. Any advantage to the defendant would be gained by directing that the actions be set down together and tried together, if the trial Judge should so direct. He would, no doubt, take care that any evidence, if such there be, common to both actions, should not be repeated. Costs in the cause. Alexander MacGregor, for the defendant. W. Douglas, for the plaintiffs.

BATHO v. ZIMMER VACUUM MACHINE CO.

(Decision No. 2.)

Ontario High Court, Middleton, J., in Chambers. April 19, 1912.

PLEADING (§ I J—65)—*Claim—Infringement of Rights under Patent for Invention—Postponement until after Discovery.*]—An appeal by the defendants from the order of the Master in Chambers, 3 O.W.N. 1009. MIDDLETON, J., dismissed the appeal with costs to the plaintiff in any event of the action. E. G. Long, for the defendants. A. C. McMaster, for the plaintiff.

WEBB v. BLACK

Ontario High Court. Trial before Britton, J. April 19, 1912.

PARTNERSHIP (§ I—3)—*Fraud — False Arrest — Sale of Business — Judgment — Terms.*] — Action for fraudulently

and wrongfully depriving the plaintiff of his business; for false arrest; and to establish a partnership between the plaintiff and defendant. The learned Judge finds that there was not a particle of evidence of any fraud on the part of the defendant in his business transactions with the plaintiff; that there was no partnership in fact between the parties; and that, although technically there was an arrest, no damage resulted to the plaintiff therefrom. Upon the defendant consenting, there will be judgment directing that, upon payment by the plaintiff or his nominee to the defendant, within one week, of the amount actually paid by the defendant for machinery, rent, wages, and supplies, and the amount of liabilities actually incurred by the defendant in connection with the business, and $100 costs of the action, the entire business, machinery, stock in trade, and the lease of the premises, shall be handed over to the plaintiff or his nominee, and the defendant shall have nothing more to do with that business on these premises. The amount to be paid is found to be $2,080.21. In default of payment as above, the action to be dismissed with costs, fixed at $100. T. N. Phelan, for the plaintiff. A. J. Anderson, for the defendant.

WARD v. DICKENSON.

Ontario High Court. Trial before Latchford, J. April 19, 1912.

CHATTEL MORTGAGES (§ VI—55)—*Power of Sale—Improvident Sacrifice of Goods—Mala Fides—"Money Lender"—R.S.C. 1906, ch. 122, sec. 2.*]—Action to recover possession of goods of the plaintiff taken by the defendant or for damages for their conversion. The plaintiff offered the defendant $25 for the loan of $100 for three months. The defendant agreed to make the loan, and took from the plaintiff a chattel mortgage upon the plaintiff's household effects. He advanced only $45; and he sold the goods, which were said to be worth $2,000, for $148. The learned Judge said that the defendant, as mortgagee, was reckless and improvident in his conduct of the sale. He was not liable for the conversion of the goods, because they were his under the chattel mortgage. The defendant did not act in good faith. He dealt with the plaintiff's property in such a way that her interests were unnecessarily sacrificed, and she lost the right she would have had in the large surplus which would have been realised had the sale been properly conducted. For the damages she thus sustained, the defendant was answerable: Rennie v. Block, 26 Can. S.C.R. 356.—There was no direct evidence that the defendant was a money-lender, within the meaning of the Act respecting Money Lenders, R.S.C. 1906 ch. 122, sec. 2. Upon his examination for discovery he stated that he usually charged twelve per cent. upon loans. The learned Judge said that he had concluded that the plaintiff was a money

ONT.
H. C. J.
1912
MEMO. DECISIONS.

lender within the meaning of the statute, although he denied making loans unless asked to do so. The fact that the plaintiff offered him one hundred per cent. per annum did not justify him in accepting it; and his familiarity with the forms used by money lenders and his methods of enforcing his security supported the conclusion.—The learned Judge estimated the plaintiff's damages at $600, and gave judgment for her for that sum, with costs, subject to a reference as to damages if either party was dissatisfied. Costs of reference, if any, and further directions, reserved. T. J. W. O'Connor, for the plaintiff. John MacGregor, for the defendant.

McCUTCHEON v. PENMAN.

Ontario High Court. Trial before Latchford, J. April 19, 1912.

FRAUD AND DECEIT (§ IV—16)—*Sale of Vehicle—Reliance on False Representation — Damages.*]—Action for damages for fraud and misrepresentation upon the sale of a motor-car by the defendants to the plaintiff for $970, which amount the plaintiff had paid. The learned Judge found as facts, upon the evidence, that the car was not in good running order when sold to the plaintiff; that it had not been overhauled, as represented by the defendants; that the plaintiff had no knowledge of motor-cars, and relied on the representations of the defendants; that the car was worthless to the plaintiff; and that he was entitled to recover the damages which he had sustained by reason of the false representations. And held, that the plaintiff was entitled to test the motor-car before repudiating the bargain, and did not lose his right to recover by his efforts to put the car into running order. Judgment for the plaintiff for $970 with interest from the date of the purchase and with costs. W. A. Henderson, for the plaintiff. F. Arnoldi, K.C., for the defendant Pink.

BARTLETT v. BARTLETT MINES LIMITED.

Ontario High Court, Cartwright, M.C. April 20, 1912.

COSTS (§ I—10)—*Discharge of Order—Costs of Garnishees—Salary of Judgment Debtor Paid in Advance.*]—Motion by the garnishees to discharge an order attaching debts alleged to be due by the applicants to the plaintiff, the judgment debtor. See 3 O.W.N. 958. It was conceded that the order must be discharged. But as to the costs, the Master thought that they should not be given to the garnishees, as, if the salary of the debtor was not paid in advance, yet there was such a variation between the affidavit of C. W. Allen in answer to the motion and the full facts of the debtor's employ-

ment by the garnishees, as justified inquiry. This was the course taken in Wilson v. Fleming, 1 O.L.R. 599, followed in Fallis v. Wilson, 13 O.L.R. 595. If a judgment debtor is allowed to overdraw his account or is paid in advance, this deprives his creditors of a remedy which they might have if he was paid in the ordinary way. This was done for his benefit, and it would be open to his employers to recoup themselves for the expense to which they had been put for his advantage—a course of which he could not rightly complain. Order discharged without costs. The garnishees to have leave to appeal as to this, if they wished to do so. J. D. Falconbridge, for the garnishees. M. L. Gordon, for the judgment creditors.

