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ANNOTATED

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VOL. 66

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CASES REPORTED IN THIS VOLUME.

TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

APPEARING IN VOLS. 1 TO 66 INCLUSIVE.

REFERENCE FROM HIS EXCELLENCY THE GOVERNOR-GENERAL CONCERNING THE CHIEF JUSTICE OF ALBERTA.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. May 2, 1922.

STATUTES (§IIA—96)—ALBERTA JUDICATURE ACT—ALTA. STATS. 1919, CH. 3, AS AMENDED BY 1920 STATS. CH. 3 AND CH. 4—CONSTRUCTION—CHIEF JUSTICE OF ALBERTA—CHIEF JUSTICE OF TRIAL DIVISION—LETTERS PATENT 1921 MAKING APPOINTMENTS—VALIDITY—LETTERS PATENT OF 1910 APPOINTING CHIEF JUSTICE STILL IN FORCE.

The Alberta Judicature Act, 1919 (Alta.), ch. 3, as amended by 1920 stats., ch. 3 and ch. 4, does not create a new Supreme Court and an entire new set of judicial officers, but continues the existing Supreme Court and judicial officers, and merely adds to the number of the latter and creates an additional Chief Justiceship of the newly named Trial Division. It follows, therefore, that Letters Patent appointing the Chief Justice of the Appellate Division as formerly constituted, to be Chief Justice of the new Trial Division are of no effect, he being by virtue of former Letters Patent which are still in force and by the Judicature Act, sec. 6, Chief Justice of the newly constituted Appellate Division, and not being entitled under the Act to be Chief Justice of both divisions. Letters Patent appointing another Chief Justice and President of the Appellate Division as reconstructed by the Act are also of no effect.

REFERENCE from his Excellency the Governor-General concerning the Chief Justice of Alberta. The questions submitted are fully set out in the judgment of Mignault, J.

E. L. Newcombe, K.C., for Attorney-General of Canada.

E. Lafleur, K.C., for Harvey, C.J.

DAVIES, C.J.:—The questions submitted to us are five in number and ask us to advise whether, in our opinion, the Letters Patent issued to David Lynch Scott of September 15, 1921 as the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the Judicature Act of Alberta, 1919 ch. 3, as amended, are effective to so constitute him Chief Justice and President, and whether the Letters Patent of same date appointing the Honourable Horace Harvey Chief Justice of the Trial Division of said Court are effective so as to constitute and appoint him as such Chief Justice.

From the copy of the report of the Committee at the House of Commons approved by His Excellency, the Governor-General, submitted to us it appears that the Honourable Horace Harvey was by Letters Patent of October 12, 1910 appointed Chief Justice of the Supreme Court of Alberta with the style and

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title as such Chief Justice and by Letters Patent of September 15, 1921 the said Horace Harvey was constituted and appointed to be the Chief Justice of the Trial Division of such Supreme Court and *ex officio* a Judge of the Appellate Division of said Court, whereas by Letters Patent of the same date the Honourable David Lynch Scott was appointed Chief Justice and President of the Appellate Division as constituted under the said Judicature Act as amended and to be styled the Chief Justice of Alberta and to be *ex officio* a Judge of the Trial Division.

As the Honourable Horace Harvey had never resigned his office as Chief Justice of Alberta to which he had been appointed in 1910 the submission to us was that by virtue of the amendments made to the Supreme Court Act of the Province from time to time his Commission as Chief Justice of the old Appellate Division dated in 1907 had practically come to an end by the creation of a new Appellate Division with new Judicial Officials.

The question immediately arose not whether he could be reappointed as Chief Justice of the new Appellate Division for that, of course, no one questions, but whether he must necessarily receive a new commission appointing him as such Chief Justice or whether His Excellency's power on that regard was untrammelled and he could appoint any other eligible person from the Bench or Bar.

To determine the question we had, of course, to consider all the Statutes of Alberta bearing upon the creation and constitution of the Supreme Court of Alberta and its branches and divisions.

The Act of 1919, ch. 3, called the Judicature Act, came into force by proclamation on September 15, 1920, on which date the Letters Patent or Commissions in question were issued and in my judgment it is upon the proper construction of the several sections of this Act as amended by the Statute of 1920, passed before the Act of 1919 was brought into force that the question submitted to us must be answered.

I may premise that the difficulties of reaching a firm and clear conclusion upon these questions are very great owing to the slipshod and inartistic manner in which the amendments to the Act of 1919 were framed and passed. However inartistic and loosely framed these amendments may be, there is no doubt in my mind that they indicate a clear and radical change in the intention of the Legislature with respect to the Appellate Division in several important respects from the intention apparent from the sections as passed in 1919. First it was not

to be a "continuance" of the then existing Appellate Division. Every word in the section of the Act as passed in 1919 and being amended indicating that, was struck out and secondly it was not necessarily to be presided over by the then Chief Justice of Alberta but by any eligible person of the Bench or Bar who his Excellency might appoint.

Section 6 of the Act of 1919 called the Judicature Act of 1919 as originally passed read as follows:—

"The Appellate Division shall continue to be presided over by the Chief Justice of the Court who shall continue to be styled as the Chief Justice of Alberta and shall consist of the said Chief Justice and four other Judges of the Court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal and three judges shall constitute a quorum."

The result of the amendment made in sec. 6 by the Act of 1920, ch. 3, made the section read as follows:—

"The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the Court and who shall be styled the Chief Justice of Alberta and shall consist of the said Chief Justice and four other judges of the Court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for hearing of appeals from any District Court, but the Appellate Division when hearing such appeals may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges."

And on the day when the Act of 1919 was proclaimed as coming into force sec. 6 of the Act read as I have above set out.

The result of that amendment was that instead of the old Appellate Division being continued and presided over by the then Chief Justice of Alberta as was expressly provided for in the Act of 1919 as originally passed, an Appellate Division of the Supreme Court was created which was to be presided over by a Chief Justice to be appointed by His Excellency the Governor-General and to consist of that Chief Justice so appointed and four other Judges of the Court to be assigned to it by His Excellency the Governor-General.

The Act in other words before being amended provided for the continuance of the then existing Appellate Division and

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that the then Chief Justice should continue to be its presiding officer while the amendment deliberately struck out the words providing for the continuance of the Appellate Division and of the continuance in the office as its Chief Justice of the then existing Chief Justice and created an Appellate Division with a Chief Justice to be appointed by the Governor-General who might be chosen and taken from those eligible either from the existing Bench or Bar. By thus expressly striking out the words that the Appellate Division should be "continued" and the further words providing that the existing Chief Justice should be the Chief Justice of the reconstituted Appellate Division leaving the appointment of the new Chief Justice untrammelled with His Excellency, it seems to me that the intention of the Legislature was clearly not to continue the old Appellate Division but to so construct it as to create a new Appellate Division leaving the presiding officer to be anyone eligible chosen by the Governor-General. Further the amendment provided for an appeal to the Appellate Division from the newly constituted Trial Division and that when hearing such appeals the Appellate Division should be composed of 5 Judges. The new and additional jurisdiction thus given to the reconstructed Appellate Division, the elimination from the section being amended of all words making the new Appellate Division a continuance of the old division and also of the words making the then Chief Justice of the Court the Chief Justice of the new Appellate Division thus leaving the appointment of the new Chief Justice in His Excellency's hands untrammelled and the declaration that the Chief Justice to be appointed and 4 other Judges of the Court to be assigned to it by His Excellency the Governor-General and to be called Justice of Appeals should constitute the Appellate Division, thus abolishing the old plan of the Judges in a body selecting yearly these 4 Judges combine to satisfy me that the Appellate Division so established was a new division with new judicial offices and some additional functions. It is strongly argued that such a construction is at variance with secs. 3 and 5 which read as follows:—

3. "There shall continue to be in and for the province a superior court of civil and criminal jurisdiction known as 'The Supreme Court of Alberta.'

5 The court shall continue to consist of two branches or divisions which shall be designated respectively 'The Appellate Division of the Supreme Court of Alberta', and 'The Trial Division of the Supreme Court of Alberta."

I respectfully submit there is no real or necessary inconsist-

ency between these two sections and the amended sec. 6. Indeed it may be said they rather support the argument as to the intention of the Legislature not to leave it open to the slightest doubt that the Superior Court of Alberta was continued but that it should thereafter consist of two branches or divisions respectively designated as Appellate Division and the Trial Division, and with the respective jurisdictions and appointees assigned to each, and emphasising their intention of creating a new division by striking out the word "continue" in two places of the section and by further expressly striking out the words of the section amended which provided for the former Chief Justice continuing as President of the Appellate Division.

Having reached this conclusion I would answer the first question and the third question in the affirmative and question 5 in the negative. Questions 2 and 4 do not require any answer in view of my answers to questions 1, 3, and 5.

IDINGTON, J.:—The Province of Alberta was established by 4 and 5 Edw. VII. ch. 3, assented to July 20, 1905, and known as the Alberta Act, which came into force on September 1, 1905.

Prior thereto it had formed part of the North West Territories and fell within the jurisdiction of the Supreme Court of the said territories.

The Legislature of Alberta was, by said Act, given power for all purposes affecting or extending said Province, to abolish said Court. That power does not seem to have been exercised until the Supreme Court was constituted by the Legislature of that Province acting within its powers under said Alberta Act, and the B.N.A. Act, sec. 92, item 14 thereof, by the enactment of 1907 to be cited as the Supreme Court Act.

Section 5 of said Act (1907, ch. 3) declared that the said Court "shall consist of a Chief Justice who shall be styled 'The Chief Justice of Alberta' and four puisne judges who shall be called the justices of the court."

The power of appointment of said Chief Justice and puisne Judges rested as it always has done in like cases, under sec. 96, of said B.N.A. Act, 1867 with the Governor-General, and appointments were duly made pursuant thereto of the Chief Justice and puisne Judges as specified by the said Supreme Court Act.

The appellate work of the Court was referred to as *en banc* according to ancient form of speech, and, it would seem to have been left to the Judges to arrange amongst themselves who should sit *en banc*, and who attend to *nisi prius* work, observ-

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ing, however, the term times for *en banc* sittings fixed in regard to time and place by the Lieutenant-Governor in Council, as required by sec. 30 of the said Supreme Court Act.

That condition of things (save as to an amendment in 1908 increasing the number of puisne Judges to 5 instead of 4) existed when, on the resignation of the then Chief Justice, the late Honourable A. L. Sifton, the then Honourable Horace Harvey, a puisne Judge of said Court, was appointed to succeed him in 1910 as Chief Justice.

In 1913 tentative amendments were made and part thereof repealed and parts left to be brought into force by proclamation and the net result was that the power was given the Lieutenant-Governor in Council at the second session of 1913 to proclaim an increase in the number of puisne Judges from 5 to 6, 7 or 8, and, in January 1914, by proclamation the desired increase to 8 was brought into effect.

In March following another proclamation brought into effect sub-sec. 2 of sec. 38 of ch. 9 of the Statutes of Alberta, 1913 (1st sess.) being an amendment to sec. 30 of the Supreme Court Act.

That amendment was as follows:—

"(2) By repealing sec. 30 and substituting therefor the following: '30. The Court *en banc* shall be known as the Appellate Division of the Supreme Court and shall sit at such times and places as the judges of the court shall determine and three judges shall constitute a quorum.

(2) The judges of the Supreme Court shall, during the month of December, and at such other times as may be convenient, select four of their number to constitute the Appellate Division for the next ensuing calendar year, but every other judge of the said court shall be *ex officio* a member of the Appellate Division.

(3) The terms "*Court en banc*" or "*Court sitting en banc*" and "Appellate Division" wherever used in this or any other Act or in any rules made thereunder, shall be deemed to be interchangeable and to have the same meaning.' "

The enabling the Judges to fix their own term times, instead of being dependent as previously on the directions of the Lieutenant-Governor in Council, and to distribute their work for the coming year, one can easily understand, but the mere changing of the name of the division would seem absolutely unimportant unless to keep up with the fashions of modern times.

But for the stress laid up on it by counsel in argument herein I should not have thought it worth mentioning.

If memory serves me correctly, he was under the impression that the rest of the Court was at the same time designated the "Trial Division" which was not the case until the Act of 1919, presently to be referred to.

No change in the jurisdiction nor change in the organisation of the Court seems to have been pointed to as in contemplation at that stage in the history of the legislation we are concerned with.

The word "court", used in that connection, is, by the interpretation clause of the Act the "Supreme Court."

Such being the condition of things there was enacted in 1919 an Act styled, by sec. 1 thereof, "The Judicature Act" which in its growth gives rise to our present troubles.

It does not profess to be a consolidation of acts relative to the Supreme Court, nor does it begin by recognising the existence of that Court but, on the contrary, after giving the name of the Act as just stated, and in sec. 2 an interpretative clause, by sec. 3 enacts as follows:—

"There shall continue to be in and for the province a superior court of civil and criminal jurisdiction known as 'The Supreme Court of Alberta.' "

It is to be observed that this enactment is under the caption of "Constitution of Court" and clearly refrains from continuing the Supreme Court then existent, and instead of doing so declares there shall continue to be a Supreme Court of civil and criminal jurisdiction.

That circumstance, in connection with much else to be presently referred to, suggests a clear intention not to continue the then existing Court.

It is the interpretation and construction of this Judicature Act, and amendments thereto, before it was brought into effect by proclamation as provided by the act itself, as to which we are interrogated.

The questions raised thereby are whether or not the Legislature had created a new Court or Courts, to which the Dominion Government was entitled to appoint Judges, or created new judicial offices which the said Government was entitled to fill.

Section 6 of the Judicature Act above referred to as originally enacted, reads as follows:—

"6. The Appellate Division shall continue to be presided over by the Chief Justice of the court, who shall continue to be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor-General in Coun-

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eil and to be called Justices of Appeal and three judges shall constitute a quorum."

That, which clearly contemplated the continuation of the then Chief Justice as such and his filling the new office, was amended before the proclamation was issued bringing the said Judicature Act into effect, by ch.3, sec. 2, of the Statutes of Alberta, 1920 as follows:—

Sec. 6 is amended as follows:—

(a) by striking out the words "continue to" where the same occur in lines 1, 2 and 3 thereof, and by striking out the expression "of the court" where the same occurs in line two thereof; and by striking out the first "the" in the second line thereof, and substituting in lieu thereof the article "a".

(b) by striking out the words "three judges shall constitute a quorum" where the same occur in the seventh line thereof, and substituting the following in lieu thereof:—

"Three judges shall constitute a quorum for the hearing of appeals from any district Court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges."

That in turn was amended the same year, 1920, before the proclamation, bringing the said Judicature Act into effect was issued, as follows:—

1. By adding after the article "a" in the 6th line of subsection (a) of section 2, the following: "and by adding thereto after the words 'Chief Justice' in the second line thereof, the expression 'who shall be Chief Justice of the Court and' . . . "

Thus the said section was made to read at the date of said proclamation as follows:—

"The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the Court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for hearing of appeals from any District Court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall

an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges."

The said Judicature Act thus, and otherwise, amended was duly declared by proclamation, on August 15, 1921, to come into force and effect on, from and after September 15, 1921.

The other amendments, though substantial, have no important bearing on what we are concerned with herein.

Section 59 of the Judicature Act, enacted as follows:—

"59. The Judicature Ordinance, being cap. 21 of the Consolidated Ordinances, 1898, and the Supreme Court Act, being chapter 3 of the Acts of 1907, and all amendments of the said Ordinance and Act, are hereby repealed."

I submit that by said repealing section of the said Act, all the legislation effective prior to September 15, relevant to the Supreme Court of Alberta was rendered null, and in effect the said Court was abolished as the Legislature had power to do if it saw fit.

The only use such legislation thus drastically repealed could thereafter serve was as a possible historical means of helping to interpret the actual meaning of the Judicature Act, so brought into effect.

The clear meaning of the language used in said sec. 6 of the Judicature Act, as finally amended, as I read it, was to constitute of the Appellate Division of the Supreme Court of Alberta a new Court of Appeal requiring the appointment of a Chief Justice thereof and that when he was appointed he would be styled the Chief Justice of Alberta.

The party chosen for such position might be he who had been under the Supreme Court Act styled Chief Justice of Alberta, or any other person qualified by law to accept such a position. On such appointment the party so appointed would thereby become but not otherwise entitled to be styled such Chief Justice.

It seems to me, in face of the several legislative attempts to make, by the amendment above quoted clear the purpose of the Legislature, idle to contend that such was not the intention of the Legislature, whatever may be urged as to the exact extent of the effect of the repealing sec. 59, which I quote above.

The Dominion Government evidently acted upon one or other of these interpretations, and proceeded upon the assumption that the new Court of Appeal and the new Trial Division, each required the appointment of a Chief Justice and, as to the Court of Appeal, new puisne Judges, and appointed accordingly Mr. Justice Scott to be Chief Justice of the Appellate Division,

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and Chief Justice Harvey to be Chief Justice of the Trial Division, and reappointed some of those previously named to serve as puisne Judges of the Trial Division.

It is stated that each accepted the respective position thus assigned to him, except the late Chief Justice Harvey who has declined so far as to refrain from taking the required oath of office, yet has continued to act as a Judge.

His status on which he relies for his present contention was expressed thus by sec. 5 of the Supreme Court Act:

"The Court shall consist of a Chief Justice who shall be styled 'The Chief Justice of Alberta', etc."

The oath of office prescribed by sec. 7 of said Act which he presumably took, reads as follows:—

"I . . . solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, exercise the powers and trusts reposed in me as Chief Justice (or one of the puisne judges) of the Supreme Court. So help me God."

That oath it is to be observed, makes no mention of the style now so much relied upon and, I respectfully submit, having been swept away by the repealing section above quoted before the present Divisional Courts could come into existence, is a rather slender thread to rely upon.

Five months later, we are asked the questions I will presently refer to.

Counsel for Chief Justice Harvey in his factum remarks in dealing with the changes of sec. 6, upon the want of modifications of secs. 3, 4, 5, 7 and 9, of the statute of 1919.