CHARLEBOIS v. MARTIN.

Ontario High Court, Cartwright, M.C. April 22, 1912.

JUDGMENT (§ I F—46)—*Rule 603—Action on Bills of Exchange—Defence—Reference under Con. Rule 607.*]—In this action the plaintiff, as assignee of the Union Bank of Canada, sued the defendant for $2,819.28, the sum total of ten bills of exchange drawn on the defendant by A. H. Dewdney & Co. between the 4th March and the 14th June, 1907, and accepted by the defendant. A. H. Dewdney & Co. assigned for the benefit of their creditors in July, 1907, and so far only a small dividend had been paid. The plaintiff moved for summary judgment under Con. Rule 603. The defendant was a native of Germany, over seventy years of age, with a very imperfect knowledge of English and very limited powers of expressing himself in that language. He said that he was a working jeweller employed by A. H. Dewdney & Co., and that anything he signed was solely for their accommodation and at their request. He also thought that he was not incurring fresh liability on each occasion, but was only signing a renewal of the previous obligation. He admitted his signature to the documents, but said that he was never asked to pay them until the present action was brought. He also drew attention to the dividend paid on the Dewdney estate, which was not credited on the writ of summons in this action, nor mentioned in the plaintiff's affidavit: see Union Bank of Canada v. Aymer, 3 O.W.N. 773. The defendant also alleged that the Union Bank of Canada held other securities which, if properly handled, would have paid the indebtedness of the Dewdneys, but which have not been so applied, though realised—and he claimed to be entitled to an account of the proceeds of such securities. The Master said that, no doubt, the necessary discovery as to this could be obtained under Con. Rule 441 in an ordinary case; but the assignor here being a corporation prevented this being done, as

ONT.

H. C. J. 1912

MEMO. DECISIONS.

was decided by a Divisional Court in the much-litigated case of Bank of Toronto v. Anchor Fire Insurance Co., 18 P.R. 41. It must be admitted that the circumstances under which this heavy liability was incurred by an elderly foreigner, however inexcusable, did not constitute a defence to the action. But, for the reasons given in the Aymer case, and the additional reason here of the long delay in bringing the action, the defendant had shewn facts sufficient to entitle him to have the matter investigated; and an order should be made under Con. Rule 607 for a reference to the Master in Ordinary. Costs in the cause. The fact, if it was a fact, stated in the plaintiff's affidavit in reply, that the defendant was disposing of his property, was no reason for not allowing him to defend in a proper case: Dobie v. Lemon, 12 P.R. at p. 76. On the prima facie right of a surety to be allowed to defend, see Lloyds' Banking Co. v. Ogle, 1 Ex. D. 262.

HOWIE v. COWAN.

Ontario High Court, Sutherland, J. April 22, 1912.

PARTIES (§ II A—67*a*)—*Numerous Defendants—Representation by Counsel at Trial—Powers of Court—Con. Rule 200—Unnecessary Party—Motion to Dismiss—Absence of Consent.*]—This was an action with reference to the estate of Richard P. Smith, deceased. The defendant Cowan was the executor of his will, to whom letters probate thereof had been duly issued. The plaintiffs, twelve in number, were claiming under certain other alleged wills. The defendants were some twenty-nine in number. The plaintiffs were specific legatees, and the defendants specific and residuary legatees. It was admitted that, in any event of the action, there would be ample to pay all the specific legacies and costs. Issue had been joined, and the action was expected to go to trial at London at the sittings commencing there on the 29th April. The plaintiffs moved for an order that, at the trial, the defendants "are to be represented by separate counsel only in so far as they are divided into classes, and that each class be represented by its own counsel." It was suggested that the motion was made under Con. Rule 200. The learned Judge said that he thought it clear that that Rule had no application to motions such as this or to an action which had reached the stage that this one had. See Ward v. Benson, 3 O.L.R. 199, for the object and scope of that Rule. No authority was cited in support of the motion; and the learned Judge could not see what power he had to interfere with the rights of the defendants as to their representation at the trial by counsel. The motion was, he considered, misconceived, and must be dismissed with costs.—On the argument, counsel for the Presbyterian Church suggested that the church made no claim

with respect to the legacy mentioned in the will, as it was one contingent upon events which did not happen before the death of the testator, and expressed a willingness on its behalf to be dismissed from the action. Counsel for the plaintiffs was not prepared to consent to this; and the learned Judge said that he could not make such an order without consent. R. U. McPherson, for the plaintiffs. J. H. Moss, K.C., for the executor and a number of legatees. H. Cassels, K.C., for the Presbyterian Church in Canada. S. G. Crowell, for Catharine A. Smith. J. Folinsbee, a specific legatee, in person. Joseph Montgomery, for the London and Western Trusts Company.

TANNER v. TANNER.

Ontario High Court. Trial before Kelly, J. April 23, 1912.

DIVORCE AND SEPARATION (§ V C—55)—*Cruelty—Desertion—Quantum of Allowance.*] — An undefended action for alimony, tried at Welland. The learned Judge finds that the defendant was guilty of cruelty to the plaintiff; that he ordered her from his house; that he made no provision for her support or for that of their only child, who went with the plaintiff; that the plaintiff is without means of support for herself and child; and that the defendant is possessed of property and means ample for that purpose. Judgment for the plaintiff for alimony at the rate of $75 per month, payable monthly, with leave to apply for an increase of the amount if and when the defendant's circumstances change. The defendant to pay the costs of the action. G. H. Pettit, for the plaintiff.

EMPIRE LIMESTONE CO. v. CARROLL.

Ontario High Court. Trial before Kelly, J. April 25, 1912.

REFORMATION OF INSTRUMENTS (§ I—1)—*Assignments of Lease — Knowledge of Assignees of Mistake — Reformation of Assignments.*] — Action to restrain the defendants from entering on any part of the south-west 25 acres of lot 5 in the 1st concession of the township of Humberstone and from laying railway tracks thereon or removing sand or gravel therefrom and from interfering with the plaintiffs' rights under a lease of the 25 acres made in 1899 by Annie Benner and her husband to the defendant Samuel S. Carroll for a term of fifteen years. In 1902, Carroll assigned the lease to E. L. Fuller. In 1905, Annie Benner and her husband conveyed the land to Carroll, making no reference to the lease. In 1911, the personal representative of E. L. Fuller, who had died in 1909, assigned the lease to the plain-

ONT.
H. C. J.
1912
MEMO. DECISIONS.

tiffs. The only covenants in the lease on the part of the lessee were to pay rent and not to carry on any business on the premises that might be deemed a nuisance. But the lease contained this provision: "And the said lessee shall have the privilege of removing the whole of the sand bank situate on the northern portion of said demised premises, during said term, and for no other purposes." At the south end of the 25 acres, there was also a sandhill, the land between the two hills being described by a witness as a "plateau." The defendants counterclaimed for reformation of the lease, and, by amendment asked for at the trial and allowed, for reformation of the assignments of the lease. The learned Judge said that there was no doubt that the parties to the lease intended it to be a lease of the northerly sandhill only, and that there was a mistake in the lease, common to both parties. He also found that Fuller and the plaintiffs took their assignments with the knowledge and on the understanding that the lease was so limited; and he was, therefore, of opinion that the lease and the assignments should be reformed. Judgment dismissing the action with costs, and allowing with costs the counterclaim of the defendants. If the parties fail to agree on the manner of reforming these documents, there is to be a reference to the Local Master at Welland to settle the method. W. M. German, K.C., for the plaintiffs. H. D. Gamble, K.C., for the defendants.

DAVIDSON v. PETERS COAL CO.

Ontario High Court. Trial before Mulock, C.J.Ex.D. April 25, 1912.

EXPLOSIONS AND EXPLOSIVES (§ II D—20)—*Injury to Servant—Negligence—Uncovered Receptable—Cause of Injury—Negligence of Servant—Findings of Fact of Trial Judge.*]—The plaintiff, whilst in the employment of the defendants, was injured by an explosion of blasting powder contained in an open pail, and brought this action, under the Workmen's Compensation for Injuries Act, for damages because of such injury. The negligence charged was in supplying an open pail in which to handle the blasting powder. The action was tried before the Chief Justice without a jury. He found that the pail was supplied by the defendants of their own motion, and that they were negligent in so supplying it; but he was of opinion that the plaintiff had not shewn that that negligence was the cause of the injury. In a written opinion, he made an exhaustive examination of the evidence, and stated his conclusion as follows: From the evidence, I entertain no doubt that the plaintiff deposited the pail within a foot or two of the fuse in the hole (in quarrying stone), and that the sparks from the fuse fell into the pail and thus caused

the explosion. The plaintiff's theory that sparks might have adhered to his sleeve and fallen into the pail, at a distance from the hole, was not supported by the evidence. The sparks would not live long enough. The evidence as to whether the small sparks would ignite is conflicting. From the practical test made in Court, it is clear that no sparks would keep alive during the time required to go a distance of two feet from the point of ignition. Further, sufficient time did not elapse between the ignition of the fuse and the explosion to have allowed immediately of the plaintiff's clothing being so far consumed as to fall away in sparks. There is no evidence whatever to shew that the plaintiff's clothing was set on fire or that any sparks lit upon his clothing. There is ample evidence, however, that the sparks flew directly from the fuse into the pail. Having regard to the plaintiff's experience as a quarryman, perfectly familiar with the danger incident to the use of blasting powder and of fuses, it was, I think, negligence on his part to have deposited the pail within reach of the falling sparks. If he had used proper care, he would have placed it at a safe distance, and the accident would not have happened. I, therefore, think his own negligence was the cause of his injury; and that, therefore, he is not entitled to recover. This action is, therefore, dismissed without costs. T. J. Blain, for the plaintiff. A. J. Anderson, for the defendants.

FRASER v. WOODS.

Ontario High Court, Kelly, J. April 25, 1912.

REFORMATION OF INSTRUMENTS (§ I—1) — *Description — Boundary Line—Mistake — Evidence—Trespass — Injunction.*] —The plaintiff, being the owner of two adjoining parcels of land in the town of Amherstburg, called respectively "the lumber-yard lot" and "the homestead," sold the former, which lay south of the latter, to the defendant Mabel S. B. Woods, and executed a conveyance to her by which he intended to convey that parcel, describing it by metes and bounds. The defendant Sophronia Beresford was a mortgagee under a mortgage made by her co-defendant. There was a dispute as to the northern boundary of the part conveyed. A surveyor, acting for the defendants, ran the line, according to the description in the deed, about 30 feet to the north of the boundary line between the two properties as shewn on the ground; and the defendants began to erect a fence on the line so marked out. The plaintiff brought this action to restrain the defendants from trespassing, for reformation of the conveyance, and other relief. KELLY, J., after reviewing the evidence in detail, said that, having in mind that very strong evidence was necessary to found a right to rectification of a written instru-

ONT.

H. C. J. 1912

MEMO. DECISIONS.

ment, he was clearly of opinion that the evidence submitted on behalf of the plaintiff was, to use the words of Lord Chelmsford in Fowler v. Fowler (1869), 4 De G. & J. at p. 264, "such as to leave no fear or reasonable doubt upon the mind that the deed does not embody the final intention of the parties." He referred also the language of Armour, C.J., in Clarke v. Joselin (1888), 16 O.R. 68, 78, and concluded his written reasons for judgment thus:—After careful consideration of the whole evidence, and having regard to all the circumstances surrounding the transaction, the conclusion I have come to, and I have reached it without any doubt as to its correctness, is, that the deed from the plaintiff to the defendant Woods does not embody the true description of the property intended by the parties to be dealt with. The evidence convinces me, and I find, that what the purchaser, through her husband and Davis (solicitor for the husband), asked to purchase, and what the plaintiff intended to sell and offered to sell for $3,500, and what the purchaser intended to purchase for that price, and what the defendant Sophronia Beresford intended as security for the money advanced to her co-defendant, was the property shewn on the ground as the lumber-yard property, the northerly boundary of which is the line of the south wall of the barn on the plaintiff's homestead property and its continuation westerly to the river. There will, therefore, be judgment declaring that the northerly boundary of the land intended to be sold and purchased and intended to be mortgaged to the defendant Beresford is the south line of the barn and its continuation westerly to the river;; that the conveyance from the plaintiff to the defendant Mabel S. B. Woods be reformed so as to carry this into effect; and that the mortgage from the defendant Mabel S. B. Woods to her co-defendant be likewise reformed. The injunction restraining the defendant Mabel S. B. Woods, her servants, workmen, and agents, from entering on or trespassing upon or interfering with the plaintiff's property north of that line is made perpetual; the other defendant is likewise restrained. The plaintiff is entitled to his costs of action. A. R. Bartlett, for the plaintiff. J. H. Rodd, for the defendants.