Section 3 I have dealt with already by pointing out that the Legislature seems to have purposedly abstained from continuing the then existing Supreme Court and, I may add, did so in light of the very different mode of treatment given by prior legislation relative to the Supreme Court of the North West Territories, when superseded by the creation of the Supreme Court of Alberta.

For many reasons apart from the situation we are confronted with it seems to me that example demanded some provisions which had not been made.

Section 4 is simply another illustration of same spirit. Both shew a determination to ignore the possibly continued existence of the old Supreme Court of Alberta, and detract from the force sought in such suggestion.

Section 5 continues two branches or divisions of the Court

constituting one the Appellate Division and the other the Trial Division.

As a matter of fact, there always existed two classes of duties to be performed by the Judges of the Supreme Court, but not until this Act of 1919 was there any such description given legislatively of a Trial Division.

It is brought into existence as a distinct entity by that Act, and the word "continue" is simply one of the many absurdities to be found in this legislation.

There was nothing in fact continued, but an existent duty was given over to a new Court, called, in sec. 7, for the first time "Trial Division."

I fail to see how that helps in any way unless to uphold the action of the Dominion Government of which counsel complains.

Section 9, when read in light of the amendments made to sec. 6 before it was brought into force and the plain language thereof especially when we consider sec. 59 had obliterated all styles resting upon prior legislation, clearly is consistent also with said action.

It is contended, however, that said section 6 as it stands amended, when brought into effect, constituted him who had been heretofore styled "Chief Justice of Alberta", the actual Chief Justice of the new Appellate Division, and hence to continue to be styled the "Chief Justice of Alberta."

In other words, despite the several amendments to the contrary so clearly designed to remove any possibility of such being held to have been the intention of the Legislature, we are asked to say that such amendments must be treated as null.

One of the alleged reasons for such contention is that he had been theretofore styled the Chief Justice of Alberta.

He had been so styled, but only by virtue of the Supreme Court Act so directing; but that Act and all else bearing upon such a question was repealed the moment that the Judicature Act came into force on September 15, 1921.

From the earliest hour of that date, according to Alberta time, he ceased to be entitled any longer to be so styled.

The Act must be read as of the date when it came into force unless there is in it some clear intention to the contrary, which is not the case.

Again it is submitted by counsel for the Minister of Justice and I think quite correctly, that any attempt by the Legislature to dictate to His Excellency who should be appointed to hold the new judicial office, would have been *ultra vires*.

Indeed I should not be surprised to learn that the discovery

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thereof was the reason for the numerous changes made in said sec. 6, for as it stood originally it was clearly open to that objection.

And as to the question of styling the head of the new Court, or if you will, him called to fill the new judicial office created, the Chief Justice of the Province, that is entirely within the power of the Legislature.

I was at first blush disposed to look upon that as emanating from the Royal Prerogative exercised on behalf of the Dominion, but on considering the matter fully I find nothing to found such a pretension upon, for sec. 96 of the B.N.A. Act limits the power of His Excellency the Governor-General to merely nominating him who is to fill the office created by the Legislature.

All that legislation can do relevant to the creation or constitution or recreation or reorganisation or abolition of the Court, rests with the Legislature except the nomination of the person to fill the office which alone rests with the Governor-General of the Dominion as advised by his Ministers.

What has been done in that regard cannot now be undone by anything we may say herein for in answering such interrogatories, we and all concerned, I must respectfully submit, must never forget a single sentence contained in the judgment of the Judicial Committee of the Privy Council in the case of *Att'y-Gen'l for Ontario* v. *The Att'y-Gen'l for Canada* in 3 D.L.R. 509, at p. 517, [1912] A.C. 571, 81 L.J. (P.C.) 210, wherein, that Court said:—

"But the answers are only advisory and will have no more effect than the opinions of the Law Officers."

I have no doubt that the Alberta Legislature aimed at having, as Ontario long had, and other Provinces later, a new Court of Appeal separated from that dealing with the other work of its Supreme Court.

As now constituted the Judges of either division are qualified *ex officio* to sit in the other, but, I assume, only to be made available in case of possible necessity.

I submit these suggestions as probably explaining what was aimed at and hence helping to illuminate the language used.

I may be permitted here to say that I prefer the method adopted in British Columbia, and betimes in Ontario, to that adopted by the Alberta Legislature, to produce substantially the same result. In the first named of the Legislatures whilst creating a Court of Appeal and, of course, styling the head thereof "Chief Justice" of the new Court, preserve the title

of Chief Justice of the Province to him who then filled it and, on his vacating the place, to be passed on to the head of the Appellate Court.

Yet I must look at the case presented purely as a matter of law free from all such sentiment, and try to realise what those concerned were in truth about.

It cannot, I submit, be contended for a moment that the Legislature could not have created a new Appellate Court and eliminated from the jurisdiction of the Chief Justice, and all other Judges of the old Supreme Court, all the appellate powers it had theretofore exercised, and then leave him and them no other powers than those of trial Judges.

That in effect is all the Legislature, I imagine, really desired to bring about.

By the united efforts of the respective executives of the Dominion and of Alberta acting in harmony, that is all that has transpired.

The same result as I have pointed out could have been reached by pursuing another and possibly better method, at all events by someone of the several methods I have mentioned as adopted in other Provinces.

It is not my desire to criticise herein, but to try to realise from the past history of our country and its several Provinces the probably justifiable object the Legislature had in view, and then give to a rather peculiar growth of 6 years in way of legislation the exact measure of vitality it was intended to have.

Approached in such a mood and attitude as such considerations are likely to produce, the contention set up by able counsel seems to me rather an undue strain upon the English language.

Clearly there were to be two Courts where only one existed before, and two Chief Justices to be appointed.

It was then thrown upon the Dominion Executive to select him it chose for each respectively.

We have no facts stated relative to how this duty was to be discharged, though we may suspect or indeed infer from the remarkable coincidence of events which took place, that it was well understood between the two Executives concerned that the old Chief Justice and such of his puisne Judges as the Dominion Executive chose to fill the positions they respectively were chosen to fill, should be effected by such a manner as would substantially protect them and the due administration of justice at the same time.

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Clearly it so happens that some men are by nature and attainments better fitted for appellate courts then trial courts, and *vice versa*.

The salaries allotted the new Chief Justices were, we are told, in each case to be the same.

It may be pointed out that this is not the first instance on record of a Legislature having taken upon itself to change the status of judicial officers, for I find that in pre-confederation days, though the old Court of Error and Appeal Act, ch. 13 of the Consolidated Statutes of Upper Canada, by sec. 5 thereof, had declared that the Chief Justice of the Queen's Bench, for the time being, and the Judge entitled to precedence over all other Judges should preside, yet by 1861, ch. 36, sec. 1 that was repealed.

Much stress seemed to be put by counsel for Chief Justice Harvey upon the fact that uncertainty as to the tenure of the position of Chief Justice of Alberta may be attended with serious consequences, inasmuch as important powers are conferred upon the Chief Justice of that Court, the exercise of which by an incompetent Judge might lead to serious consequences, and he cites the example of the Bankruptcy Act ch. 36, 1919 (Can.) assigning the power to the Chief Justice to make the appointments to certain officers in certain contingencies.

I should have thought that the doctrine of *de facto* applied to any officer would relieve any person so embarrassed and should be surprised if anyone thought of applying to anyone else than Chief Justice Scott.

But if that is not enough, clearly the true remedy must be that applied in the cases of *Buckley* v. *Edwards*, [1892] A.C. 387, 61 L.J. (P.C.) 64, and *McCawley* v. *The King*, [1920] A.C. 691, 89 L.J. (P.C.) 130, instead of the adoption of the opinion of this Court as mere law officers of the Crown as intimated in the case cited above, which surely cannot be held especially if divided as entitled to override the opinions of the law officers of the Crown who presumably must have held in line with what I have concluded was the correct course.

For the foregoing reasons I would answer the first question in the affirmative. Hence the second needs no answer. I would also answer the third question in the affirmative, and the fourth I would answer by saying that his being *ex officio* a Judge of the Appellate Division of the said Court only qualifies him to act in the place or stead of some member of the Court not being able to take the place to which he or his

successor may have been assigned.

The fifth question I would answer in the negative and that he holds only the office provided by his said Letters Patent of September 15, 1921.

DUFF, J.:—The fundamental question raised by the present reference is this: Had the amendments of 1919 and 1920 the effect of abolishing the office of Chief Justice of the Supreme Court of the Supreme Court of Alberta an office created by the Supreme Court Act of 1907? If the office still exists then the Hon. Mr. Harvey is still the incumbent of it and he is also the President of the Appellate Division because the intention of the statutes mentioned is indubitably that the two offices shall be held by one and the same person.

The statutes of 1920 by their terms were to come into force on proclamation and they were passed as amendments of the statute of 1919 which was also to come into force on proclamation. The proclamation by which they became operative is dated August 11, 1921. I shall speak of these statutes by reference to their respective dates.

Now the statutes of 1913, ch. 9, 1st sess., and 1919 (as originally framed), although they made some changes in relation to the functioning of the Supreme Court, left quite unaffected most important matters of substance. 1st, the Supreme Court itself was not abolished—the legislation did not create a new Supreme Court bearing the old name; secs. 2 & 3 of the statute of 1919 which was left untouched by the Act of 1920 demonstrate this. 2nd, in the division of the Court into two branches effected by these Acts (of 1913 and 1919) the legislation does not appear to have proceeded by the way of the creation of new judicial offices save in respect of two matters which are not relevant to the present discussion—the provision made for a Chief Justice of the Trial Division and an additional Judge of the Supreme Court.

An examination of the pertinent section seems to give this result. Section 30 of the Act of 1913 which first authorised the designation "Appellate Division" provides simply that such shall be the designation by which the "Court *en banc*" shall be known; and by sub-sec. 3 of that section it is declared in terms that the phrases "Court en banc" and "Appellate Division" shall have the same meaning in that very statute of 1913 as well as elsewhere. By the Act of 1919 an important provision is introduced touching the selection of Judges for duty in the "Appellate Division" and the weight and significance of this circumstance must of course be considered; but the

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phraseology of secs. 2, 3, 5, 10 and 28 shews that the Legislature in using the designation "Appellate Division" was still applying it to the Supreme Court of Alberta sitting *en banc*.

By sec. 5, for example, it is enacted that "the Court" that is to say, the existing Supreme Court of Alberta, which when sitting *en banc* is, by force of the Act of 1913, known as the "Appellate Division," "shall continue to consist of two branches or divisions." In sec. 6 the form of words used is "The Appellate Division shall continue to be presided over by the Chief Justice of Alberta," a turn of phrase implying an intention to preserve the identity of the Appellate Division. Section 10 provides that all the Judges of the Supreme Court shall *ex officio* be members, with equal jurisdiction, power and authority, of both divisions; and finally, by sec. 28 it is declared again that the terms "Court *en banc*" and "Appellate Division" wherever "used in any Act or Ordinance . . . shall be deemed to have the same meaning." These features of the statute afford good reasons for thinking that the Legislature was not in 1913 or in 1919 erecting a new Court under the existing style of the "Appellate Division;" and that in providing for the assignment of Judges of the Supreme Court to duty in that division the statute does not contemplate the establishment of new judicial offices.

As inconsistent with this view of the statute it is pointed out that the four Judges who, under sec. 6 of the Act of 1919, together with the Chief Justice normally constitute the Appellate Division, are to be "assigned to it by His Excellency the Governor General in Council" and this provision is relied upon as giving support to the contention that the office of Judge of that Court is a new judicial office created by this statute. I may say at once, that—after examining the indicia afforded by this legislation for determining the true character of this section (I am speaking now of the section as passed in 1919) whether, that is to say, in the context in which it is found it ought to be read as prescribing the duties or providing machinery for prescribing the duties appertaining to judicial offices already existing (or created by enactment *aliunde*) or on the other hand as establishing a new judicial tribunal or a new judicial office—I think on the whole those indicia point rather directly to the conclusion that the office of the section is limited to making provision for the administration and exercise of the judicial duties and powers of the existing Court, and the Judges of that Court. One consideration weighs very powerfully with me; and it is that arising from the circumstance that while the

Judges other than the Chief Justice constituting the Appellate Division are to be named by the Governor in Council, these Judges are to be chosen—that I think is the meaning of the section—from among persons who are already Judges of the Supreme Court of Alberta. If the office of Judge of that Court were a new judicial office the appointment by force of sec. 100 of the B.N.A. Act would rest with the Governor in Council and I am unaware of any authority possessed by a Province to regulate the exercise of the Dominion authority in relation to judicial appointments by prescribing the class of persons from whom the appointees to judicial office shall be selected. The provision moreover for assignment by the Governor in Council would be pointless unless it be, as apparently it is, intended as an invitation by the Legislature to the Governor in Council to act on its behalf in performing that duty.

The Act of 1919, that is to say, the Act which received the Royal assent in the year 1919 as ch. 3 was by its terms, as already mentioned, not to come into force until after proclamation; and before proclamation two statutes were passed (in the year 1920) amending secs. 2 & 6 of this Act of 1919. The effect of this amendment of sec. 6 was that for the section so numbered as it stood in the statute as originally passed in the year 1919, the following was substituted:—[See judgment of Davies, C.J. *ante* p. 3].

The language of this section undoubtedly lends some colour to the contention that the Legislature had in view the creation of a new office of Chief Justice of the Appellate Division, the incumbent of which should be *ex officio* the Chief Justice of the Supreme Court in substitution for the old office of Chief Justice of the Supreme Court, the incumbent of which under the statute of 1919 as originally passed would have been the *ex officio* President of the Appellate Division. But it must be remembered that secs. 3, 5, 9, 10 and 28 of the Act as amended in 1920 stand as they originally stood in the Act of 1919 as conditionally passed in that year; that the Appellate Division is still, after the amendments of 1920, the Supreme Court of Alberta sitting *en banc;* that it is the Chief Justice of the Supreme Court who, by sec. 9 takes rank and precedence over all the Judges of any Court in the Province and not the Chief Justice of the Appellate Division; and that in the Act even as it now stands there is no office formally designated in terms as that of the Chief Justice of the Appellate Division. And although sec. 6 in the form it assumes under the amendments of 1920 is capable of a construction according to which

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the then existing office of Chief Justice of the Supreme Court would cease to exist, that is not the necessary meaning of the words used. And the other construction, that which regards the whole section in so far forth as pertains to the office of Chief Justice (as well as in other respects) as an enactment designed to make provision for the distribution and assignment of judicial duties among existing judicial offices elsewhere provided for seems to accord better with the general tenour of the statute of which it is a part.

The answers which I think should be returned to the questions submitted are these:—To No. 1.—No. To No. 2.—Wholly inoperative. To No. 3.—No. To No. 4.—Wholly inoperative. To No. 5.—He is Chief Justice of the Supreme Court of Alberta and as such is entitled by law to perform and exercise the jurisdiction, office and functions of Chief Justice and President of the Appellate Division.

ANGLIN, J.:—Seldom has the embarrassment which may be occasioned by requiring this Court to answer any question that the executive department of the Government may see fit to propound for its consideration and opinion been so forcibly brought to our attention as in the reference now before us. The Court is called upon to express its opinion as to the status of two gentlemen on behalf of each of whom it is asserted that he holds the highest judicial office of the Province of Alberta under Letters Patent from His Excellency, the Governor-General. Unfortunately only one of them has been represented before us by counsel, the other although duly notified, having as was his right declined to appear.

Nor is our embarrassment materially lessened because our "answers are only advisory and will have no more effect than the opinions of the law officers." But the right of the Governor in Council to refer questions to this Court touching any matter in regard to which he may see fit to do so, and our duty to consider and answer questions so referred (Supreme Court Act R.S.C. 1906, ch. 139, sec. 60) are conclusively settled. *Att'y Gen'l for Ont.* v. *Att'y Gen'l for Canada*, 3 D.L.R. 509. A suggestion made by their Lordships of the Judicial Committee that the Court may point out in its answer considerations which render difficult the discharge of the duty imposed upon it or that the answer itself is of little value, or may make representations to the Governor in Council looking to the withdrawal of the reference in whole or in part (p. 517) would seem, with respect, to have little practical value.

The facts out of which the questions referred in the present

case have arisen are fully stated in the opinion of my brother Mignault. I shall not repeat them. The answer to those questions I think depend upon whether the Alberta Judicature Act of 1919, ch. 3, as amended in 1920 ch. 3 and ch. 4, should be regarded as having created a new Supreme Court for that Province, or, at least, an entire new set of judicial officers, or should be deemed to have continued the existing Supreme Court and judicial officers, merely adding to the number of the latter and creating an additional Chief Justiceship. The constitutional validity of the statute has not been challenged. The question argued at Bar was one of construction,—what was the intention of the Legislature as expressed in the several enactments?

In view of the tenure of judicial office (sec. 99 of the B.N.A. Act) I should be disposed to hold that the Alberta Judicature Act of 1919 as amended, had either the effect of abolishing the existing Supreme Court of Alberta and creating in its stead a new Court under the same name, or of doing away with the existing judicial offices and substituting therefor new Judgeships of the same class, only if it does not reasonably admit of another construction.

Far from that being the case, however, it seems to me that another construction is not merely quite possible but is much more probably that intended by the Legislature.