UNITED INJECTOR CO. v. JAMES MORRISON BRASS MANUFACTURING CO.

Ontario High Court, Cartwright, M.C. April 26, 1912.

PLEADING (§ II—65)—*Particulars—Infringement of Patent Rights—Postponement till after Discovery.*]—In an action for infringement of patent rights and use of trade marks, the defendants moved, before pleading, for particulars of allegations made in the statement of claim. The Master referred to the analogous case of Batho v. Zimmer Vacuum

Machine Co., 2 D.L.R. 894, and 2 D.L.R. 902, 3 O.W.N. 1009, 1152, and said that it seemed sufficient at this stage to make an order such as was made in that case. What machines the defendants had made and what sales, or whether they had made any, must be within the knowledge of the defendants. If they had done none of these things, they could safely plead to that effect. Then, with the case at issue and discovery made, it would be open to them to amend their defence as they might see fit. The motion should be dismissed; costs in the cause. The defendants to plead in eight days. Leave reserved to apply for further particulars after discovery, if desired. The case might be put on the peremptory list two weeks after being set down, so as to have a trial before vacation. Grayson Smith, for the defendants. Britton Osler, for the plaintiffs.

JAMIESON MEAT CO. v. STEPHENSON.

Ontario High Court. Trial before Britton, J. April 30, 1912.

PARTNERSHIP (§ I—3)—*Failure to Establish—Assignment of Interest in Business—Attack by Creditors—Disclaimer by Assignee—Judgment—Costs.*]—Action against two defendants, Stephenson and Spragg, for the price of meat supplied to the "Savoy Café" at Cochrane. The plaintiffs alleged and attempted to prove that the café was being run or carried on by the defendants as partners. Stephenson and Spragg both denied that any partnership ever existed between them in this café business. The plaintiffs' claim was admitted by Spragg as against the café, and, therefore, against Spragg, as he alone, as he contended, carried on the business. The learned Judge said that the question was entirely one of fact, and, upon the evidence, he must find that the defendant Stephenson was not a partner, and that the plaintiffs did not supply meat upon his credit.—The plaintiffs also attacked an assignment made by Spragg to Stephenson on the 18th January, 1912, purporting, in consideration of $1, to assign to Stephenson all Spragg's interest in the restaurant business known as the Savoy Café, the stock in trade, furniture, goodwill, etc. The real consideration was, that Stephenson agreed to pay certain liabilities of the restaurant. The plaintiffs alleged (by amendment) that the assignment was void as a preference to Stephenson. The defendant Stephenson said, at the trial, that he would not accept the interest of the defendant Spragg in the property mentioned, upon the terms under which it was given, and he had no desire to prejudice the creditors of Spragg or to prejudice his own claim. The learned Judge said that, in regard to this claim, the judgment should be, with the consent of Stephenson, that, as against the plaintiffs, as creditors of Spragg, the assignment should not be set up or in any way relied on by Stephenson

ONT.
H. C. J.
1912
MEMO. DECISIONS.

or stand in the way of the plaintiffs as execution creditors of Spragg in the recovery of the amount of their execution, but the defendant Stephenson was not to be prejudiced as to any claim he might have against Spragg or as to any securities he held other than the assignment. Judgment for the plaintiffs against Spragg for $335.60, with costs as if he were sole defendant and as upon a judgment by default. Action as against Stephenson (otherwise than as above) dismissed with costs. T. W. McGarry, K.C., for the plaintiffs. G. E. Buchanan, for the defendants.

MacMAHON v. RAILWAY PASSENGERS ASSURANCE CO. (No. 1).

Ontario High Court, Cartwright, M.C. May 6, 1912.

DEPOSITIONS (§ I—2)—*Motion for Commission—Suggested Term — Premature Application.*] — The action was on a policy of life assurance. The assured died abroad, very shortly after the issue of the policy. The action being at issue, and the plaintiff, the sole executor of the deceased, being on his way to Europe and expecting to be at the place where the assured died, for a month or six weeks from the 20th May instant, and supposing that the defendants would probably ask for a commission to take evidence as to the death of the assured at the place where it occurred, moved for an order directing that, "if any commission is applied for and issued to take evidence . . . the said commission be executed at some time between the 20th day of May and the 30th day of June, 1912." The Master said that no precedent for such an order was cited, nor had he found any. The motion seemed premature, and to suggest a term that might be considered if the defendants should apply for such a commission; but, on the argument, their counsel was not prepared to say whether they would or not. Motion dismissed, with costs to the defendants in any event. H. E. Rose, K.C., for the plaintiff. Shirley Denison, K.C., for the defendants.

MacMAHON v. RAILWAY PASSENGERS ASSURANCE CO. (No. 2).

Ontario High Court, Cartwright, M.C. May 6, 1912.

DISCOVERY AND INSPECTION (§ I—2)—*Action on Life Insurance Policy—Issue as to Age of Assured—Production of Marriage Certificate—Relevancy—Affidavit on Production.*]—In this action on a life insurance policy, one of the defences was that the age of the assured was incorrectly given. On the examination of the plaintiff for discovery, he was interrogated on this point, and was asked to produce the marriage certificate of his mother, the assured. No such document was mentioned in the

plaintiff's affidavit on production, and his counsel objected to these questions as being an attempt to cross-examine on the affidavit on production. The plaintiff did not say whether he had it or not; but stated that he was informed that the marriage took place at Belleville, Ontario, in what year he could not say. He stated facts as to his own birth and that of his elder brother, which would agree with 1864 as the date of the marriage. He further stated that he had no record of his mother's age, and that all his inquiries on the point had been fruitless. He was then asked again as to the marriage certificate, and the objection of his counsel was again made and sustained by the examiner. The defendants moved for an order requiring the plaintiff to answer the questions, and to produce the marriage certificate therein referred to, and to make a further affidavit on production. The Master said that it was to be observed that the plaintiff had never admitted that he had at any time any marriage certificate of his parents. It was, therefore, clear that the motion, so far as it asked for a further affidavit, was made too soon. (The Master referred to Standard Trading Co. v. Seybold, 1 O.W.R. 650.) Counsel for the defendants stated that he was willing to accept the statement of the plaintiff's solicitors as to whether there was a marriage certificate in existence, and if the plaintiff had seen it or had had it in his possession. The Master said that the defendants were entitled to this, on the ground that the true age of the assured was in issue, and the production of the certificate *might* enable the defendants to obtain conclusive evidence on this point. (See Attorney-General v. Gaskell, 20 Ch. D. 528, cited in Bray, p. 112.) This was the more important as the plaintiff admitted that, a month before her death, his mother said, "I am about sixty-four." One of the conditions of the policy was that the assured was on the 11th April, 1911, not sixty-two. If the solicitors were not able to give this information, there must be further examination before the trial. Success having been divided, costs of the motion to be costs in the cause. Shirley Denison, K.C., for the defendants. H. E. Rose, K.C., for the plaintiff.

CAMPBELL v. SOVEREIGN BANK OF CANADA.

Ontario High Court, Cartwright, M.C. May 15, 1912.

DEPOSITIONS (§ II—5)—*Foreign Commission—Terms—Prior Examination of Officers of Defendant Bank.*]—Motion by the defendants for a commission to examine one D. M. Stewart as a witness on their behalf at New York. It was stated in the affidavit in support of the motion that Stewart had agreed to be examined at New York, but that he expected to leave that city

ONT.
H. C. J.
1912
MEMO. DECISIONS.

for the interior of Alaska early in June. The Master said that it could not be argued that Stewart was not a material witness; but it was said that the plaintiffs were not prepared to cross-examine him effectively; that they wished to examine two of the defendants' officers, Jarvis and Jemmett, for discovery before the examination of Stewart, on the principle of the exclusion of witnesses at a trial. The defendants were willing that the two officers should be examined this week, and offered to produce them. The Master said that if the two officers were examined early next week, and Stewart the week following, each side would have all they could reasonably ask. On this understanding, an order was made for the issue of a commission to examine Stewart. Costs of the motion and of the commission to be left to the Taxing Officer unless disposed of by the trial Judge. W. J. Boland, for the defendants. F. Arnoldi, K.C., and F. McCarthy, for the plaintiffs.

ROGERS v. WOOD.

Ontario High Court, Cartwright, M.C. May 8, 1912.

JUDGMENT (§ 1 F—46)—*Rule 603—Action against Directors of Company for Wages—Companies Act, sec. 94—Affidavit of Solicitor's Agent—Claim of Plaintiff.*]—Motion by the plaintiff for summary judgment under Con. Rule 603, as against all the defendants except Bennett. The action was against directors of a company for wages, the plaintiff having an unsatisfied judgment against the company, as in Lee v. Friedman, 20 O.L.R. 49, on the effect of 7 Edw. VII. ch. 34, sec. 94 (O.) The Master said that the judgment in that case made it plain that the action was maintainable in its present form, and that Herman v. Wilson, 32 O.R. 60, was decided on the pleadings and was not applicable. That, however, was not decisive of the present motion, to which two objections could be taken. First, the only affidavit in support of the motion was made by a member of the firm of solicitors who were agents for the plaintiff's solicitor. This recited the proceedings leading up to the present action, and alleged that the deponent had knowledge of the matters in question, and that the defendants were indebted to the plaintiff as claimed. Although this was stated in this positive way, it might be fairly assumed that the deponent, as to this last fact, was not speaking of his own knowledge. This would ordinarily be known only to the plaintiff or his solicitor—but not to that solicitor's agent. For the reasons given in Great West Life Assurance Co. v. Shields, 1 O.W.N. 393, the motion should not be granted. It also was at least doubtful whether Con. Rule 603 could be applied in cases of this kind. The judgment against the company was by

default, and was not binding on these defendants, as stated by Britton, J., in Lee v. Friedman, 20 O.L.R. at p. 55. It appeared that these actions had always gone to trial, as, for instance, George v. Strong, 1 O.W.N. 350, as well as the Lee case. There was no trace of any motion such as the present in such actions. There was a question also as to the position of the plaintiff. His claim was for $300 out of the total of $826.40. It was alleged that he was not "a labourer, servant, or apprentice," but occupied the position of foreman or contractor. This could not be disposed of on affidavit evidence. Motion dismissed; costs in the cause; the trial to be expedited. Irving S. Fairty, for the plaintiff. Charles Henderson, J. M. Ferguson, and W. H. Price, for the responding defendants.

CONKLE v. FLANAGAN.

Ontario High Court, Cartwright, M.C. May 9, 1912.

VENUE (§ II A—15)—*County Court Action—Issues for Trial—Evidence—Convenience—Expense.*]—Motion by the defendants for an order transferring the action from the County Court of the County of Wentworth to the County Court of the County of York, in the following circumstances. It was admitted that a verbal contract was made in March, 1912, at an interview between the two plaintiffs and the defendant Flanagan, at which no one else was present. It was then arranged that a boxing entertainment was to be given before the National Sporting Association Limited, at Toronto. The only issue was as to the amount which the plaintiffs were to receive out of the receipts. They claimed one-half of the gross receipts. The defendants said that they were to pay only fifty cents for every one who attended the entertainment. This sum had been paid. The plaintiffs sued for $334.50, alleging that the gross receipts were $1,338. This, while formally denied in the statement of defence, was not disputed in the two affidavits of the defendant Flanagan filed on this motion. The Master said that, whether this was so or not, the exact figures could be found on examination of the books of the association on discovery; and it should not be necessary to give oral evidence at the trial. The main issue was on the plaintiffs, who must satisfy the Court of the terms of the agreement as they presented them. It was argued that the defendants would have to give evidence of the terms on which such bouts are usually arranged by the managers of other similar associations in Toronto. But such evidence would not be admissible, as the plaintiffs were suing on an express agreement. Considering the short distance between Toronto and Hamilton, and the frequent communication, making it possible to have the trial at Hamilton, without the witnesses being absent from home

ONT.