I regard it as not arguable that, as enacted in 1919, the Alberta Judicature Act did aught else than continue the existing Supreme Court with its existing judicial officers, by sec. 6 assigning to one of them—the Chief Justice of Alberta—by his title of office, the duty of presiding over the Appellate Division of the Supreme Court and entrusting to the Governor General in Council the selection of 4 of the puisne Judges who should with the Chief Justice of Alberta ordinarily constitute the membership of that Division of the Court. As amended in 1920 this may not so clearly be the purpose and effect of sec. 6. Indeed Mr. Newcombe strongly pressed that these amendments predicate an intention to create 5 appellate judgeships as new positions to be filled by the Governor-General in Council. It may be a little difficult to assign another purpose to the amendments. But no mere implication can suffice to overcome the explicit term of sec. 3 that "there shall continue to be . . . a superior court of civil and criminal jurisdiction known as 'The Supreme Court of Alberta,'" and of sec. 5 that "the Court (i.e. the existing Court continued by sec. 3) shall continue to consist of two branches or divisions which shall be designat-

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ed respectively: 'The Appellate Division of the Supreme Court of Alberta' and 'The Trial Division of the Supreme Court of Alberta.' ''

Section 6 as amended must be read and construed with secs. 3 and 5, which remain as they were enacted in 1919. These provisions, in my opinion, make it quite impossible to contend successfully either that a new Supreme Court was established or that new divisions of that Court were constituted. The existing Court and the existing divisions are expressly ''continued'' —one of them retaining the name given to it at its birth in 1914, ''The Appellate Division'' (4 Geo. V. ch. 9, sec. 38; 4 Geo. V. 2nd sess. ch. 2, sec. 11; Alberta Gazette vol. X, pp. 164-5.), and the other, likewise born in 1914 and existing since that date, as is evidenced by sec. 5 of the Act of 1919, being by that section christened for the first time ''The Trial Division.''

It is, I think, equally impossible to maintain that all the existing judicial positions in the Supreme Court were abolished and eleven new Supreme Court judgeships created. If that had been the case, all the Judges theretofore in office might have been superseded and a judiciary consisting of an entirely new personnel appointed by the Governor-General in Council. Is it conceivable that the Legislature intended to create a situation admitting of such a possibility? Again, although the Judges theretofore in office should be re-appointed, the former Chief Justice of Alberta might have been appointed a puisne Judge and two of his former puisnes, or it may be the two additional Judges provided for by the Act of 1919, appointed to the two Chief Justiceships. If a new Court was constituted, or wholly new judicial positions were created by the legislation of 1919, as amended in 1920, it was undoubtedly the right of Governor-General in Council to select whom he would (subject, it may be, to prescribed requirements of qualification) to fill those positions. It was not competent for the Provincial Legislature to place any restriction upon the freedom of choice.

I am of the opinion that the existing Supreme Court, the existing two divisions of that Court and the existing judicial positions were continued by the Alberta Judicature Act, 1919-1920, and that the only new offices thereby created to which the Governor in Council was authorised to make appointments were the Chief Justiceship of the Trial Division and an additional puisne judgeship of the Supreme Court. Placing on sec. 6, as amended, a construction in harmony with secs. 3 and 5 and within the competence of a Provincial Legislature, I read it as assigning to the Chief Justice of Alberta for the time be-

ing the duty of presiding over the Appellate Division, and to 4 of the 9 puisne judges provided for, to be . . . . nominated by the Governor-General in Council, the duty of sitting as ordinary members of that Division. To the Chief Justiceship of the Trial Division and to one of the 9 puisne judgeships, as new positions the appointment lay exclusively with the Governor-General in Council, subject, however, to this restriction, that the same person could not fill the two Chief Justiceships for which the Judicature Act provides.

It follows that the position of Chief Justice of the Supreme Court of Alberta, with the style and title of the Chief Justice of Alberta, to which the Hon. Horace Harvey was appointed by Letters Patent of October 12, 1910, still exists and continues to be filled by that gentleman, he having neither resigned nor been removed from office by competent authority. While holding that office he was not eligible for appointment as Chief Justice of the Trial Division.

I would for these reasons respectively return the following answers to the questions referred by His Excellency in Council: (1) No; (2) Wholly; (3) No; (4) Wholly; (5) (a) Yes; (b) Chief Justice of the Supreme Court of Alberta with the style and title of the Chief Justice of Alberta.

BRODEUR, J.:—Five questions have been submitted to us by the Governor in Council under the provisions of sec. 60 of the Supreme Court Act.

We are called upon to give our opinion on the effect of the Letters Patent of October 12, 1910, nominating the Honourable Horace Harvey Chief Justice of the Supreme Court of Alberta and on the effect of the Letters Patent of September 15, 1921 nominating the same Mr. Justice Harvey Chief Justice of the Trial Division of the Supreme Court of Alberta and the Hon. D. L. Scott Chief Justice and President of the Appellate Division of the same Supreme Court.

The effect and validity of these different Letters Patent depends very largely upon the construction of the statutes concerning the Supreme Court of Alberta and upon the respective powers of the federal and provincial authorities concerning the constitution, maintenance and organisation of Provincial Courts and the appointment of Judges of these Courts.

The Legislature of Alberta created in 1907 (ch. 3) "The Supreme Court of Alberta" which consisted of a Chief Justice and of a certain number of puisne Judges, and determined that the Chief Justice (sec. 6) who should be designated as Chief Justice of Alberta, should have rank of precedence over all other

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Judges of any Court in the Province and should preside when the Court sitting *en banc* (sec. 31) would hear appeals from any decision of any Judge of the Supreme Court.

In 1910, Mr. Justice Harvey was appointed by the Federal Government to fill the position of Chief Justice of the Supreme Court of Alberta.

In 1913, the Legislature of the Province enacted that the Court *en banc* should be known as the Appellate Division of the Supreme Court. In 1919, a Judicature Act was passed declaring (sec. 3) that "there *shall continue* to be in and for the province a superior court of civil and criminal jurisdiction known as the Supreme Court of Alberta," and that the Court *should* continue to consist of two branches or divisions which shall be designated as the Appellate Division and the Trial Division. (sec. 5).

It was declared in sec. 6 of that Judicature Act that the Appellate Division should *continue* to be presided over by the Chief Justice of the Court and by 4 other Judges who should be assigned to it by the Governor-General in Council.

This sec. 6 was amended twice in 1920 and reads now as follows:—[See judgment of Davies, C.J., *ante* p. 3].

We have no information before us as to the reasons why sec. 6 was amended in 1920, but I presume by what has been contended by Mr. Newcombe at the argument that the Federal Government found in this original sec. 6 an encroachment upon its right to appoint the Judges of the Provincial Courts.

I fail to see, however, how sec. 6 as originally enacted could be considered as *ultra vires*.

By the B.N.A. Act (sec. 92, sub-sec. 14) the constitution and organisation of the Courts are within the domain of the Provincial Legislature. The Legislature of Alberta had then the power to create a Supreme Court and to determine that it could be presided over by a Chief Justice whose powers and rank in its branches and divisions could be fixed by the Provincial authorities.

On the other hand, it was for the federal authorities to determine whom they would select for the position of Chief Justice of the Supreme Court. In the exercise of its power, the Federal Government had in 1910 appointed Mr. Justice Harvey as the Chief of this Court and according to the B.N.A. Act Mr. Justice Harvey would hold such office and could not be removed therefrom except on address of the Senate and House of Commons or unless the Provincial Legislature would abolish the Court or the office.

It is no wonder then that in 1919, when the Provincial Legislature intended to call with specific names the Trial and Appellate Divisions which practically existed before, it declared that the Appellate Division which was naturally more important than the other, should continue to have as its presiding officer the Chief Justice of the Supreme Court.

The right to regulate and provide for the whole machinery for the proper administration of civil justice in its widest sense is with the Provincial Legislatures subject to the appointing power of the Federal Government and subject to the reserved power for the Federal Parliament to create certain additional Courts (sec. 101). The powers and authority of these Judges is to be determined by the Province; and once a person was appointed Chief Justice of a Court he could not be removed except on the recommendation of the Senate and the House of Commons. On the other hand, this Chief Justice could see his powers and authority curtailed by the Provincial Legislature and even the Court of which he is a member, or his title or both could be abolished by the Province. At the same time, the Province could extend his powers and authority in connection with the administration the same as the Provincial Legislature could impose additional authority or powers on the other Judges.

The Legislature of Alberta, in my opinion, had the power to state that the Chief Justice of the Supreme Court appointed by the federal authorities could continue to preside over the more important of the divisions of this Court.

Section 6 of the Act of 1919 originally drawn was then *intra vires*.

But the Legislature found it advisable to amend sec. 6 and to declare that the Appellate Division would be presided over "by a Chief Justice who shall be Chief Justice of the Court and who shall be styled the Chief Justice of Alberta."

It is contended that this amendment gave the authority to the Governor in Council to select any person to act as Chief Justice of the Appellate Division.

This contention has undoubtedly a great deal of force. The Legislature has shewn its disposition not to interfere with the power of appointment. At the same time we have to conciliate this amendment with the other sections of the Act and particularly with sections 3 and 7.

Section 3 states that the Supreme Court has not been abolished and continues to subsist. The main purpose of the Act is to provide for two specific divisions, viz. the Appellate Division and the Trial Division of the Supreme Court and that there will

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be at the head of each division a Chief Justice. It gives, however, to the one who is to preside over the Appellate Division the additional title of Chief Justice of Alberta and gives him by sec. 7 rank and precedence over all other Judges, even the Chief Justice of the Trial Division.

The Supreme Court of Alberta being continued, the Governor in Council having in the discharge of its power of appointment nominated in 1910 the Hon. Mr. Harvey as Chief Justice of this Court and Chief Justice of Alberta, it seems to me that the new legislation concerning the Chief Justice could not be construed as providing for a new office. It is the old office of Chief Justice of Alberta which is continued and maintained, though the Legislature has assigned to this Chief Justice the duty to preside over the Appellate Division.

The Legislature never intended to abolish the old office of the Chief Justice. The statute could not be construed as maintaining the old position of Chief Justice and as creating a similar position. The idea of having two Chief Justices of Alberta with the same power and authority has certainly not entered into the mind and intention of the Legislature. The old position stands and has not been superseded by the one mentioned in sec. 6 of the Act of 1919.

I therefore come to the conclusion that Mr. Justice Harvey being already the Chief Justice of Alberta, should have been imposed, under the new Act, the duty of presiding over the Appellate Division or should have been confirmed in his right to preside over this Appellate Division.

I would answer the questions as follows:—

To the first question: No. To the second question: The Letters Patent of September 15, 1921, nominating Hon. Mr. Scott Chief Justice of Alberta are wholly ineffective. To the third question: No. To the fourth question: The Letters Patent nominating Mr. Justice Harvey Chief Justice of the Trial Division are wholly ineffective. To the fifth question:—The Honourable Horace Harvey holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta and is by law entitled to exercise and perform the jurisdiction office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

MIGNAULT, J.:—The questions submitted by this reference are very important and, if I may say so, somewhat unusual. They call for an expression of opinion as to the status and authority of two eminent members of the judiciary in the Province

of Alberta. They also touch on some important constitutional problems which have seldom been discussed before the Courts of this country. It seems impossible to satisfactorily deal with them unless they are prefaced by a very brief statement of what I may perhaps call the history of the case.

The Provinces of Alberta and Saskatchewan were created in 1905 out of what was known as the North West Territories. These territories had a court of superior jurisdiction called the Supreme Court of the North West Territories, which administered justice either by sitting *en banc* or by trial Judges, and which the Legislature of each Province was empowered to abolish for all purposes affecting or extending to the Province.

The Legislature of Alberta, in 1907, passed an Act, ch. 3, creating the Supreme Court of Alberta, consisting of a Chief Justice, styled the Chief Justice of Alberta, and 4 puisne Judges. When sitting as an Appellate Court this Court was called the Supreme Court *en banc*, and its quorum was three Judges and it was presided over by the Chief Justice, or in his absence by the senior Judge. The Chief Justice had rank and precedence over all Judges and the latter between themselves ranked according to seniority of appointment.

While this statute was in force, the Hon. Horace Harvey then a puisne Judge of the Supreme Court of Alberta, was appointed Chief Justice of the Supreme Court of Alberta with the style or title of the Chief Justice of Alberta, his commission bearing date October 12, 1910.

In 1913, ch. 9 the Supreme Court Act above referred to was amended by changing the name of the Court *en banc* to that of "The Appellate Division of the Supreme Court," and it was enacted that during the month of December, or at some other convenient time, the Judges of the Supreme Court should select 4 of their number to constitute the Appellate Division for the next ensuing calendar year, but that every other Judge of the said Court should be *ex officio* a member of the Appellate Division.

These two statutes were repealed by the Judicature Act 1919 ch. 3, which was to come in force upon a day to be named by proclamation of the Lieutenant-Governor in Council. This proclamation was issued on August 11, 1921, and fixed September 15, 1921, for the coming in force of the Act.

By the provisions of this statute it is declared that there shall continue to be in and for the Province a Superior Court of Civil and Criminal jurisdiction known as "The Supreme Court of Alberta" (sec. 3) and that the Court shall continue

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to consist of two branches or divisions which shall be designated respectively "The Appellate Division of the Supreme Court of Alberta" and "The Trial Division of the Supreme Court of Alberta" (sec. 5).

As enacted in 1919, sec. 6 was as follows:—[See judgment of Davies, C.J., *ante* p. 3].

In 1920 (before the Act was proclaimed and had come in force), sec. 6 was twice amended, by ch. 3 of the Statutes of that year, sec. 2, and by ch. 4 of the same statutes, sec. 43. And thus amended—and the changes can easily be noticed by careful reading—sec. 6 is in the following terms:—[See judgment of Davies, C.J., *ante* p. 3].

By sec. 7 of the Judicature Act 1919, the Trial Division consists of a Chief Justice, styled the Chief Justice of the Trial Division of the Supreme Court of Alberta, and 5 other Judges, called Justices of the Supreme Court of Alberta.

The Chief Justice of the Court has rank and precedence over all other Judges of any Court in the Province; the Chief Justice of the Trial Division has rank and precedence next after the Chief Justice of the Court; the other Judges of the Court rank among themselves according to seniority of appointment (sec. 9). Every Judge is *ex officio* a Judge of the division of which he is not a member (sec. 10).

Referring very briefly to these enactments, it will be noticed that although the term "Supreme Court *en banc*" was used from the origin of the Court, and the term "Appellate Division" from 1913, the expression "Trial Division" was introduced only by the Judicature Act of 1919; Section 6 of the latter statute however appears to have recognised by the words "there shall continue to be" that there had been hitherto two divisions of the Supreme Court. The second, or then unnamed Trial Division, was composed of the Judges who did not sit in the Appellate Division, although no doubt any of the latter could hold trials if thought advisable.

The Judicature Act, 1919, was amended in 1920, came in force, I have said, on September 15, 1921. It increased the number of Judges and added a Chief Justice for the Trial Division. For the salaries of these Judges, Parliament made a provision by 1920 ch. 56 sec. 14 A which came in force by proclamation of the Governor in Council also on September 15, 1921.

On the same day, September 15, 1921, the Governor-General, by commission under the Great Seal of Canada, appointed the Honourable David Lynch Scott described as "one of the judges

of the Supreme Court of Alberta, as heretofore established," to be "the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta, as constituted under the Judicature Act of Alberta, ch. 3, 1919, as amended, and to be styled the Chief Justice of Alberta and to be *ex officio* a judge of the Trial Division of the said Court."

Also, on the same day, the Governor-General, by Commission under the Great Seal of Canada appointed the Honourable Horace Harvey described as "Chief Justice of the Supreme Court of Alberta as heretofore established" to be "The Chief Justice of the Trial Division of the Supreme Court of Alberta and *ex officio* a judge of the Appellate Division of the said court."

The reference states that the following questions have arisen upon which the advice of this Court is desired by the Governor in Council:

1. Are the aforesaid Letters Patent of September 15, 1921 nominating the said David Lynch Scott effective to constitute and appoint him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the Judicature Act of Alberta, 1919, ch. 3, as amended, and to be styled the Chief Justice of Alberta, and to be *ex officio* a Judge of the Trial Division of the said Court?

2. If the last mentioned Letters Patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective?

3. Are the said Letters Patent of September 15, 1921, nominating the said Horace Harvey, effective to constitute and appoint him to be the Chief Justice of the Trial Division of the Supreme Court of Alberta and *ex officio* a Judge of the Appellate Division of the said Court?

4. If the last mentioned Letters Patent be not effective for all purposes therein expressed, in what particular or particulars, or to what extent are they ineffective?

5. Is the said Horace Harvey by virtue of the aforesaid Letters Patent of October 12, 1910, constituted and appointed to be, or does he by law hold the said office of, or is he by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the Judicature Act of Alberta, 1919, ch. 3, as amended, and what judicial office or offices does he hold other than as provided by his said Letters Patent of September 15, 1921?

Notice of the hearing under this Reference was given by or-

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der of the Court to the Hon. Horace Harvey and to the Hon. David Lynch Scott, as well as to the Attorney-General of Alberta. The two latter were not present or represented at the hearing. The Hon. Horace Harvey appeared by Mr. Eugene Lafleur, K.C. and the Attorney-General of Canada by Mr. E. L. Newcombe, K.C. Deputy Minister of Justice.

The Administration of Justice in the Province, including the constitution, maintenance and organisation of the provincial Courts, both of the civil and criminal jurisdiction, is by the B.N.A. Act, (sec. 92, para. 14), assigned to the Provinces. The appointment of Judges of superior, district and county Courts belongs to the Governor-General, and their salaries are provided for by the Parliament of Canada (same Act sec. 96, 100). Judges hold office during behaviour but are removable only by the Governor-General on address of the Senate and House of Commons (B.N.A. Act sec. 99).

Mr. Newcombe's contention was that the Alberta Judicature Act, 1919, created, if not a new Court, at least new judicial offices which could be filled only by appointments made by the Governor-General; that anything in the said Act purporting to vest these offices in any existing Chief Justice or Judge would be *ultra vires* of the Legislature of Alberta, and that consequently the Commissions issued on September 15, 1921, were effective for the purposes therein stated.

Mr. Lafleur argued that no new Court and no new judicial office, with the exception of the Chief Justiceship of the Trial Division and the additional judgeships, had been created by the Judicature Act, 1919; that the Hon. Horace Harvey, as Chief Justice of the Supreme Court of Alberta and Chief Justice of Alberta, could not be removed nor his offices taken away except by the method specified in the B.N.A. Act, sec. 99; that, as the Hon. Mr. Harvey still filled the said offices, no other person could be thereunto appointed, and consequently the Commission of September 15, were inefficient to appoint the Hon. Mr. Scott to be Chief Justice and President of the Appellate Division of the Supreme Court of Alberta and Chief Justice of Alberta, and the Hon. Mr. Harvey to be Chief Justice of the Trial Division of the Supreme Court of Alberta, for obviously the two offices could not be filled by the same person.