H. C. J. 1912

MEMO. DECISIONS.

a single night, the Master thought that it was not a case for obliging the plaintiffs to conduct the subsequent proceedings in the county of the defendants, instead of in their own. Motion dismissed; costs in the cause. If the trial Judge thinks fit, he can apportion the costs of the witnesses on application to him for that purpose. See Rice v. Marine Construction Co., 3 O. W.N. 1080, and cases cited. J. G. O'Donoghue, for the defendants. A. M. Lewis, for the plaintiffs.

McKINLEY v. GRAHAM.

Ontario Divisional Court, Boyd, C., Latchford, and Middleton, JJ. February 7, 1912.

LIMITATION OF ACTIONS (§ II J—80)—*Action to Enforce Charge on Land — Will — Legacy — Executors — Devisee — Trust — Devolution of Estates Act.*] — Appeal by the plaintiff from the judgment of BRITTON, J., 3 O.W.N. 256. J. Shilton, for the plaintiff. H. L. Ebbels, for the defendants, the executors. H. C. Macdonald, for the defendant, Charles Harper, junior. The judgment of the Court was delivered by BOYD C.:—The provisions of this will were considered in April, 1890 (see Harper v. Graham, in my book of that date), in an action wherein the plaintiff was a party and the other beneficiaries and the executors. It was then held that the land devised to the son William was charged with the payment of $200 per year for five years after the death of the testator towards satisfaction of the legacies—including that of the plaintiff. These payments for the five years have been made, and the executors have administered the personalty, and turned over the other land devised to Charles to him in 1891, which was charged with an annuity for the life of the widow as a first charge and as a second charge any unpaid balance remaining due on the legacies. That act of transfer concluded the duties of the executors, and thenceforth the devisee Charles took the land subject to the lien for legacies. This lien was, by the terms of the will, exigible at the end of the five years from the testator's death, so far as the balance then unpaid was concerned. The land might have been resorted to subject to the lien of the widow, and sold, but this course was not taken—it may be because it was considered that the land would not realise sufficient to pay anything on the legacies, if sold subject to the widow's annuity. But of this there is no explanation in the evidence, and all that appears is, that from 1894, when the five years expired, until the issue of the writ in October, 1907, nothing has been done to relieve the plaintiff from the bar imposed on this action to recover the

legacy charged on the land, which arose at the end of ten years from 1894. I see no other way in which the legal effect of the whole transaction can be viewed, and I see no way in which any case of express trust can be raised as against the executors or the other defendant. Costs were given below. I would not think it a case for costs of this appeal as against Charles, who holds his land exempt from the payment of $600, which the testator intended should be made. The executors should get costs of appeal.

LAMOUREAUX v. SIMPSON.

Ontario Divisional Court, Boyd, C., Sutherland, and Middleton, JJ. January 12, 1912.

CORPORATIONS AND COMPANIES (§ V C—189)—*Transfer of Company-share—Undertaking to Re-transfer—Sale or Loan of Share.*]—Appeal by the defendant from the judgment of BRITTON, J., 3 O.W.N. 212, dismissed with costs. C. J. Holman, K.C., for the defendant. I. F. Hellmuth, K.C., and E. H. Ambrose, for the plaintiffs.

MARTIN v. CLARKE.

Ontario High Court, Co. Cweright, M.C. January 13, 1912.

JUDGMENT (§ I F—46)—*Con. Rule 603—Action on Covenant in Mortgage — Release — Delay in Bringing Action.*]—Motion by the plaintiffs for summary judgment under Con. Rule 603, in an action on a covenant in a mortgage made on the 20th May, 1889. The action was begun on the 15th June, 1911. The Master said that from the affidavit of the defendant and his cross-examination it appeared that there was no defence to the action, unless the release of which the defendant spoke (a draft of which was in the plaintiffs' possession) could be produced. At present it was not forthcoming. The defendant said that he had not made a thorough search among his old papers for it. No payment had been made by the defendant since 1901. The release must be produced within a fortnight. If this was not done, judgment should go, unless the defendant preferred to have the case go to trial in the usual way. This second course was only allowed on the ground of the long delay in bringing this action and the total silence of the plaintiffs for so many years on the matter. The Master did not wish to be understood as recommending any further resistance to the plaintiffs' claim. The costs of the motion to be in the cause. H. J. Martin, for the plaintiffs. J. Shilton, for the defendant.

ONT.

H. C. J. 1912

MEMO. DECISIONS.

BROWN v. CHAMBERLAIN.

Ontario High Court, Sutherland, J. January 16, 1912.

BILLS AND NOTES (§ I D—31)—*Liability of Maker—Blank Note Filled up and Used for Unauthorised Purpose.*]—Action on a joint and several promissory note made by T. F. Chamberlain and W. P. Chamberlain, the defendants, dated the 20th June, 1906, payable one year after date, and purporting to be with interest at 6 per cent. The defendant T. F. Chamberlain, who was the father of his co-defendant, appeared on the note as the first of the two makers. It was admitted by the plaintiff that certain payments, amounting in all to $280.95, had been made on account by the defendant T. F. Chamberlain upon various dates in 1906, 1907, and 1909. It was admitted also that the signatures to the note were those of the defendants respectively. The defendant T. F. Chamberlain said, in his statement of defence, that he joined in the note for the accommodation of his co-defendant, for whose benefit the money was procured, and that the note was given to the plaintiff by his co-defendant, and he claimed over against his co-defendant in case the plaintiff obtained judgment against himself. The defendant W. P. Chamberlain, in his statement of defence, alleged that, if the note in question was given in respect of any indebtedness to the plaintiff, it had been paid or discharged; that the note was not given to the plaintiff by him nor signed by him to be given to the plaintiff; that the plaintiff was aware, and received the note with notice, that it was not intended for her; that there was no authority in any person to give it to her; that the note had been altered in a material part after being issued; that, while he and his co-defendant had borrowed money of the plaintiff prior to 1898, it had been arranged between them that the indebtedness should be taken care of by the defendant T. F. Chamberlain, who did make payments from time to time on account thereof, and who, in the year 1898, with the knowledge and consent of the plaintiff, replaced a note previously given to her by the defendant W. P. Chamberlain, in 1897, and indorsed by T. F. Chamberlain, by the latter's own demand note for the amount then due; that thereafter he (the defendant W. P. C.) did not make nor authorise to be made any payments on account of the said indebtedness, nor did he authorise his co-defendant to complete in favour of the plaintiff the note in question herein, which was originally a blank note, given by him to his co-defendant for use in their common business, and to be used for it alone; that he was not aware until just before this action was commenced that it had ever been used for another purpose, or that it had been filled out in the form in which it now appeared. He also alleged that his co-defendant was primarily liable upon the note, and claimed over against his co-de-