Assuming, but not deciding that the Legislature could destroy an existing judicial office, so as to deprive thereof the person duly appointed thereto, it would require a very clear enactment to make me come to the conclusion that the judicial office had been destroyed and that the titulary thereof was no

longer entitled to exercise the powers, authority and jurisdiction thereunto appertaining. Still less would I be disposed to find in the reorganisation and rearrangement by the Legislature of an existing Court with provisions for the appointment by the proper authority of the Chief Justice and Judges of the Court, where the Court had already, as it naturally would have had, a Chief Justice and Judges,—the creation of new judicial offices or the destruction of the existing ones. It is only when the Legislature by legislation such as that under consideration, increases the number of Judges of an existing Court, or when, in dividing the Court into different branches, it provides for additional Chief Justices that I would readily conclude that a new judicial office has been established. It follows that if the existing judicial offices are filled and have been destroyed, no new appointments can be made thereto.

Bearing these considerations well in mind, I will take up the proper construction of the Alberta Judicature Act, 1919, and I have no difficulty whatever in coming to the conclusion that the only new judicial offices created by this Act were the additional judgeships required to complete the number of Judges provided for and the Chief Justiceship of the Trial Division.

In other respects, in my opinion, the existing Supreme Court of Alberta continued. This is shewn by sec. 3 of the Act. Section 5 assumes that there were already two existing branches or divisions of the Court and it gives a name to the Trial Division, section 6, as first enacted in 1919, shews that that was clearly the intention of the Legislature, for the language was "the Appellate Division shall continue to be presided over by the Chief Justice of the Court, who shall continue to be styled the Chief Justice of Alberta."

But it is contended that the 1920 amendments shew that this intention of the Legislature was not persisted in. No doubt the present language of sec. 6 does not as emphatically express the intention not to create a new office of Chief Justice of the Supreme Court of Alberta, but even were I of opinion that the new language of the section is equivocal or consistent with either construction, I would not, for the reasons above stated, give the preference to a construction that would deprive the existing Chief Justice of the Supreme Court of his high office, and possibly leave the Governor in Council free not to reappoint him to any judicial office. Furthermore, the language of sections 3 and 5 was not changed in 1920, and I find in these sections the clearly expressed intention to continue the existing

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Court with its existing Chief Justice and Judges, the number of which, however, was increased.

It appears unnecessary to express any opinion upon the right of the Legislature to make these enactments. I assume, for the purpose of answering the questions submitted, that it acted within its powers.

Answering now these questions, I will reply to the first and third questions in the negative. I do not think, in view of this answer, that questions 2 and 4 call for a reply; it is clear that the Letters Patent in question are wholly ineffective for the purposes therein expressed. I would answer question 5 by saying that in my opinion the said Horace Harvey holds the office conferred on him by his Commission of 1910, which office is continued under the Judicature Act of Alberta, 1919, and entitles him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

The Court answers the questions submitted as follows:—

To Q. 1: No. Q. 2: Wholly. Q. 3: No. Q. 4: Wholly. Q. 5: The Hon. Horace Harvey holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta and is by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta. The Chief Justice and Idington, J. dissenting, answer questions 1 and 3 in the affirmative that the Honourable David Lynch Scott is the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta and that the Honourable Horace Harvey is the Chief Justice of the Trial Division of such Supreme Court. The Chief Justice answers the fifth question in the negative and holds therefore that no answer is required to questions 2 and 4. Idington, J. holds no answer to 2 necessary, but answers the fourth question by saying that the Honourable Horace Harvey being *ex officio* a Judge of the Appellate Division of the Court of Appeal only qualifies him to act in place or stead of some member of the Court not being able to take the place to which he or his successor may have been assigned. To the 5th question Idington, J. answers in the negative and that the Honourable Horace Harvey only holds the office provided by his Patent of September, 1921.

TURNER v. CANADIAN PACIFIC R. Co.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman, Clarke and Simmons, JJ.A. May 17, 1922.

CARRIERS (§IIIF—430)—CONTRACT FOR TRANSPORTATION OF HORSES—LIMITATION OF LIABILITY—DEATH OF ANIMALS FROM POISONING—NO EVIDENCE AS TO HOW POISON ADMINISTERED—NOT COVERED BY CONTRACT—LIABILITY.

Where by a contract for the transportation of stock, the carrier's liability for injuries is limited to such as may arise from a collision of the train or throwing of the cars from the track during transportation, the obligation undertaken by the shipper requiring that he should feed, water, and while in the cars care for the stock at his own expense and risk, the carrier cannot be held liable for the death of the animals by poisoning during transportation, there being no evidence to shew how such poisoning occurred.

APPEAL by plaintiff from the trial judgment, dismissing an action for damages for the death of certain animals while being carried over the defendant company's railroad. Affirmed.

A. Macleod Sinclair, K.C., for appellant.

D. W. Clapperton, for respondent.

STUART, J.A. concurs with SIMMONS, J.A.

BECK, J.A.:—I agree with Simmons, J.A. that the appeal should be dismissed with costs on the ground that the company as carriers were by the terms of the contract of carriage not liable for injuries to the animals which, on the evidence it must be inferred, happened in the course of feeding, watering and caring for the animals while *en route*, the expense and risk of and from which, by the contract, falls upon the owner.

It is not necessary to pass upon the ground upon which the trial Judge based his decision but I wish to say that I think that what is "delivery" must depend upon the facts and circumstances of the particular case and that I am inclined to the opinion that in this case there was no delivery until within 24 hours of the notice by the owner to the company.

HYNDMAN and CLARKE, JJ.A., concur with SIMMONS, J.A.

SIMMONS, J.A.:—The plaintiff's claim against the defendants arises out of alleged negligence on the part of the defendant while acting in the capacity of carrier of plaintiff's horses from Coutts, Alberta, to Carstairs, Alberta. The shipment consisted of two carloads, consisting of 43 horses and two cattle.

They were loaded at 4 a.m. on August 24, at Coutts and left Coutts about 9 a.m. the same morning.

The shipment came through via. Lethbridge and Macleod and arrived at Calgary Stock Yards and were unloaded about 6 p.m. on August 25th.

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The animals were fed and watered by the employees of the Stock Yards Company, at Calgary.

At 4 on the following morning the plaintiff visited the stock yards where the horses were. The horses were then about to be reloaded in 2 cars, which were not the cars in which the horses had travelled to Calgary. The plaintiff complained that the cars were dirty and had not been cleaned and bedded. Cattle had been shipped to Calgary in these cars. However, notwithstanding the plaintiff's protest the horses were loaded in these cars and during the forenoon the cars proceeded to Carstairs. The plaintiff accompanied the stock cars to Calgary, but travelled on a passenger from Calgary to Carstairs. The passenger train passed the freight train at Airdrie, a station about half way between Calgary and Carstairs.

The plaintiff got off the passenger train at Airdrie and ran alongside the freight train and looked into the cars and the horses were all standing up and looked all right.

The plaintiff was at Carstairs when the stock cars arrived. He says he proceeded to unload the horses. Four horses were dead and one died while it was being unloaded. All the horses in that car (21) were very ill and 16 out of 21 had died within 24 hours from the time of unloading. It was subsequently established that the horses died of arsenic poisen. The car in which these horses were transported from Calgary to Carstairs was taken back to Calgary without being cleaned or interfered with and an examination of it made by a chemist who found arsenic in the horse droppings found on the floor of the car, but no trace of the poisen was found where food would usually be placed in the car for the horses. Evidence was given by a cattle shipper that he shipped cattle to Calgary in the car immediately before it was used for carrying the horses, and the cattle did not shew any symptoms of poisoning. The evidence is to the effect that the horses and cattle were given the same quality of food and water as other animals in the stock yards and none of the other animals shewed any symptoms of poisoning.

The source of the poison and the manner in which the horses obtained it is unexplained. It is a mere matter of speculation as to whether the poison was in the food or water supplied to the animals or was accessible to the animals in some other form while they were in the car or was obtained by the animals when they were in the stock yards at Calgary. The plaintiffs were required under the contract of shipment to give notice of any claim for damages within 24 hours of delivery and the Chief

Justice dismissed the action on the ground that notice was not given within the required time.

I do not think the plaintiffs can recover in any case upon the merits.

The particulars of negligence alleged by the plaintiff were:— 1. Leaving said horses and cattle in the train for more than 28 hours. 2. Putting the horses and cattle in unclean cars at Calgary. 3. Negligence in not feeding, watering and caring for the horses while en route from Calgary to Carstairs.

There is no evidence connecting the cause of injury with any alleged negligence. The nearest suggestion to it is the claim of the plaintiff that "the said cars were unclean in that they still had manure and unclean hay in them and had not been swept out or white-washed or cleaned in any manner."

The only evidence of the existence of poison in the car when examined by Mr. Field, city chemist, was in the horse droppings at one end of the car.

The contract of shipment contained these provisions:—

1. "The company shall not be liable for any loss or damage in respect of the said live stock by reason of delay of trains or of escape or loss of any stock from cars, or injuries to animals arising from bruising or wounding themselves or each other, or from crowding in the cars, or by reason of the manner of loading or unloading of the said stock *or of any other injuries happening* to the said stock while in any railway car, except such as may arise from a collision of the train or the throwing of the cars from the track during transportation.

2. Said stock shall be loaded, unloaded, fed, watered and while in the cars cared for in all respect by the shipper or owner, and at his expense and risk.

3. When destination of any shipment of live stock is more than one hundred miles from the point of shipment, the shipper or owner, or some person on his behalf (not an employee of the company) must accompany and care for the shipment throughout the journey, and unless the shipment is so accompanied the company shall be relieved from all obligation to carry the same. If the company carry such live stock without it being so accompanied it shall not be liable for any loss or damage due to the live stock not being so accompanied and cared for."

The obligation undertaken by the plaintiff required that he should feed, water and while in the cars care for them at his own expense and risk. He did not accompany the horses from Calgary to Carstairs. The plaintiff has failed to establish any

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connection between the alleged acts of negligence of the defendant and the damage to the cattle. The animals must have obtained the poison from the water or something in solid form taken into their stomachs. Since, as I have observed the cause of the damage is purely a matter of speculation, the provisions of the contract above cited are a complete answer to the plaintiff's claim that the damages arose from the negligence of the carrier.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

CARTER v. GOLDSTEIN.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. December 9, 1921.

WILLS (§IIIA—75)—CONSTRUCTION—SUM SET ASIDE—INTEREST PAID TO WIDOW—TO "REVERT" UNDER CERTAIN CONDITIONS—MEANING OF "REVERT"——SUM FALLING BACK INTO ESTATE—INCLUSION IN RESIDUARY DEVISE TO WIDOW.

A clause in a testator's will read as follows: "In addition to the sum given to my said wife I direct and desire that my executors whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her life time so long as she remains a widow, but in the event of marrying then in such case the said interest or dividends shall cease and the said sum revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife," and by a subsequent clause the testator directed "Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years, but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue the said residue shall go to my wife to whom I give the same absolutely." The wife survived the testator, and died without remarrying and without issue. The Court held that the word "revert" in the first clause meant "fall back into" his estate, and therefore was included in the corpus, which under the conditions was devised to the wife, and that the heirs-at-law of the testator were not entitled to this sum.

APPEAL by heirs at law of a testator from the Court of Appeal (Quebec) dismissing an action claiming the sum of $25,000 under the will. Affirmed.

Lafleur, K.C., and *Labelle* for appellant.

Geoffrion, K.C., and *Beullac* ,K.C., for respondent.

DAVIES, C.J.:—The question arising on this appeal was whether a sum of $25,000 passed to the widow of the testator as part of the residue of his estate bequeathed to her, or devolved upon the heirs-at-law of the testator as on an intestacy.

I have little difficulty in reaching the conclusion that the $25,000 in question did pass to the widow of the testator.

The two clauses of the will in question upon the construction of which the dispute in question must be determined read as follows:—

"5. In addition to the sum given to my said wife, I direct and desire that my executors whom I also name as trustees, shall set apart a sum of twenty-five thousand dollars and invest the same in the securities provided by law, and pay the interest or dividends from the said sum as the same are payable to my said wife during her lifetime so long as she remains a widow, but in the event of marrying then in such case the said interest or dividends shall cease and the said sum revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife.

15. Should there be any issue of my marriage the residue of my estate shall be kept in trust for such issue until such issue shall attain the age of twenty-one years but the interest or revenue shall be employed in the education and support of such issue, but in default of such issue, the said residue shall go to my wife to whom I give the same absolutely."

In clause 5 the testator directed the $25,000 to be set apart and the interest or annual proceeds to be paid to his widow during her lifetime and widowhood, but that in the event of her marrying the interest or dividends should cease and the "said sum revert to" his estate in the same manner as it would revert to his estate upon his wife's death.

I construe the word "revert" to mean "fall back into" his estate. In that paragraph, however, he made no further disposition of the corpus of the $25,000 beyond saying that under the specified contingencies it should revert to his estate.

When, therefore, in the 15th clause he provides that in default of issue from his marriage the residue of his estate should go absolutely to his wife, that residue necessarily included the corpus or principal of the $25,000 which was previously undisposed of. When the possibility of issue from his marriage ceased, the absolute devise of the corpus of the $25,000 being part of the residue of his estate, would attach and become operative.

As the widow survived him and there was no issue of the marriage the bequest to her absolutely of the corpus of the $25,000 attached and became operative.

I would therefore dismiss the appeal with costs.

IDINGTON, J.:—The late C. B. Carter who married Emma

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Blunden on April 19, 1905, and made his last will and testament on June 28, 1905, died on August 9, 1906.

He had by a marriage contract on the day of his said marriage, but preceding same, bound and obliged "himself, his heirs and representatives to pay to the future wife within three months after his death, the sum of $10,000, with the right to secure the same during his lifetime and to make payments on account either by investments in the name of the future wife, by insurance on his life, by mortgage, or hypothec upon immoveable property or in any other way."

This transaction is of no consequence save as illustrating the provisions made in said will in respect thereof and also, I may be permitted to think, of the mentality of the testator whose said will we are now asked by this appeal to consider and reverse the construction put thereon by the Court of Appeal for Quebec, *sub nom. Goldstein* v. *Montreal Trust Co. and Carter* (1920), 31 Que. K.B. 157, which reversed that put upon it by the Superior Court.

The said wife survived the testator and died on August 21, 1917, after having made her last will and testament in the preceding February of the same year.

The respondent Goldstein was appointed thereby executor and trustee thereof.

The respondent trust company and one Armstrong, a brother-in-law of the deceased testator, were the acting trustees of the said testator's estate under the said will.

The respondent Goldstein, as executor and trustee, brought before the said Superior Court the question of his right as executor of the will of the said testatrix to recover from said trustees the sum of $25,000 or the securities in which the said sum had been invested in course of their executing the trusts under said testator's will.

The whole difficulty arises in regard to the proper interpretation and construction of the 5th and 15th clauses of said will of the testator.

The 1st clause revokes all former wills.

The 2nd deals with his burial, and the third with the direction to pay all debts and funeral expenses.

The 4th refers to the said marriage contract, directs the sums of money due thereby to be handed over and paid his said wife absolutely to be disposed of by her as she thinks proper, and asks his executors to assist his wife in the investment of said sum so that she shall not suffer any loss, and that the investment should be in the best securities.

Then follows the 5th clause which reads as follows:—[See judgment of Davies, C.J. *ante* p. 35.]

Then there follows a great many bequests in which appellants and others are given personal bequests.

And amongst other bequests of that kind, he gives a total of $8,000 to a number of institutions as objects of charity.

As his entire estate did not much exceed, if at all, $90,000 he clearly did not think his own relatives, amongst whom he distributed the bulk of his estate, as needy objects of further generosity or charity, or we should have, I submit expected something more presented in his will than what I am about to refer to and it is contended was an expression of such intention.

The 15th clause (which is the last in the will, save an injunction in the way discharge of duty on the part of the executors was to be observed and power to discharge same), is as follows:—[See judgment of Davies, C.J. *ante* p. 35].

I do not find the serious difficulty that the appellants do in the interpretation or construction of this will.

I think that these two clauses, 5 and 15 read together and in light of the whole will clearly gave the whole of that fund of $25,000 to his testators to hold as an investment solely for the benefit of his widow and possible children, but to be subject to the condition against remarriage.

It was clearly to be for her and them subject only to a forfeiture on remarriage.

So interpreted and construed there arises no such difficulty as suggested in argument of a bequest only to become operative on her death.

There seems to me neither such difficulty nor room for the rather curious suggestion of interpreting the words in the last part of clause 5, reading as follows:—"the said sums shall revert to my estate, in the same manner as it will revert to my said estate upon the death of my said wife" either as a bequest to his heirs or as a case of intestacy.

He certainly did not (being a member of our profession) in making such a will as before us intend that as a bequest to anyone; nor did he expect to die intestate, unless his widow should remarry which as a reasonable man he would, in confronting her with forfeiture of such a bequest, consider highly improbable.

We must never forget, it we would interpret correctly the situation, that this will was made within a little more than two months after his marriage when the possibility of issue was quite conceivable.

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I do not think the contention should have been continued beyond the decision of the Court of Appeal 31 Que. K.B. 157 and hence conclude that this appeal should be dismissed with costs.

DUFF, J.:—The intention of the testator is, I think, plainly enough evinced to dispose by testamentary disposition of the whole of his property both in extent and in interest. A certain interest in the investments representing the sum of $25,000 passes (under clause 5) to his wife—it is not necessary, I think, to determine with precision the character of that interest. What of the interest left untouched by that clause? I see no good reason why it should be supposed that it is not captured by the residuary clause—clause 15—so as to pass in one event to the issue and in the other to the wife. There being no issue, the combined effect of the two pertinent clauses (5 and 15) is to give to Mrs. Carter the entire property in the sum of $25,000 and the investments respecting it.

ANGLIN, J.:—The late C. B. Carter bequeathed $25,000 to trustees to pay the income derivable therefrom to his wife until her death or remarriage and directed that in the latter event "the said sums (*sic*) shall revert to my estate in the same manner as it (*sic*) will revert upon the death of my said wife." The residue of the estate was bequeathed to the testator's children if any (to be held in trust for them until they should attain 21 years, the income meantime to be applied for their education and support) and, if he should die without issue, to his wife absolutely. He died childless. The single question is whether the sum of $25,000 passed as part of the residue bequeathed to the wife or devolved on the heirs-at-law as on an intestacy.

I find nothing in the context to limit the universality of the word "residue." 6 Aubry & Rau, 4th ed. p. 466. There may be a question, of no practical importance since Mrs. Carter's death, whether, having regard to the trust for her of the income, she could have claimed payment of the corpus of the sum of $25,000 during her lifetime. But that the ownership of that sum became vested in her on her husband's death without any child born or *en ventre*, so as to form part of her estate, I entertain no doubt whatever.

Counsel for the appellant relied greatly on the testator's direction that in the event of his widow's remarriage the $25,000 should revert to his estate. In the first place it should be noted that the widow did not remarry and therefore this direction was inoperative. The corpus in fact does not pass under it but

is undisposed of by any provision of the will other than that dealing with the residue. Moreover, the direction for revertor appears to signify nothing more than that in the event of the widow's remarriage the same disposition of the $25,000 shall ensue as would occur under the other terms of his will upon her death.

The word "revert" is obviously not applicable in the technical sense to the corpus of the $25,000. Since that sum was never taken out of the testator's estate, it could not revert to it. But in using the word the testator would seem to have had in mind as well the payments of income to his wife for the rest of her life, which had been in a sense taken out of his estate by the gift of them to her defeasible in the event of her contracting a second marriage. His use of the word "sums" would so indicate. This may explain his employing the word "revert", notwithstanding its inconsistency, if so used, with the succeeding phrase "in the same manner as *it* will revert to my estate upon the death of my said wife." Note that the singular pronoun "it" is used to signify the "sums" directed to "revert." Inaccuracy of diction is perhaps the most notable characteristic of this entire provision. I cannot find in the use of the word "revert" however, any indication of an intention to divert the otherwise undisposed of corpus from the residuary legatees or legatee to the heirs-at-law. Still less can I discern in the word "estate" a designation of such heirs-at-law as its ultimate recipients to the exclusion both of the children and the widow of the testator as residuary legatees. For both would have been alike excluded if the appellant's contention is sound. I cannot conceive that that was the testator's intent. His future children, if any, were the first and direct objects of his residuary bequest.

The objection made against the wife claiming under the bequest that the benefit of it would enure only to her estate after her death does not apply to the bequests to the children. Yet if the children were to take under the residuary bequest the undisposed of corpus must have been included in the residue. Once there it is there for all the purposes of the bequest including the gift over to the wife. Any other construction seems impossible unless the clearly outstanding purpose of the testator—to deal with the entire residue of his estate, including all property not otherwise effectively disposed of by his will (Fuzier-Herman, vbo. Legs. No. 8778), for the benefit in the first place of his children, if any, and failing issue, for that of his wife—should be disregarded. It is trite law, recently re-

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stated in the Privy Council (*Auger* v. *Beaudry*, 48 D.L.R. 356, [1920] A.C. 1010, that speculation or conjecture as to the motives that may have influenced the testator in giving to his bequests the form in which we find them cannot warrant a refusal to give effect to the fair and literal meaning of the actual language he has used. We may not reject the plain bequest to the wife because in the result it may benefit her heirs rather than the heirs of the testator.

If the right of the widow to payment of the $25,000 under the residuary bequest accrued immediately on the testator's death without children, the objection, strongly urged by Mr. Lafleur, that the bequest was to a person in whose favour it could not take effect until after her death and therefore in contravention of art. 838 C.C. would obviously have no application. The same observation might be made if her right to payment of the corpus had arisen by reason of her remarriage. But assuming that the effect of the trust created by clause 5 of the will was, in the event which happened, to defer any right to actual payment of the corpus under the residuary bequest until her death, that suspension merely postponed the execution of the residuary disposition and did not prevent her having under it during her lifetime "an acquired right transmissible to her heirs," art. 902 C.C. "The event which gave effect to" the residuary legacy to the widow was the death of the testator without any children either born or *en ventre*. Thereupon she became "seized of the right to the thing bequeathed." Art. 891 C.C.

Whatever justification any obscurity in the late Mr. Carter's testamentary dispositions may have afforded for instituting this litigation and carrying it to the Court of King's Bench, the mis-en-cause might well have been content to abide by the judgment of that Court, 31 Que. K.B. 157. They should pay the respondents their costs of the unsuccessful appeal here.

BRODEUR, J.:—The point at issue in this case is to determine if the sum of $25,000 specifically mentioned in the will of Mr. Carter, advocate, of Montreal, belongs to his wife.

Mr. Carter was married to Miss Blunden at Montreal on April 19, 1905; and had given to his wife by contract of marriage the sum of $10,000, payable at his death, with the stipulation, however, that if she predeceased him, the gift should not take effect.

About two months after his marriage, namely on June 27, 1905, Carter made his will by which he named the children that might result from his marriage as his universal legatees;

and if he should not have any children, then his whole estate should go to his wife. This universal legacy is provided for in clause 15 of the will which reads as follows:—[See judgment of Davies, C.J., ante p. 35].

He had in the preceding clauses confirmed and ratified the above mentioned gift made by contract of marriage. He had named a relative and a friend as testamentary executors and trustees and he also made several particular legacies to his relatives and friends, and in para. 5 he disposes of the sum of $25,000 in the following terms:—[See judgment of Davies, C.J. ante p. 35].

Carter died a little more than a year after making his will. His wife survived him and became universal legatee according to the terms of the testament, since they had no children. The sum of $25,000 was administered by the trustees, who were at the same time testamentary executors and the revenue derived from it was paid to Mrs. Carter, who did not remarry and died on August 21, 1917, leaving a will by which she named the respondent, Goldstein, as her testamentary executor, and her brother and sister, who live in England, as her universal legatees.

The heirs of Carter, which are the appellants, claim that this sum of $25,000 mentioned in para. 5 of Carter's will belongs to them and that the words "revert to my estate" mean "return to my legal heirs." Goldstein, the respondent, claims, on the contrary, that this sum should revert first to the children under clause 15 of the will and that in default of children, it should become the property of Mrs. Carter and that the latter's heirs have the right to revendicate it.

Carter had made his will in the expectation of having children. He had named them universal legatees. At the same time he wished to provide for his wife's support and he provided that she should have the usufruct of the sum of $25,000 during her widowhood, or for the remainder of her life. If Carter had left children when he died, there could be no doubt that the naked ownership of this sum of $25,000 would have fallen to those children as heirs-at-law, or as universal legatees of their father. But he did not leave any children and so the universal legacy made in their favour became inoperative and his wife acquired the succession as universal legatee.

Now this succession comprised amongst other things the bare ownership of $25,000 (art. 596 C.C.) Despite the somewhat peculiar expression "revert to my estate" which Carter used, he could not prevent the bare ownership of this sum from be-

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longing to some one at his death. This beneficiary could not be a testamentary executor or trustee, who is only "legatee in point of form" bound to hold in trust the sum bequeathed, and to administer it until the time comes to hand it over to the real legatee. Michaux, Des Testaments, p. 220, No. 1428; Merlin, Répertoire, vbo. Fiduciare, No. 3, Zachariæ, Aubry & Rau, vol. 6, para. 694, text and note 9.

This sum of $25,000, supposing Carter had had children, would therefore have belonged to his wife in usufruct and to his children in bare ownership. Since he had no children it belongs to his wife in usufruct and also in bare ownership, since she was instituted universal legatee in default of children. She would have had the right to revendicate this sum from the universal legatees by virtue of art. 479 C.C., in accordance with which the usufruct established in her favour by the will was extinguished and "by the confusion or re-union in one person of the two qualities of usufructuary and of proprietor." The distinguishing mark of a universal legacy is the fact that the legatee is given the universality of the effects composing the testator's estate. In the present case the testator, in bequeathing the residue of his goods to his wife, shewed a very definite intention to exclude his heirs-at-law from the succession. Laurent vol. 13, Nos. 5 and 6, Aubry & Rau, vol. 7, p. 466, para. 714, Demolombe, vol. 4, Donations, p. 542.

This sum became the absolute property of Mrs. Carter on Carter's death; the appellants are therefore not justified in invoking art. 838 C.C. in support of their contention. The transmission of the bare ownership of this sum of $25,000 could not take place until after Mrs. Carter's death as the appellants say, but this transmission was determined by the death of the testator; otherwise we would be confronted with an illegal testamentary disposition leaving a part of the testator's estate without any owner at his death.

The word succession or "estate" is not confined to the idea of legal succession; it includes the testamentary succession as well. In fact, legal succession only takes place when the deceased has left no will. If there is a will, and the heir or universal legatee has been named, such testamentary disposition takes the place of the legal succession. (art. 597, C.C.).

Carter in giving the residue of his estate to his children and, in default of children, to his wife, called the latter, as the authors say, to the universality of the goods composing his estate. (Beaudry-Lacantinerie, Des Testaments, Nos. 2288 and 2298).

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I am therefore of opinion that the heirs at law of Carter are not entitled to this sum of $25,000 and that it should be given to Mrs. Carter's testamentary executor.

The appeal should be dismissed with costs.

Appeal dismissed.

GRIEVE McCLORY Ltd. v. DOME LUMBER Co. Ltd.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. May 26, 1922.

CONTRACTS (§IIA—128)—SALE OF LAND AND COMPANY SHARES—CONSTRUCTION — ADMISSIBILITY OF EVIDENCE AS TO INTENTION OF PARTIES—EXAMINATION OF OTHER INSTRUMENTS OF EVEN DATE—INTENTION OF PARTIES AS SHEWN IN INSTRUMENT — INTENTION TO PREVAIL OVER ORDINARY MEANING OF WORDS.

In construing an agreement for the sale and purchase of land and company shares, the Court will not admit evidence to shew what took place between the parties prior to the making of the contract, which must be construed according to the terms contained within the four corners of it, regardless of evidence to shew the intention of the parties, but it is permissible in aid of construction to refer to another instrument of even date executed in pursuance of the instrument in question or to look at promissory notes made also in pursuance of the same instrument. If the provisions are clearly expressed and there is nothing to enable the Court to put upon them a construction different from that which the words import, the words must prevail, but if the provisions and expressions are contradictory and if there are grounds, appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words.

APPEAL by plaintiff from the trial judgment dismissing an action on an agreement for the sale and purchase of certain lands and shares, and to recover the balance of the purchase price, thereunder. Affirmed.

H. H. Parlee, K.C., for appellant.

R. E. McLaughlin, for respondent.

SCOTT, C.J. concurs with HYNDMAN, J.A.

STUART, J.A., concurs with CLARKE, J.A.

BECK, J.A.:—The question for decision depends upon the construction of the agreement for sale, of February 4, 1920, the material facts of which are set out by my brother Hyndman. To assist in its construction I think we cannot look at extrinsic evidence. It is true that the word "purchase" *implies* a promise to pay the purchase money, just as the word "sell" *implies* a promise to convey the thing sold; but these implications arise because they are involved and included in the ordinary sense of the words. Such an implication differs from an implication raised upon equitable grounds out of the situation

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created by an instrument which becomes the subject of consideration.

In the latter case extrinsic evidence is admissible to rebut the equitable presumption. In the former case there is no exception to the general rule which would admit extrinsic evidence. But when we find ordinary words in an instrument and are called upon to interpret them, the context may shew that they are used with some modification of or limitation upon their ordinary meaning and in this way it may come about that some implication ordinarily resulting is not to be drawn. Obviously as a matter of construction such an implication, e.g. an implication of an agreement to pay by a purchaser, is easily rebutted, while it would, except in an extraordinary case, be impossible by way of construction to eliminate an express covenant to pay.

I think however it is permissible in aid of construction to refer to the instrument of even date, executed in pursuance of the instrument in question just as, if it were material, it would be permissible to look at the promissory notes made also in pursuance of the same instrument. With these principles in view I have come to the conclusion that the defendant Thompson is not personally liable for the purchase money of the shares.

Thompson is the "purchaser" of the shares; but he has in no part of the instrument expressly covenanted to pay their purchase-price, while the company has expressly convenanted to pay the whole price both of the land and the shares, giving, as collateral to its covenant, its promissory notes for the deferred payments of the whole price of both; and in the instrument of even date, being the grant of the land from McClory to the Dome Lumber Co., the consideration is expressed to be $13,700 (the total purchase-price of both land and shares) and is expressed to be "now paid by the grantee" (the company) "to the grantor."

It is true that there is a clause in the instrument to the effect that the *purchasers* shall, upon delivery to the bank of the documents to be held in escrow (that is, a proper deed of the land and the proper share certificates and assignments), immediately pay the cash (down) payment of $5,500 but as to this clause I think two observations are justified; first, it seems a mere method of providing for the concurrent deposit of the documents and the payment of the down payment and the delivery of the company's notes for the deferred payment; and, secondly, being the only express covenant on Thompson's behalf relating to the payment of purchase money it seems to aid

the construction which excludes his liability for the deferred payments.

I would therefore dismiss the appeal with costs.

HYNDMAN, J.A.:—This is an appeal from Harvey, C.J., who dismissed the plaintiff's action against the defendant Thompson with costs.

The claim arises out of an agreement between the plaintiff of the one part, and the defendant company and Thompson, of the other part, for the balance of the purchase-price of certain land and shares, the subject matter of the agreement in question.

It is advisable to state the material facts as disclosed in the Appeal Book.

The plaintiff company were the promotors of a company known as the Dome Creek Lumber Co. Ltd. Later on they formed a second company called the Dome Mountain Lumber Co., for the purpose of acquiring the assets and affairs of the first.

The plaintiff was instrumental in inducing the defendant Thompson and certain other individuals to purchase shares in the latter company.

In process of time disagreements arose between the plaintiff and said last mentioned shareholders, with the result that the latter faction, controlling a majority of the shares, determined to re-organise by establishing a third company under the name of the Dome Lumber Co. Ltd. This was opposed by the plaintiffs as they looked upon it as a scheme to practically "freeze" them out, refused to become shareholders and eventually, owing to what had taken place, became openly hostile to the new company and most of its directors (of whom the defendant Thompson was one) and sought to obtain every advantage possible against it.

The company's operations had been carried on, and their mill was situated upon a 40 acre tract of land being part of lot 919 in the district of Cariboo, B. C., which had been held under lease from one Armstrong, a resident of Vancouver.

Owing to nonpayment of rent, Armstrong cancelled the lease, refused to re-instate it, and subsequently sold the land for the price of $2,000 to the plaintiffs.

The natural consequence of this was that the plaintiffs became the absolute owners of the very land vitally necessary for the operations of the Dome Lumber Co. their mill and equipment being established upon it and there being no other available site upon which they might continue to operate.

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It was decided then to open up negotiations with the plaintiffs for the acquisition of the property, which was accordingly done, Abbott and defendant Thompson representing the company.

Objection was taken at the trial to the admission of any evidence to shew what took place between the parties prior to the making of the contract. I think such objection well taken. (See Broom's Common Law 8th ed. 287, 358.)

Therefore it is only necessary to say that such negotiations resulted in an executed agreement under seal, the portions thereof material to the issues being in the following terms:—

"This agreement made this 4th day of February, A.D. 1920 between:

Grieve, McClory, Limited, a body corporate having its head office at the city of Edmonton, in the Province of Alberta (hereinafter called the "Vendor") of the first part:

and

Dome Lumber Company, Limited, a body corporate having its head office at the City of Edmonton, in the Province of Alberta, and *T. S. Thompson* of the City of Edmonton aforesaid, Merchant, (herein after called the "Purchasers") of the second part:

Whereas the party of the first part is the owner of certain lands and premises containing an area of forty (40) acres, lying at or near the intersection of Dome Creek in the Province of British Columbia, with the right-of-way of the Grand Trunk Pacific R. Co., and being part of lot numbered 919, in the District of Cariboo, in the Province of British Columbia;

And whereas the said vendor is also the owner of sixty (60) shares of the capital stock of a company known as the Dome Mountain Lumber Co. Ltd., and is also the holder by assignment of thirty-seven (37) other shares of the capital stock of the Dome Mountain Lumber Co. Ltd.;

And whereas the vendor has agreed to sell to the Dome Lumber Co. Ltd., as purchaser, the said 40 acres above referred to, and has agreed to sell to the said T. S. Thompson the said 97 shares of capital stock of the Dome Mountain Lumber Co. Ltd., and the said purchasers of the second part have respectively agreed to purchase the property and shares at and for the price or sum of thirteen thousand seven hundred ($13,700) dollars, *to be payable at the times and in the manner hereinafter set forth*:

Now wherefore this indenture witnesseth that the said vendor does agree to sell unto the said Dome Lumber Co. Ltd.; who

agree to purchase from the vendor, all and singular that certain parcel or tract of land and premises. . . . . .

The purchase price of the said land shall be the sum of four thousand ($4,000.00) dollars, which the Dome Lumber Co. Ltd., hereby agrees to pay *jointly with the moneys* hereinafter agreed to be paid as the purchase-price of the shares of stock herein referred to at the times and in the manner hereinafter set forth.

The vendor hereby agrees to sell unto the said T. S. Thompson, who hereby agrees to purchase, the following shares of stock in the Dome Mountain Lumber Co. Ltd., represented by the certificates as herein designated, namely:— . . . . . .

The purchase price for all of the said stock certificates shall be the sum of ninety-seven hundred ($9,700) dollars, which said sum shall be paid *jointly with the sum of four thousand $4,000* dollars above mentioned, in the manner and at the times hereinafter stated, namely,—The sum of fifty-five hundred ($5,500) dollars of the total purchase-price to be paid in cash upon the execution of this agreement (the receipt whereof is by the vendor hereby acknowledged):—The sum of forty-one hundred ($4,100) dollars on February 4, A.D., 1921; and The sum of forty-one hundred ($4,100) dollars on February 4, A.D. 1922:

Together with interest on such . . . . . .