fendant in case the plaintiff succeeded in obtaining a judgment against him (the defendant W. P. C.) Each of the defendants served a third party notice on the other. SUTHERLAND, J., after setting out the facts at length, said:—I am not at all convinced by the evidence that the note sued on was made on the date it appears to be. I do not credit the testimony of the plaintiff and T. F. Chamberalin as to this. I am strongly inclined to believe that the note was filled in after the release between the defendants made in in 1899. It is, I think quite clear that—whenever it was filled in—the defendant T. F. Chamberalin utilized, without the consent of his co-defendant, a blank form of note signed by the latter for their business purposes, and which he had no authority to use to fill in favour of the plaintiff. The defendant T. F. Chamberlain admits that he made the note and is bound by it, but claims over against his co-defendant. I do not think the defendant W. P. Chamberlain is liable upon the note sued on, nor at this date with respect to the indebtedness existing in 1898 and evidenced by the note made in that year. As to the indebtedness, I think, from the evidence, that the Statute of Limitations would apply The plaintiff will have judgment for the amount of her claim, with proper interest, against defendant T. F. Chamberlain, with costs; and the action will be dismissed as against the defendant W. P. Chamberlain, with costs, if the same are asked for. D. B. Maclennan, K.C., and C. H. Cline, for the plaintiff. C. A. Moss, for the defendant W. P. Chamberlain. The defendant T. F. Chamberlain, in person.

BREWER v. GRAND TRUNK RAILWAY CO.

Ontario Divisional Court, Meredith, C.J.C.P., Teetzel and Middleton, JJ. January 16, 1912.

NEW TRIAL (§ II—5)—*Railway—Death of Person—Negligence — Evidence for Jury — New Trial.*]—An appeal by the plaintiff from the judgment of MULOCK, C.J.Ex.D., dismissing the action, which was brought by Louisa Brewer to recover damages for the death of her husband, E. S. Brewer, who was killed in a collision between two of the defendants' trains, alleged to have been caused by the negligence of the defendants. MULOCK, C.J., was of opinion that there was no evidence of negligence to go to the jury. The Court reserved judgment pending the decision of the Supreme Court of Canada upon appeals from the judgments of the Court of Appeal in McKeand v. Canadian Pacific R.W. Co., 2 O.W.N. 812, and Griffith v. Grand Trunk R.W. Co., 2 O.W.N. 1059. The decisions of the Court of Appeal having been affirmed, the Court directed that

ONT.

H. C. J. 1912

MEMO. DECISIONS.

the appeal in this case should be allowed and a new trial had, upon the ground that there was some evidence for the jury. Costs of the former trial and of the appeal to the plaintiff in any event. E. G. Porter, K.C., for the plaintiff. D. L. McCarthy, K.C., for the defendants.

[See Richard Evans & Co. Limited v. Astley, [1911] A.C. 674.]

STONE LIMITED v. ATKINSON BROTHERS.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Latchford, JJ. January 18, 1912.

APPEAL (§ VII L—470)—*Question of Fact—Finding of Trial Judge—Evidence.*]—Appeal by the defendants from the judgment of Judge Denton, one of the Junior Judges of the County Court of the County of York, in favour of the plaintiffs, in an action, in that Court, to recover $440, the price of 2,500 posters designed by the plaintiffs and furnished by them to the defendants. The Chief Justice said that the defendants' counsel very ingeniously endeavoured to take the case out of the rule laid down in Bishop v. Bishop, 10 O.W.R. 177, and to bring it within Beal v. Michigan Central R.R. Co., 19 O.L.R. 502. He (the Chief Justice) had perused the evidence twice with a view of seeing whether the argument that the Judge misapprehended the effect of the evidence, or failed in any way to appreciate the relation of the facts as he found them to the issue which he was trying, was well-founded; and was of the opinion that it was not. The trial Judge had found distinctly in favour of the testimony adduced by the plaintiffs as against that of the defendants in at least two vital particulars; and there was no reason for finding fault with his conclusions. The case fell within the general rule; and the appeal should be dismissed.

LATCHFORD, J., agreed.

BRITTON, J. (dissenting), thought that the trial Judge had failed to consider a material part of the evidence given by the defendants; and, as against the defendants, had given undue weight to the evidence of witnesses called for the plaintiffs, who were or had been in the plaintiffs' employ, and who were interested in putting upon the defendants the job in question. It was the duty of the Divisional Court to rehear the case. In his opinion, the appeal should be allowed and the action dismissed except as to the amount paid into Court. In the result the appeal was dismissed with costs. F. E. Hodgins, K.C., for the defendants. Grayson Smith, for the plaintiffs.

CRABBE v. CRABBE.

Ontario High Court, Cartwright, M.C. January 20, 1912.

INTERPLEADER (§ II—20)—*Payment into Court — Rival Claims to Money Due from Sale of Chattels.*]—This was an action to have it declared that certain land and chattels which had been dealt with by the defendant were the property of her husband, the plaintiff. The farm in question had been leased for five years, at a rent of $700 a year, to one Roche, who had also bought from the defendant and partly paid her for the chattels. A further payment being due, the plaintiff served upon Roche a formal notice of his claim, and Roche now moved for the usual interpleader order. The Master said that the facts were analogous to those in Trebilcock v. Trebilcock, 2 O.W.N. 303. Unless, therefore, the parties could agree on some different arrangement, an order must be made as in that case. F. J. Roche, for the applicant. E. W. Boyd, for the defendant. Johnston (W. Laidlaw), for the plaintiff.

HAMILTON v. VINEBERG.

Ontario High Court, Sutherland, J. January 24, 1912.