It is distinctly agreed and understood that promissory notes, bearing even date herewith for each of the respective deferred payments, due on the due dates of the said deferred payments, shall be given to the vendor by *Dome Lumber Co. Ltd.* as collateral for the payment of the moneys due hereunder.

The purchasers shall have the right and privilege of paying the balance due hereunder and retiring the said promissory notes at any time before maturity.

There shall be deposited in escrow in the Standard Bank of Canada, Edmonton, a registered deed of the said 40 acres above referred to in the name of J. A. McClory, the title for which said property shall be free and clear of all encumbrances and a further deed in the statutory form, of the said 40 acres from the said J. A. McClory to the Dome Lumber Co. Ltd., and shall also be deposited in escrow in the said bank each and all of the said stock certificate for shares of stock in the Dome Mountain Lumber Co. Ltd., hereinbefore referred to, which said shares shall be properly and duly assigned or transferred so that the said T. S. Thompson may upon receipt of same have them duly assigned and transferred on the books of the company into his name. The condition of the said escrow shall

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be that upon payment in full of the deferred payments hereunder with interest thereon as herein set out, that the said Standard Bank of Canada shall deliver to the said purchasers, or either of them, all of the said documents so deposited, and the production of the said promissory notes herein referred to with evidence of payment thereof shall be sufficient for the said Standard Bank of Canada to conclude that the terms of the escrow have been complied with and that delivery of the said documents may be made as herein provided.

The purchasers shall upon delivery to the said Standard Bank of Canada of the documents herein stated to be held in escrow, and this agreement having been duly completed by the vendor, immediately pay to vendor or to such persons as he may direct, the cash payment of fifty-five hundred ($5,500) dollars as herein specified.

The vendor and Robert G. Grieve and John A. McClory do hereby in consideration of the premises, assign, transfer, release and set over unto the said T. S. Thompson, all claims or rights of claims which the vendor may have against or in conjunction with or for the benefit of the Dome Creek Lumber Co. Ltd., the Dome Mountain Lumber Co. Ltd. and the Dome Lumber Co. Ltd., and does hereby covenant and agree that it will be in order to effectually set over all rights either of itself in any of the said companies, or the rights of the said companies, procure or cause to be procured the proper signatures of the officers of the Dome Creek Lumber Co. Ltd., to any document or documents reasonably required for such purpose.

The purchasers hereby release the vendor and John A. McClory and Robert G. Grieve from any and all claims of every kind and nature whatsoever with respect to the sale of the Dome Creek Lumber Co. Ltd., and with respect to the sale of stock in the Dome Mountain Lumber Co. Ltd., and hereby undertakes to indemnify and protect them and each of them from any and all claims in connection with the Dome Mountain Lumber Co. Ltd.

This agreement and everything herein contained shall enure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of each of the parties hereto respectively.

In witness whereof the parties hereto have hereunto

Witness: P. W. Abbott.

Dome Lumber Company, Limited. Grieve McClory Limited.

C. W. Holmes, President. R. G. Grieve, President

T. S. Thompson, Secretary. J. A. McClory, Sec'y-treas. set their hands and seals the day and year first above written."

The agreement therefore must be construed according to the terms contained within the 4 corners of it, regardless of evidence adduced (subject to objection) to shew the intention of the parties and the relationship as trustee of the defendant Thompson.

An examination of the provisions of the contract reveals that the Dome Lumber Co. purchases the 40 acres and the defendant Thompson the shares; that the purchase-price of both combined is $13,700 and expressed to be paid *"at the times and in the manner hereinafter set forth."* It should be carefully noted that though the company purchases only the land, and Thompson only the shares, that the price is fixed at the aggregate of both. The price of the land at $4,000 and the shares at $9,700, —totalling $13,700.

The question for solution is by the terms of the contract was it intended that the purchase-price of said shares should be paid by the defendant Thompson or by the company only?

Where a party agrees to sell and another to purchase any land or thing it is, I think, clear in the absence of terms exhibiting different intention, that the purchaser impliedly covenants to pay. But the whole document must be construed and not an isolated part thereof, and where all the terms are expressed nothing can be implied. (See Shirley's Leading Cases, 3rd ed. 467).

If, as in the case at Bar, it appears that one of the defendants purchases the land, and the other the shares, and there is a covenant by the former to pay not only the price of the land, but also for the shares (which I conceive was meant when the company covenanted to pay the $4,000 jointly with the moneys hereinafter agreed to be paid as the purchase-price of the shares, etc.) *and*, there is included no express covenant by the latter party to pay (except the cash payment of $5,500 which was duly made), it would seem to me proper to infer from such circumstances and terms an intention by all contracting parties that the company alone was bound to pay and that no action should lie against Thompson: in other words, the intention is clear that no implied covenant exists to pay for the shares; or perhaps it ought to be said that such implication is rebutted or overridden by the express covenant.

In *Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192 at p. 202, 40 E.R. 617, Cottenham, L.C. said: "If the provisions are clearly expressed, and there is nothing to enable the Court to put upon

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them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds, appearing upon the face of the instrument affording proof of the real intention of the parties then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention." See also Broom's Legal Maxims 7th ed. 404, 405.

Mr. Parlee cited the case of *Watling* v. *Lewis*, [1911] 1 Ch. 414, 80 L.J. (Ch.) 242 as an authority to the effect that even an express covenant that the covenantor should not be personally liable was ineffective on the ground of repugnancy. But Warrington, J. in the same judgment says at p. 422: "On the other hand, it was pointed out in *Williams* v. *Hathaway* (1877), 6 Ch. D. 544 that there is no objection in law to a proviso limiting the liability of the covenantor, provided it really limits it without destroying it; if it really limits the liability either in point of time or by specifying the particular fund out of which alone the payment has to be made, that may be perfectly good."

Now it seems to me a true construction of the agreement in issue is that the company and Thompson were purchasing respectively the land and shares for the aggregate consideration of $13,700; that they both covenant to pay the sum of $5,500 (which was performed) and that the company alone should pay the balance. This conclusion is further evidenced by the fact that the company alone were to and did, make their promissory notes as collateral security therefor.

This in my opinion is what is meant by the expression in the agreement which says that "the said purchasers have respectively agreed to purchase the property and shares at and for the price or sum of $13,700 to be payable *at the times and in the manner hereinafter set forth.*"

For the foregoing reasons I would dismiss the appeal with costs.

CLARKE, J.A.:—Much as I would like to relieve the defendants, under the unfortunate circumstances that exist, from payment of the balance of the purchase money of the land and shares in question I am unable to find any solid ground either in the written agreement or the surrounding circumstances for doing so. There is in the written document of February 4, 1920, a positive agreement on the part of the plaintiff to sell

and on the part of the Dome Lumber Co. Ltd. to purchase the 40 acres in question, for the price of $4,000 and an equally positive agreement on the part of the plaintiff to sell and on the part of the defendant Thompson to purchase the 97 shares in question for the price of $9,700, which creates a binding obligation or covenant on the part of each defendant to pay, and the evidence would have to be very strong to warrant an inference or finding that the purchase-price of the shares is not to be paid by Thompson, the purchaser, but by the company exclusively. The only circumstance, in my opinion, favoring such an inference is that in respect of the land there is an express agreement by the company to pay in addition to the agreement to purchase. I cannot see that this creates any greater obligation on the part of the company than that assumed by Thompson, in respect of the shares, by his agreement to purchase for the price stated, and there is much in the agreement to support the view that each was to be liable for and to pay the price agreed upon in respect of his individual purchase.

One of the recitals states that the purchasers "have *respectively* agreed to purchase the property and shares at and for the price or sum of $13,700 to be payable at the times and in the manner hereinafter set forth." A definition given of "respectively" in Webster's Dictionary is "as each belongs to each." I take the meaning of the clause to be that the company has agreed to purchase the land for its purchase-price and Thompson the shares for their purchase-price, the two aggregating $13,700. Were it intended that the company only was to be liable for the purchase-price of both properties I would expect to find the words "by the company" inserted after the word "payable" in the clause, or some other words indicating such intention.

Then in the operative part of the agreement relating to the purchase of the land, the company agrees to pay $4,000, the purchase-price of the land, (not the $13,700) "jointly with the moneys hereinafter agreed to be paid as the purchase-price of the shares." If the shares were to be paid for by the company one would expect it to be so stated in this clause or afterwards, in the part of the agreement dealing with the purchase of the shares. But the only agreement thereinafter contained to pay for the shares, is an agreement on the part of Thompson to purchase them for $9,700, which is evidently treated as an agreement to pay for them. There is no suggestion here that any other person than the purchaser of the shares is to pay for them. The clause in the agreement which provides that the

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purchasers shall upon delivery of the documents to the Standard Bank in escrow pay to the vendor the cash payment of $5,500, does not in my opinion create any new obligation but merely gives the time of payment. The obligation to pay had already been created by earlier provisions. It has an important bearing however as shewing the agreement of the parties that the cash payment was to be made by both purchasers, and if the cash payment, why not the deferred payments? The earlier provisions creating liability for the cash payment apply equally in my opinion to those deferred.

My chief difficulty arises from the provision that the payments by each purchaser shall be made jointly with the payment by the other purchaser. If on the dates fixed for payment each purchaser was ready with his *pro rata* proportion, and they paid it over together, there would be no difficulty, as then the papers in escrow would be delivered over, the deed of the land to the company and the share transfers to Thompson; but what is to happen upon default of one of them? Neither is entitled under the terms of the agreement to receive what he purchased till the total purchase-price of both properties be paid. The vendor should not be able to enforce payment by the one purchaser alone unless he can deliver the subject matter of such purchase, each purchaser is therefore interested in the completion of the other purchase. It may be argued that the obligation of the one to pay is dependent upon the payment by the other and upon default by the latter the former is discharged, but my conclusion is that the interests and obligations of the two purchasers are so entwined that their obligations should be treated as joint, one with the other. Neither can fulfil his obligation without the concurrence of the other, and therefore each in order to fulfil his part undertakes the performance by the other.

My conclusion from an examination of the document alone is that both defendants are liable for the balance of the purchase-price, both of the land and the shares. This imposes no obligation upon Thompson greater than his separate obligation for the shares, for it appears that the company contributed $4,000 of the first payment of $5,500, so that the balance owing is properly payable by him.

Were I to seek the aid of extrinsic surrounding circumstances in construing the agreement my views of it would be strengthened. It was the opinion of the draftsman of the agreement, that the defendant company could not legally purchase the shares, which however seems to be erroneous, they not

being shares of the defendant company. He says in his evidence:—"Well, when we had arrived at the stipulated figure and the terms of payment, I advised them that it would be necessary for us to put the stock in Mr. Thompson's name, as the company could not purchase its own stock, and that we would have to acquire that stock through Mr. Thompson."

It is true that he adds that the company was to pay for it. It seems a strange proposition that the company could not purchase the stock but could pay for it. The minutes of the company scarcely bear out his idea that the company was to pay for the shares, for the minute book of the company shews that at a meeting of the five directors who comprise, I think, all of the shareholders, held on February 9, 1920, these resolutions were passed:—

"Moved by P. W. Abbott, seconded by T. S. Thompson, that the proposed agreement between Grieve and McClory, T. S. Thompson and this company be entered into, and that the president and secretary be authorised to execute same on behalf of the company and attach thereto the company's seal. Carried.

"Moved by P. W. Abbott, seconded by J. F. Harris, that T. S. Thompson be a trustee for the shareholders for 97 shares purchased in the stock of the Dome Mountain Lumber Co. Ltd. Carried.

Moved by J. F. Harris, seconded by G. L. Williamson, that the company make a loan to T. S. Thompson, in his capacity as trustee, of $9,700—$1,500 cash; $4,100 in 1 year; $4,100 in 2 years."

And at a subsequent meeting of directors held on April 16, 1920, the minutes of the meeting of February 9 were confirmed. Abbott says that the minutes were taken by Patton and transcribed by him while Thompson (the defendant) was nominally secretary. However this may be, Thompson appears to have been present at both meetings, and I think the minutes should be taken as authentic.

It appears therefore that not only was Thompson appointed trustee of the shareholders in respect of the shares, but a loan was authorised to him of $1,500, the amount required for the cash payment in excess of the $4,000 payable by the company as well as of the amounts of the two deferred payments of $4,100 each. This seems to me pretty strong evidence that Thompson was the man who was to make the payments to the plaintiff for the shares.

Admittedly the plaintiffs were not informed that Thompson

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was acting as agent or trustee for the company or for the shareholders, and were it otherwise, having contracted under seal as principal he cannot escape liability on that ground. I would allow the appeal with costs against the defendant Thompson.

Regarding the form of relief to be given, the original claim asked for payment of the balance owing with interest at 7% per annum as provided in the agreement, and by amendment the plaintiff asks for specific performance, or on refusal thereof, damages.

I am disposed to give the form of relief most favourable to the defendants. The company is being wound up under the Dominion Winding-up Act, and it appears by an order of the Master in Chambers, made in the winding-up proceedings, dated September 27, 1921 (Ex. 1) that the company is hopelessly insolvent and that as the company's creditors refused to contribute funds for the purpose of contesting the plaintiff's claim in this action, and their contention that the buildings, plant and machinery erected by the company on the land in question, are affixed to and form and have become part of the realty, it was directed by the order that the liquidator do not contest the plaintiff's claim and do abandon the equity, if any, of the company in the aforesaid buildings, etc., and the lands.

The plaintiffs' factum states that the stock and land are now of no value. No question has been raised regarding the plaintiff's title to the land or shares. If the defendant Thompson accepts this as the correct situation, it would probably save expense, especially as the land is in British Columbia, to award the plaintiff damages for breach of contract in the amount claimed, viz. $8,200, and interest according to the agreement, and subject to the options hereinafter given to the defendants, I would set aside the judgment below and order judgment for damages as above indicated and direct the documents in the Standard Bank to be returned to the plaintiff as provided by the last clause of the said judgment. But the defendants or either of them, should have the option by filing in the office of the clerk of the Supreme Court, at Edmonton, within 30 days, an election in writing that the judgment be for specific performance with a reference to the said clerk to inquire into the plaintiff's title and report. And the further option instead of specific performance to have a reference to the said clerk to ascertain the amount of the plaintiff's damages, as for breach of contract, in which the value of the land with the fixtures thereon and of the shares will be ascertained and deducted

from the said balance of principal and interest owing under the agreement.

In the event of the exercise of either option further directions and costs of the action and reference to be reserved for disposal by a Judge of the Supreme Court.

If neither option be exercised the defendant Thompson to pay the costs of the action.

Judgment accordingly.

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Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

PARTNERSHIP (§V—21)—TO OPERATE THRESHING OUTFIT — CLAIM OF PARTNER FOR EXPENSES AND WAGES—SETTLEMENT OF ACCOUNT—ACTION FOR FURTHER AMOUNT—RIGHTS OF PARTIES.

In the absence of an agreement to that effect, one partner cannot charge his co-partners with any sum for compensation whether in the shape of salary, commission or otherwise on account of his own trouble in conducting the partnership business, the position of debtor and creditor not arising until the concern is wound up or until there is a binding settlement of the accounts. Held, on the evidence, that there had been a settlement which had been accepted by all parties as being in full of plaintiff's account, and that he was not therefore entitled to succeed in his action.

APPEAL by defendants from the trial judgment in an action against the members of a syndicate for and against the syndicate for an alleged balance due to the plaintiff for repairing a threshing outfit and for wages. Reversed.

C. R. Morse, for appellants.

T. A. Lynd, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—The plaintiff in this action sues the 6 defendants as individuals comprising the Allan Hills Syndicate, as well as the syndicate itself. He alleges that the syndicate "is a partnership operating a threshing outfit." At the trial the action was abandoned as against the syndicate. The facts of the case are as follows: The plaintiff owned a second-hand threshing outfit. The defendants were desirous of buying one. It was agreed that the 6 defendants and the plaintiff should constitute themselves a syndicate to carry on threshing operations. The plaintiff and four of the defendants were to have a one-sixth interest each; the other two defendants were to have a one-sixth interest between them. The question of putting the outfit in proper repair for threshing arose. The defendants asked the plaintiff what it would cost to put the machine in proper shape. They say that he told them it could be

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done for $200. He says the $200 was only an estimate. The defendants raised the $200 among themselves, and gave it to the plaintiff and told him to make the repairs. It was also agreed among them that the plaintiff should operate the outfit during the threshing season, and that he should have $18 a day to cover the expenses and his wages. He repaired the machine and commenced threshing, but he could not make it work satisfactorily. After a couple of weeks operating, the defendants asked the plaintiff to leave the machine and they would get someone else to run it. He refused, and continued trying to thresh. Some days later they ordered him to quit, but again he refused. They then summonsed him before a magistrate and charged him—as far as I can make out from the evidence—with dissipating the property of the partnership. He was convicted, and directed to turn over the outfit to the defendants. On the order being made, he told the defendants that he wanted a settlement. Some of the defendants were of the opinion that, as he had a share in the machine, there was nothing coming to him. Finally, however, they agreed to pay him and be done with it, and they asked him how much he claimed. They went into figures and he claimed $338.75, less $10, which he had collected from one Turriff. There were a number of claims against the plaintiff which the defendants agreed to assume, and when these were deducted from the $338.75, a balance of $185 was left in favour of the plaintiff, and the defendants gave him an order on one Hagel for that amount, which Hagel accepted and paid. Subsequently, the plaintiff brought this action, claiming that there was still due to him from the defendants the sum of $96 on account of repairing the machine, and a further sum of $136.42 on account of his wages, or $232 in all.

In answer to the plaintiff's claim, the defendants set up that they had made a settlement with the plaintiff and paid him the amount in full. They also counterclaim for damages for loss suffered through the plaintiff's incompetence and negligence in fitting up the machine, and in operating it after it had been repaired. They allege that while it was under the plaintiff's management it was operated at a considerable loss, but that, as soon as he left it, the engineer in charge operated it at a profit. The trial Judge, apparently with considerable hesitation and because the evidence did not explain how the figures in ex. B which were the figures used in the settlement—had been arrived at, held, that there had not been a settlement in full of the plaintiff's claim, and he gave judgment in favour

of the plaintiff for the amount claimed and dismissed the defendants' counterclaim. The defendants now appeal to this Court.

In my opinion, the appeal must be allowed. The relationship existing between the plaintiff and defendants was that of partners. It is so alleged in the plaintiff's statement of claim, and is established by the evidence. If there was no settlement of the plaintiff's account and an agreement by the other partners to pay it as individuals, the plaintiff is out of Court and his action should have been dismissed, for, as stated by Lindley on Partnership, 8th ed., at p. 454: "in the absence of an agreement to that effect one partner cannot charge his co-partners with any sum for compensation whether in the shape of salary, commission or otherwise on account of his own trouble in conducting the partnership business." See also Partnership Act, (Eng.) 1890, ch. 39, sec. 24 (6).

The same rule is laid down in 30 Cyc. 466, as follows:—

"Even when the partnership contract provides that a partner shall receive a fixed compensation for his services, unless the other partner or partners have bound themselves as individuals to pay it he cannot maintain an action therefor. If there is no such obligation his claim is only an item in the firm account, and a settlement must be had, before he can recover any specific sum."

In 22 Halsbury, para. 146, the rule is stated as follows:—

"146. Partners are not, as regards partnership dealings, considered as debtor and creditor *inter se* until the concern is wound up or until there is a binding settlement of the accounts."

There is not a word in the evidence from beginning to end that would indicate that the defendants ever agreed or led the plaintiff to believe that they would be responsible as individuals for the $18 per day which he was to receive for operating the machine. As to repairs, the defendants say that the plaintiff said he could put the machine in good repair for $200, and for that purpose they gave him the $200. Beyond raising the $200 for this purpose, there is nothing to indicate that the defendants ever agreed to be responsible as individuals for any sums to which the plaintiff might be found to be entitled on taking the accounts of the partnership. If, therefore, what took place when the defendants gave the plaintiff an order on Hagel for $185 did not constitute a settlement of his account, no agreement is shewn by which the defendants agreed to be responsible as individuals, and the plaintiff's action, therefore,

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cannot be maintained; for a partner in respect of a debt due from the partnership must first proceed against the partnership before he can call upon his co-partners individually to contribute.

For the defendants, it is contended that the evidence clearly establishes that a settlement had been arrived at. Four of the defendants gave evidence at the trial. They all said that the $338.75 claimed by the plaintiff was understood to be in full of his account. This is corroborated by the plaintiff himself. In his examination for discovery, the plaintiff was asked this question: "How did you come to arrive at the figure of $338.75?" And his answer was: "That is what I settled with them for." At the trial, when cross-examined as to this statement, his explanation was that he had not said that it was a settlement in full. When asked why he took the order from Hagel for $185 if it was not a settlement in full, he was unable to answer. In view of the fact that all the defendants who gave evidence stated that the settlement was understood to be in full, and in view of the fact that when they gave him the order for $185 the plaintiff did not intimate that there was still something coming to him, and particularly in view of his own admission on his examination for discovery, the proper conclusion to be drawn from the evidence, in my opinion, is, that a settlement in full had been arrived at. As the defendants carried out that settlement, they are not liable further.

The appeal should, in my opinion, be allowed with costs, the judgment below set aside, and judgment entered for the defendants with costs.

Appeal allowed.

LAFERRIERE v. GARIEPY.

Supreme Court of Canada, Idington, Duff, Anglin and Mignault, JJ., and Bernier, J. (ad hoc). November 21, 1921.

PLEADING (§IO—125)—SEVERAL ACTIONS COMMENCED—VALIDITY OF CERTAIN LEASES INVOLVED IN ALL—ONLY ONE CASE TAKEN TO APPEAL—RES JUDICATA—SUPPLEMENTARY PLEADING SETTING UP—ART. 199 QUE. CODE OF PROCEDURE.

Where several actions have been commenced to determine the validity of certain leases of premises by different parties claiming to have authority to give such leases, and the lower Courts have decided in favour of one of the parties as to the validity of the lease given by him and against which judgment there has been no appeal, such party in an action brought to obtain possession of the said lands brought at the same time as the other actions, may, on appeal to the Supreme Court of Canada, raise the question of *res judicata*, the validity of the leases being in question, and may under art. 199 of the Code of Procedure of the Province of Quebec

file a supplementary plea, covering the essential facts which have happened since the action was commenced, and under Quebec Rule of Practice 54, a motion raising the plea of *res judicata* may be treated as a supplementary plea.

JUDGMENT (§IIA—60)—CONCLUSIVENESS—RES JUDICATA—IDENTITY OF OBJECT, ACTION AND PERSONS.

The doctrine of *res judicata* is based on a presumption that the conclusion reached by the Judge is true, and having become absolute can no longer be questioned and is a bar to any further action between the same parties regarding the same matter. In order to succeed in such plea, there must be (1) identity of object in the sense that the condemnation sought should be for the same thing as in the action adjudged upon; (2) identity of action, when the demand is founded on the same cause; and (3) identity of persons; a demand between the same parties acting in the same qualities.

STATUTES (§IIA—95)—ARTICLE 1031 CIVIL CODE OF QUEBEC—CONSTRUCTION.

Article 1031 of the Quebec Civil Code which allows a creditor to exercise the rights and actions of his debtor with the exception of those which are exclusively attached to the person, when, to his prejudice, he refuses and neglects to do so, is sufficiently wide to enable a lessee to bring an action to recover possession of premises of which he is wrongfully dispossessed, where his lessor neglects or refuses to do so.

APPEAL by defendant from the judgment of the Court of Appeal (Que.) in an action brought to recover possession of certain premises. Affirmed.

The facts and circumstances are fully set out in the judgment of Mignault, J.

T. Rinfret, K.C., for appellant.

Geoffrion, K.C., and *Prud'homme*, K.C., for respondents.

IDINGTON, J.:—I am not entirely satisfied with the evidence of any authority empowering St. Denis to make the lease in question so far as respects the fractional part of the title not his own, and would prefer resting upon the *res judicata* invoked and relied upon in the opinion of my brother Mignault; and hence would prefer resting thereon in dismissing this appeal. My only difficulty in doing so is that it has not, by way of a plea, been made part of this record upon which we have to pass. I think it might well have been allowed to be pleaded by the Court of Appeal and thus rendered a foundation for the judgment appealed from. And our judgment dismissing the appeal may well proceed upon such possibility as within our jurisdiction, to pronounce the judgment the Court below should have pronounced.

I agree with the judgment of the majority that this appeal should be dismissed with costs.

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DUFF, J.:—Mr. Geoffrion has, I think, succeeded in establishing his contention that *res judicata* is, in substance, an answer to this appeal.

I assume, because it is a point of procedure upon which there was no question in the Court of King's Bench, that it was open to the respondent on the appeal to the King's Bench 31 Que. K.B. 256, to bring before that Court, in answer to the appeal, matters arising contemporaneously with or subsequent to the judgment appealed from, matters, that is to say, which, by reason of the time when they arose, could not form an element amongst those constituting the basis upon which the judgment of the trial Court rested. I assume, in other words, that the judgments upon which Mr. Geoffrion now based his averment of *res judicata* might properly have been brought before the Court of King's Bench for that purpose and might properly be considered by that Court in passing upon the appeal; that is a point of procedure upon which I accept without hesitation, the concurrent views of the Judges in the Court below.

That being so, the judgments invoked are in the language of art. 1241 C.C. conclusive as to all matters comprised within the "object of the judgment." Accordingly there are two questions upon which the appellants cannot be heard; the question of agency and the question of "pacte de préférence." As to the point raised respecting the identity of parties, that is to say, identity of quality—it seems clear that insofar as the respondent's action is based upon art. 1031 C.C. he seeks to enforce the rights of his debtors.

There is, I think, no substance in the contention that there is no identity of object because the judgments relied upon by the respondent were given in actions for a declaration of right while the action out of which the appeal arises claims executory relief. In substance the objects are identical and the form, I think, is, therefore, not material.

ANGLIN, J.:—I have had the advantage of reading the carefully prepared opinion of my brother Mignault. As the material facts of this case are very fully stated by him it is unnecessary that I should repeat them.

I agree with the views expressed by my learned brother on the issues of *res ad judicata,* which I think our broad powers of amendment allow us to entertain whatever may have been the jurisdiction of the Court of King's Bench in regard to the respondent's motion before that Court to dismiss the appeal to it on the ground of *chose jugée.* It is now *chose jugee* as against all the appellants that, when this action was begun,

Gervais and Samson had no rights either as lessees or under the "pacte de préférence" which they invoke—that their occupation of the Hôtel Riendeau was merely that of overholding tenants under an expired lease. It is also *chose jugée* as to the appellants, the Laferrières, though not as against Gervais and Samson, that the lease under which the respondent claims was then valid and effectual. There remain the questions whether, giving due effect to these premises, Gervais and Samson, who are themselves without any colour of right to retain possession, should be heard to challenge the validity of the respondent's title to recover possession, which, as against all the owners of the property, is no longer disputable.

That the respondent, if he is the holder of a valid lease, has the right to maintain this action exercising the rights of his lessors under art. 1031 C.C. is demonstrated in the opinion of my brother Mignault. Although the validity of this lease be not chose jugée as against the appellants, Gervais and Samson, if they are no longer in a position to challenge it, the respondent's status under art. 1031 C.C. is, I think, equally established.

The right, if it ever existed, to have the Gariepy lease declared invalid and set aside for want of authority in St. Denis to make it, belonged solely to the Laferrières. If they saw fit to ratify or acquiesce in that lease nobody else could attach it. As against them its validity is now conclusively established. It is, therefore, in the same position as if they had in fact so ratified it at the time the action was begun in which it became *chose jugée* that they were bound by it.

While, assuming for the moment that St. Denis lacked authority to execute the Gariepy lease on behalf of the Laferrières, that fact might have afforded a defence to Gervais and Samson so long as the Laferrières were in a position to take advantage of it, that, in my opinion, would not be the case in an action to recover possession begun by Gariepy against Gervais and Samson after the Laferrières had lost their right to contest the authority of St. Denis. Since it became binding upon them, the Gariepy lease is good as against everybody who had not theretofore acquired an interest in the property inconsistent with its enforcement. It is *res adjudicata* as against Gervais and Samson that they have no such interest. Therefore, an action brought now by Gariepy to recover possession from them should succeed. Is the Court bound (unless the evidence in the record before us affirmatively establishes the authority of St. Denis to bind the Laferrières) to refuse that relief in

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the present suit and put the respondent to the expense and delay of taking fresh proceedings to enforce his now undoubted right to obtain possession of the leased premises because the right of the Laferrières to contest that authority had not been actually, judicially negatived when this action was begun? I think not. Gariepy is now in a position to exercise the "right of action" of the Laferrières as well as of St. Denis (art. 1031 C. C.) There can be no question of their right, acting together, to eject Gervais and Samson. That is the consequence of their ownership of the property and the determination that Gervais and Samson have no right to continue in occupation either as lessees or under the "pacte de préférence," which is *chose jugée* as against them. Under these circumstances, giving due effect to the fact that the other actions were begun before this one and that the judgments in them were retroactive to the respective dates of the writs, I think Gervais and Samson should no longer be heard to question the plaintiff-respondent's status to exercise in this action the right of his lessors.

If it were clear that the finding of the trial Judge, affirmed by two of the Judges of the King's Bench, that the evidence in the present case sufficiently establishes the authority of St. Denis to bind the Laferrières, could not be supported, and if that question should be entered upon merely to deal with a matter of costs, it may be that the appellants, Gervais and Samson, would be entitled to some relief in regard to costs incurred before the judgment in the Superior Court by which St. Denis's authority was established as against the Laferrières. But I am not convinced that the finding of tacit mandate made by the trial Judge and affirmed by Martin and Flynn, JJ. in the Court of King's Bench was so clearly wrong that we should disturb it. Having regard to the jurisprudence of this Court, I would question the propriety of our entering upon such a question merely to adjudicate upon a matter of costs.

MIGNAULT, J.:—The conclusions which I think must be reached in this case will be more intelligible if I commence with a brief summary of the salient facts contained in the bulky record.

Mr. A. J. H. St. Denis, notary of Montreal, and the late Philippe Laferrière were in the year 1904 co-proprietors in equal and undivided shares of an immovable property situated on Jacques Cartier Square in Montreal and known by the name of Hotel Riendeau, and, by lease dated May 3rd, 1904, they had rented it for 10 years to a certain J. Arthur Tanguay.

During the course of this lease, Philippe Laferrière died leav-

ing a widow, since married a second time to Pierre d'Auteuil, advocate of La Malbaie, and 12 children of whom only three were of age at the time. St. Denis bought from several of the Laferrière heirs their shares in the Hotel Riendeau, so that when the lease was signed by him in favour of the respondent, he was owner of seven-eighths of the property, the other eighth belonging to three of the Laferrière heirs, two of whom were minors, but had not disposed of their shares.

On March 30, 1914, St. Denis, claiming to act both on his own behalf and as administrator of the interests of the heirs of the late Philippe Laferrière, had rented this property to the appellants, Gervais and Samson. The lease was for 6 years and would, therefore, have expired on April 30, 1920. In this lease it was provided that if the lessor decided to sell the hotel he would give the lessees a preference over any other purchaser.

In the month of February, 1920, St. Denis, who was administering the property, was dissatisfied with the lessees, Gervais and Samson, who owed arrears of rent and had been condemned for infractions of the license law, and he sought another tenant. It was in these circumstances that he conferred with the respondent Gariepy and on February 20, 1920, leased the Hotel Riendeau to him for 5 years, claiming to act as in the lease to Gervais & Samson, both personally and as authorized administrator of the succession of Philippe Laferrière. On the same day St. Denis made a promise of sale of the hotel in favour of the respondent for $60,000. This promise of sale was reciprocal. The respondent promised to buy, but could only ask for a deed of sale in 5 years' time, or after certain payments had been made.

This lease, and the conduct of the parties with respect to it, gave rise to three actions. It is evident that the tenants Gervais and Samson, whose lease expired on April 30, 1920, did not wish to give up possession of the hotel to another lessee. They argued that the lease given to the respondent was null because St. Denis signed it without the authorisation of those of the Laferrière heirs who were still interested in the property. To induce the latter to attack the respondent's lease, they guaranteed to them, on March 24, 1920, reimbursement for all costs and expenses and began by depositing a sum of $1,000 in the bank to cover disbursements. On April 8, 1920, they procured a lease and promise of sale of the property from André Laferrière, a law student acting as attorney for Paul Laferrière, of full age, and Louis Laferrière, tutor to Marthe and Madeline Laferrière, minors, on the same conditions as those

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contained in the respondent's lease and promise of sale, knowing quite well that the Laferrières retained only a minor interest in the property. On April 24, 1920, they took an action against St. Denis as defendant and against the respondent and the Laferrière heirs who still had an interest in the property as *mis-en-cause*, claiming, a lease and promise of sale similar to the lease and promise of sale obtained by the respondent, and asking for the cancellation of the respondent's lease and the radiation of its registration. On the same day, April 24, 1920, an action was commenced by the Laferrière heirs against the respondent and St. Denis to procure the cancellation of the lease and promise of sale obtained by the respondent. It is quite clear that this action would not have been taken without the guarantee given by Gervais and Samson to the Laferrières, so that it is difficult to believe that Gervais and Samson were not its instigators. In deed the Superior Court decided that they were. Finally, when the respondent sought to take possession of the property by virtue of his lease, Gervais and Samson, who had no right themselves to occupy it, opposed him, and on May 14, 1920, he was obliged to commence an action (which is the only one that has been taken to appeal) against St. Denis, the Laferrière heirs and Gervais and Samson, to obtain possession. Thanks to their contestation of this action — which is still pending, and which it must be hoped our judgment will put an end to—Gervais and Samson have retained possession of on immovable for 18 months to which they have no right. The delays of judicial proceedings were as profitable to them as they were unprofitable to the respondent.

Of these three actions, only one, the present appeal, went further than the Superior Court. The three actions were joined for trial, but were decided by three separate judgments. The action of Gervais and Samson against St. Denis, Gariepy and the heirs of Laferrière, and that of the Laferrière heirs against St. Denis and Gariepy were dismissed, and Gariepy's action against St. Denis, the Laferriéres and Gervais and Samson, was maintained. The appellants, Laferrière and Gervais and Samson, appealed from the three judgments to the Court of King's Bench, but, finding it impossible in the case of the first two actions, as we are told, to furnish the required security, they desisted from their inscription in appeal. There now remains only the third action, that in which Gariepy is the plaintiff, which has not been finally decided.

The first point which we must consider is whether the lease

granted by St. Denis to the respondent binds the Laferrière heirs who still have interests in the Hotel Riendeau.

In this connection, after a long trial, the trial Judge reached the following conclusions, which I quote from his judgment:—

"At the date of the execution of said lease and for many years prior thereto the defendant, St. Denis, was the administrator of said property, being himself sole owner of a portion of said immovable and the owner of seven eighths of the remainder of said property, the other one eighth belonging to certain of the heirs of the late Philippe Laferrière, and defendant was then and had been for many years the duly authorised agent of the said heirs and with their consent and on their behalf administered their interest in said property and the said heirs, by reason of their having allowed defendant, St. Denis, to manage and administer their interests in said property, gave reasonable cause for the belief that the said St. Denis was their agent in connection with said property, and the plaintiff, in this case, entered into said lease of 20th February, 1920, in good faith, believing that the said St. Denis was in fact the agent and representative of the said heirs of the estate of the said Philippe Laferrière."

The judgment of the Court of Appeal declares that there is no error in the Superior Court judgment and confirms it as regards the dispositif. Two of the Judges who formed the majority of the Court (Martin and Flynn, JJ.A.) specifically recognise the existence of a mandate, or, at least, a tacit mandate, by the Laferrières to St. Denis authorising the latter to lease the hotel to Gariepy. The third judge, Tellier, J. gave his opinion in favour of the respondent on the ground that the matter was *res judicata*.