CONTRACTS (§ II D 4—188)—*Extras—Architect — Counterclaims.*]—By an agreement in writing, dated the 28th September, 1909, the plaintiffs, builders and contractors, agreed to provide all the materials and perform all the work mentioned in the specifications and shewn on the drawings prepared by D. Burnham, architect, for the defendant, for the erection and completion of a dwelling-house in Toronto. The plaintiffs' claim in this action was for $1,627.49 for extras, under a written order of the architect. The defendant counterclaimed against the plaintiffs and D. Burnham, the architect, for damages; and Burnham cross-counterclaimed against the defendant. Certain issues of fact were raised upon the claim and counterclaims, which the learned Judge found in favour of the plaintiffs and Burnham. Judgment for the plaintiffs for $1,627.49, less $174, making $1,453.49, with interest from the 26th October, 1910, and costs. Counterclaim of the defendant dismissed with costs. Judgment for Burnham on his counterclaim against the defendant for $60 and costs. E. C. Cattanach, for the plaintiffs and Burnham. H. Cassels, K.C., and R. S. Cassels, K.C., for the defendant.

McPHIE v. TREMBLAY.

Ontario High Court, Kelly, J. January 25, 1912.

ASSIGNMENTS FOR CREDITORS (§ VII B—61)—*Assignment by Insolvent Partnership — Assets of Firm — Action by Assignee to Make Liable Lands Purchased by Wife of Partner —*

ONT.
H. C. J.
1912
MEMO. DECISIONS.

Fraudulent Conveyance.] — An action tried at North Bay, without a jury. The plaintiff, to whom Boulanger and Tremblay (a firm of which the defendant Peter Tremblay was a member) made an assignment for the benefit of their creditors on the 30th May, 1910, alleged that certain property purchased by the defendant Evelina Tremblay, wife of the defendant Peter Tremblay, was purchased or acquired, and buildings erected thereon, out of the funds or assets of the insolvent firm, and that such property should be declared a part of the firm's assets. The plaintiff also asked that a conveyance of the lands and property in question by the defendants Peter Tremblay and Evelina Tremblay to the defendant Routhier, on or about the 27th September, 1910, should be declared fraudulent and void as against the creditors of Boulanger and Tremblay. The learned Judge said that the only evidence offered at the trial was that of the defendants Peter Tremblay and Evelina Tremblay, both of whom were called by the plaintiff; and the evidence shewed, and the learned Judge found, that the moneys used in the purchase of the property in question and in the erection of the buildings thereon, which the plaintiff alleged belonged to Boulanger and Tremblay, were the moneys of the defendant Evelina Tremblay, and did not belong to Boulanger and Tremblay, nor to the defendant Peter Tremblay; and the property and buildings formed no part of the assets of the insolvent firm. No evidence was offered to substantiate the claim that the deed to the defendant Routhier was fraudulent and void. Action dismissed with costs. G. A. McGaughey, for the plaintiff. G. T. L. Bull, for the defendants.

CHEESEWORTH v. DAVISON.

Ontario High Court, Sutherland, J. January 25, 1912.
Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Riddell, JJ. May 7, 1912.

FRAUD AND DECEIT (§ IV—19)—*Mining Venture—Breach of Agreement — Return of Money Paid — Damages.*]—An action to recover $600 paid by the plaintiff and certain associates of his (of whose claims he had an assignment) to the defendant upon an agreement by which the defendant was to take up and operate mining claims in Alaska and the Klondike district and share the profits with the plaintiff and his associates. The plaintiff also asked damages for breach of the agreement and for an account; and (by amendment) damages for misrepresentation and fraud. The agreement was made on the 8th May, 1903. The action was begun in January, 1908. SUTHERLAND, J., after stating the facts and reviewing the evidence, said that, in the circumstances and upon the evidence and documents and after the great lapse of time, it would be impossible to find that the contract was not as the parties

intended it, or that the defendant made any false or fraudulent representations to induce the plaintiff and his associates to enter into it. Action dismissed with costs, subject to certain deductions in favour of the plaintiff. W. D. McPherson, K.C., for the plaintiff. J. T. White, for the defendant.

May 7, 1912. Appeal from the decision of Sutherland, J., dismissed by the Divisional Court.

ONT.
H. C. J.
1912
MEMO. DECISIONS.

BERGERON v. CITY OF HULL

QUE.
S. C.
1912

Quebec Superior Court, Weir, J. January 19, 1912.

HIGHWAYS (§ III—104)—*Changing Grade of Street.*]—Sections 149 and 157 of defendant's charter (56 Viet. Que. ch. 52), which provides that persons suffering damage through the change of level of defendant's streets or sidewalks shall receive compensation to be settled by arbitrators, does not deprive plaintiff of his recourse to the ordinary civil tribunals of the province, nor affect their jurisdiction: Leclerc v. Dufault, 16 Que. K.B., p. 138; Endlich, Interpretation of Statutes, secs. 151 et seq.

The construction by the defendant of the sidewalk in question on a higher level than the old sidewalk, opposite plaintiff's property, and the raising of the level of the street in the same vicinity, were found to have damaged plaintiff's property, and to be of the nature of a partial expropriation by defendant of his acquired rights therein.

Judgment was awarded the plaintiff for $350 damages with interest from the service of process in the action and costs of suit. Messrs. Major and Fortier, for plaintiff. Messrs. Devlin and Ste.-Marie, for defendant.

MILLS v. FREEL.

ONT.
H. C. J.
1912

Ontario High Court, Trial before Riddell, J. May 6, 1912.

HIGHWAYS (§ V A 2—261)—*Forced Road Substituted for Road Allowance — Right to Portion of Road Allowance in Lieu thereof.*] — Action for a declaration that the plaintiffs were entitled to part of the 10th concession road allowance in the township of East Nissouri, in lieu of a forced road taken from the plaintiffs' land, for which no compensation was paid to the plaintiffs or their predecessors in title, and for an injunction and other relief. The learned Judge said that further consideration had not changed his opinion formed at the trial. Action dismissed with costs, including all costs over which the trial Judge has control. J. M. McEvoy, for the plaintiffs. E. Meredith, K.C., and W. R. Meredith, for the defendants.

INDEX.

CONTRACTS—*Continued.*