Before this Court the respondent made a motion raising the question of *res judicata*. He claimed that there is now *res judicata* in his favour as regards the validity of his lease, which was affirmed, as he says, by the Superior Court without further appeal in the two actions commenced on April 24, 1920, which I have already referred to. Can the respondent raise this question here? I believe that he can. The appeal puts the whole matter in doubt and there will be no final judgment until this Court has pronounced its decision. The Code of Procedure of the Province of Quebec, art. 199, permits the filing of a supplementary plea, with the consent of the Judge, covering essential facts which happened since the action was taken. Furthermore, the powers of amendment possessed by this Court (rule of practice 54) gives us absolute discretion

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in this regard, and in the circumstances of the present case I would use that discretion and treat the respondent's motion as a supplementary plea.

It remains to be determined if this plea is well founded.

The doctrine of *res judicata* is based on a presumption *juris et de jure*, one might even say a rule of public order, that the conclusion reached by the Judge is true; *res judicata pro veritate habetur*. It is based not on the consent of one of the parties, as might be inferred from the fact that he did not appeal from the judgment rendered against him, but upon the unimpeachable truth of the terms of that judgment, which, when it became absolute, could no longer be questioned. And that presumption of truth has been admitted as a bar to any further action between the same parties regarding the same matter, and to make it impossible for the parties to obtain contradictory judgments.

In order to produce this result, the three identities, as they are called, must be present; the identity of object in the sense, says art. 1241 Civil Code, that the condemnation sought should be "for the same thing as in the action adjudged upon;" the identity of action, that is to say, to quote the same article, "when the demand is founded on the same cause"; and the identity of persons; namely, a demand "between the same parties acting in the same qualities."

Here, in the two actions which have been finally decided, the plaintiffs concluded for the cancellation of the lease granted to the respondent, alleging that St. Denis, in signing it, had acted without the authority of his co-proprietors, the Laferrière heirs. The judgment in the action of the Laferrières against St. Denis and Gariepy—Gervais and Samson were not parties to that case—decided that, when the Gariepy lease was signed, St. Denis was the administrator of the immovable in question and of the interests of the co-proprietors, the Laferrières, and the duly authorised agent of the latter. In the action of Gervais and Samson against St. Denis, in which the Laferrières and Gariepy were parties, the judgment does not pronounce upon the validity of the Gariepy lease, but merely annuls that which the Laferrières had given to Gervais and Samson and decides that the latter have no right to a lease and a promise of sale of the Hotel Riendeau. I, therefore, believe that there is identity of object here, having regard to the allegations and conclusions of these actions.

I would say the same as regards identity of action, for in all the actions the Gariepy lease was attacked on the ground that

it was signed by one of the co-proprietors without the consent of the others. And this lease was declared valid in the action taken by the Laferrières against St. Denis and Gariepy.

I find more difficulty regarding the identity of persons, for we only find all the parties who are before us in the action taken by Gervais and Samson against St. Denis as defendant and against Gariepy and the Laferrières as mis-en-cause, and it is only in the action taken by the Laferrières against St. Denis and Gariepy, in which Gervais and Samson were not parties, that the Superior Court formally decided that St. Denis was the duly authorised agent of the Laferrières in granting the Gariepy lease.

My conclusion, therefore, is that as between the Laferrières and the respondent Gariepy there is *res judicata* as to the validity of the lease which St. Denis granted to the latter. As regards Gervais and Samson, there is only *res judicata* as regards the nullity of their own lease granted by the Laferrières. This point is important, however, for it leads us to the conclusion that Gervais and Samson had no right to occupy the premises.

I dismiss as unfounded the argument advanced with great skill by Mr. Rinfret that Gariepy does not appear in this action in the same quality as in the two other actions, for beyond the fact that the respondent claims to exercise, by virtue of art. 1031 C.C., a right which St. Denis refuses or neglects to make good, that is, to expel Gervais and Samson, he, nevertheless, demands possession of the immovable on his own account as against St. Denis and Gervais and Samson.

If there is *res judicata* as regards all the owners of the Hotel Riendeau on the question of the validity of the Gariepy lease and as regards Gervais and Samson only with respect to the nullity of their own lease, must the latter be permitted—since this point is not res judicata in their opinion—to argue that the respondent has not a lease binding all the owners of the Hotel Riendeau?

I would say no. It is an elementary principle that one cannot allege an exception to the rights of another. The Superior Court judgment in the action of the Laferrières against Gariepy and St. Denis held that the respondent's lease is valid against all co-proprietors of the hotel, and thus determined this question of validity as regards all the parties who could raise it. To allow Gervais and Samson to renew the discussion now, when all the co-proprietors of the immovable are bound by the respondent's lease, would be not only to allow them to

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plead an exception to the rights of others, but also to plead an exception to a right which the Laferrières cannot now exercise. I am, therefore, of opinion that the validity of the respondent's lease can no longer be disputed.

This question being ruled out of the controversy, it remains to be decided if Gariepy could, given that he had a valid lease of the Hotel Riendeau, and that the appellants, Gervais and Samson, had no right to occupy it in spite of his lease, take this action and ask to be put in possession as against St. Denis and to have Gervais and Samson expelled.

All the authors agree that the lessee can as against his lessor obtain possession of the thing leased by force, if necessary. See Beaudry-Lacantinerie and Wahl, Louage, vol. 1, No. 308, where a great number of authors are cited in support of this theory, which I consider absolutely correct.

Now, since Gervais and Samson were in unlawful possession of the property, could Gariepy have them expelled?

With a view to doing so, Gariepy invokes art. 1031 of the Civil Code, which allows a creditor to exercise the rights and actions of his debtor with the exception of those which are exclusively attached to the person, when to his prejudice he refuses and neglects to do so.

It is argued that this article only applied to purely pecuniary interests, that it is a right analogous to that dealt with by art. 1032 as regards the *Action Paulienne*, and that the object of art. 1031 is to bring back into the debtor's estate a sum of money or an article of value which was fraudulently alienated.

If we only consider the very general terms of art. 1031, it would include all the "rights and actions" of a debtor with the sole exception of those which are exclusively attached to the person. And it suffices to say *lex non distinguit*.

But the commentators on art. 1166 of the Code Napoleon, which corresponds to our art. 1031, argue that these terms are too broad. They say that if the creditor is to be allowed to exercise the rights of his debtor, he must confine his attention to rights comprised in the debtor's estate and they add, as appears quite clear, that art. 1166 is at variance with all the provisions of law relative both to the status of persons and to family and relations, even though the exercise of a right of this nature should tend indirectly to increase the debtor's estate or to prevent its diminution (Baudry Lacantinerie and Barde, Obligations, vol. 1, No. 590).

They make a further distinction between a pecuniary interest

and a purely moral interest, the former being included in the rule of 1166, the latter in the exception. As for mixed rights, that is to say, rights based partly on a moral and partly on a pecuniary interest, if the pecuniary interest dominates, the creditor may exercise the resultant action (same authors No. 591).

I admit that the objection that the scope of art. 1031 would be too broad does not impress me very much, for though we may very well criticise the law, we must nevertheless apply it when its meaning is not doubtful, however broad its text may be, since it is the expression of the sovereign will of the legislature. Besides, even if we adopt the criterion that I have borrowed from the French doctrine, St. Denis' right of action to expel Gervais and Samson is certainly not founded on a moral interest and, therefore, does not come within the category of rights which are exclusively attached to the debtor's person. The pecuniary interest of St. Denis to prevent this action is however apparent, for otherwise he would have to pay heavy damages to the respondent, and in exercising it he avoided a very considerable diminution in his estate by reason of the indemnity he would have to pay to the lessee, to whom he promised the peaceable enjoyment of the property.

What seems to me decisive, besides the formal terms of art. 1031, is the fact that in France it is held that the lessor can make over to his lessee his right of action to expel any lessee who refuses to give up possession of the thing leased when his lease has expired (Dalloz, 1895, vol. 1, 367; 1894, 253; 1876 vol. 1, 27). If this right of action can be transferred, if the lessor can assign it to his lessee, and if the simple stipulation that the lessee shall obtain possession at his own risk and peril, involves such an assignment as was held in the judgment reported by Dalloz, 1876, vol. 1, 27, it would be difficult to argue that such a right does not form part of the debtor's estate. And it would not appear very logical to hold that the lessee can, as against the lessor, obtain possession of the thing leased by force, and at the same time refuse him, in spite of the general terms of art. 1031, the right to exercise the lessor's action in expulsion, when the latter refuses or neglects to exercise it himself.

I am, therefore, of opinion that the right which the respondent seeks to exercise is included in the reasonable interpretation of art. 1031, and I add that the text of this article is sufficient, without further argument, to justify the judgment appealed from.

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At the trial the counsel for the appellants, Gervais and Samson, urged that the latter in default of any other lease had a lease by tacit renewal. It is sufficient to answer that Gervais and Samson in their written plea rely solely on the lease which the Laferrières gave them and demand a lease from St. Denis. Besides it cannot be said that they have retained possession of the hotel with the lessors' consent when St. Denis served them with notice to leave on May 1, 1920. This argument, raised for the first time before this Court, must, therefore, be dismissed.

I would dismiss the appeal against all the appellants with costs.

BERNIER, J. (ad hoc.):—I concur in the opinion expressed by Mignault, J. in his notes in this case and I see nothing that might be added thereto.

The appeal should be dismissed with costs.

Appeal dismissed.

ADELKIND v. ADELKIND.

Saskatchewan King's Bench, Maclean, J. May 1, 1922.

DIVORCE AND SEPARATION (§VA—46)—ALIMONY—INDEPENDENT SUIT FOR —POWER OF COURT TO GRANT INTERIM—SASKATCHEWAN RULE 595—KING'S BENCH ACT, R.S.S. 1920, CH. 39, SEC. 22.

Where a wife is maintaining or defending an action for dissolution of marriage or judicial separation or some other action specified in Rule 595 of the Saskatchewan Rules of Court, interim alimony will be granted. In such cases the granting of interim alimony to the wife is only incidental to the main action and the jurisdiction of the Court to grant alimony *pendente lite* is not dependent on the success or failure of the wife in maintaining or defending the principal action, but where the wife's claim is for alimony independent of any other relief, it is against the wording and intention of the King's Bench Act, R.S.S. 1920, ch. 39, sec. 22, to allow her any portion of the relief asked for until she has established the conditions entitling her to that relief, and that can only be done at the trial.

[*Dorey* v. *Dorey* (1912), 9 D.L.R. 150, 46 N.B.R. 469, followed. See Annoation on Divorce, 62 D.L.R. 1.]

APPEAL from an order made by a local Master whereby he allowed the plaintiff $10 a week interim alimony and the sum of $200 for interim disbursements and counsel fee. Reversed.

H. S. Lemon, for plaintiff.

H. D. Pickett, for defendant.

MACLEAN, J.:—The plaintiff's action is for alimony, not as an incident to any other relief, but as a substantive claim. She alleges in her statement of claim acts of cruelty by her husband to

such an extent that she was forced to leave him, and live elsewhere. If her allegations are true, she would be entitled to live apart from her husband, and would be entitled to alimony, and if her allegations are not shewn to be true, she would not be so entitled. Her allegations of cruelty are denied in the defence. The defendant has filed an affidavit of his own denying cruelty. There is also filed on behalf of the defendant an affidavit of the defendant's business partner, who boarded with the plaintiff and her husband, and who was in a position to know the conduct of the defendant towards his wife, the plaintiff, and he denies the cruelty alleged. The plaintiff has filed an affidavit of her own in which she does not attempt to verify the allegations of cruelty in her statement of claim, nor does she in her affidavit make any reference to cruelty. She says that she lived with her husband for twelve years until November 15, 1921, when she was forced to leave him; but she does not say why she was forced to leave him. The only inference I can draw from the material before me is that the plaintiff's allegations of cruelty are not well founded, and that she is not entitled to live apart from her husband. If it were necessary to make a finding of fact at this stage, it would be to that effect, in which case the plaintiff would not be entitled to alimony or interim alimony.

I wish to rest this decision, however, not on finding of fact, but on another ground. The plaintiff's action is a statutory one, based on sec. 22 of the King's Bench Act, R.S.S. 1920, ch. 39. The statute makes no provision for an order for interim alimony. The right of a Court to grant relief in an action under this statute depends on the proof of her allegations in the claim, and only upon satisfactory proof of such allegations can relief be granted. If it were otherwise the wife could bring an action under the statute alleging circumstances entitling her to relief, and on an application such as this be awarded an allowance without the merits being considered, and without any means of ascertaining her true position, and then on trial utterly fail in her action, leaving her husband without redress to recover money paid to her and to which she was not entitled. Where the wife is maintaining or defending an action for dissolution of marriage or judicial separation, or some other action specified in rule 595 of the Rules of Court, interim alimony will be granted, and the Rules of Court so provide. In such cases the granting of interim alimony to the wife is merely furnishing her with the means to subsist and to enable her to litigate the question of her husband's conduct for the purpose

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and with the object of obtaining or resisting the divorce, or obtaining or resisting separation or whatever the action may be. The alimony in such cases is only incidental to the main action and the jurisdiction of the Court to grant alimony *pendente lite* is not dependent on the success or failure of the wife in maintaining or defending the principal action. In the case before me, the claim is for alimony, independent of any other relief. It would be wholly against the wording and intention of the statute in question to allow the plaintiff a portion of the relief asked for until she had established that the conditions entitling her to that relief obtained, and that can only be done at trial. It seems to me that the law is correctly stated in *Sunderland* v. *Sunderland*, [1914] 6 W.W.R. 40. That decision is based on a judgment of the Court *en banc* in Nova Scotia, *Dorey* v. *Dorey* (1912), 9 D.L.R. 150, 46 N.S.R. 469. The statutory provision in that Province, as far as this action is concerned, is identical with ours.

The appeal in respect to interim alimony is allowed.

The local Master also awarded the plaintiff $200 to pay interim disbursements and counsel fee. No material has been filed to shew what disbursements she did, or is likely to, incur, nor what she has been required or will be required before trial to pay for counsel fees. Assuming that the plaintiff's allegations of cruelty are true, the matter is one which might have been dealt with summarily under the Deserted Wives' Maintenance Act, R.S.S. 1920, ch. 154. The plaintiff, in applying for interim disbursements and counsel fee should at least shew substantial reason for not proceeding under that Act. I do not think any case has been made out for the allowance of any sum for disbursement or counsel fee, and the appeal is allowed in respect to this item also.

Costs will be costs in the cause, to the defendant in any event.

Judgment accordingly.

REX v. CHAPMAN.

Halifax Police Court, W. J. O'Hearn, K.C., Additional P.M. for City of Halifax, N.S. June 19, 1922.

CONSTITUTIONAL LAW (§IA—39) — PROVINCIAL STATUTE — DOMINION STATUTE DEALING WITH SAME OFFENCE—IMPLIED REPEAL OF PROVINCIAL ACT—MOTOR VEHICLE ACT, N.S. STATS. 1918, CH. 12, SEC. 28—CAN. STATS. 1921, CH. 25, SEC. 3, AMENDING CRIMINAL CODE.

Section 28 of the Motor Vehicle Act, N.S. Stats. 1918, ch. 12, which enacts that "no person who is drunk or intoxicated shall operate a motor vehicle" is not in force in Nova Scotia, having been impliedly repealed by sec. 3 of ch. 25 Can. Stats. 1921, amending sec. 285 of the Criminal Code, and an information charging an offence under this section will be quashed.

INFORMATION charging accused with breach of the N.S. Motor Vehicle Act, N.S. Stats., 1918, ch. 12, sec. 28. Information quashed; prisoner discharged.

R. H. Murray, K.C., for the Crown.

Hector D. Kempt, for the accused.

O'HEARN, Additional P.M.:—In this case, the defendant was charged before me with having driven an automobile on one of the streets of the City of Halifax on May 13, 1922, while intoxicated, the Information charging him in express terms with a breach of sec. 28 of the Motor Vehicle Act, ch. 12, 1918. Before the accused pleaded, Mr. Kempt, who appeared for him, moved to quash the information and summons on the ground that it disclosed an offence under a statute which was *ultra vires* the Parliament of Nova Scotia, and secondly, if not, that the section was impliedly repealed by an amendment of the Criminal Code passed last year, being sec. 3 of ch. 25, 1921, (Can.) amending sec. 285 of the Code.

Evidence was taken for the prosecution and defence, and after hearing Mr. Murray, K.C., for the prosecutor, I reserved judgment and come to the following conclusions. (1). It is doubtful whether sec. 28 of the N.S. Motor Vehicle Act is *intra vires* the Provincial Parliament, because it does not deal with a matter of merely local or private nature, but it was obviously passed and designed to secure to the public at large safety from the injuries which might result from the actions of intoxicated motorists, and applying the test of the late Sir Wallace Graham in *Reg.* v. *Halifax Electric Tram Co.* case (1897), 30 N. S.R. 469, where he expresses himself as follows: "Laws of this nature designed for the protection of public order, safety or morals belong to the subject of public wrongs rather than to that of civil rights." One would be inclined to think that this legislative activity was more along the lines of criminal law than anything else. However, I do not decide the point. (2.) The next question is, whether assuming the provincial legislation to competent, it is not now impliedly repealed, or at least its efficacy suspended since the Federal Parliament has invaded the field and passed sec. 3, ch. 25 previously referred to. The language of the amendment is identical with that of the provincial enactment. The penalties are different, the pro-

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vincial being more drastic than the federal. I think it can not be disputed that the Dominion has power to pass such a statute as the amendment referred to, and this being so there is a conflict of authority between it and the Provincial Parliament in respect to the same subject matter, and the rule adopted by the Privy Council, *Att'y-Gen'l of Ontario* v. *Att'y-Gen'l of the Dominion*, [1896] A.C. 348, 65 L.J. (P.C.) 26, must be my guide. In this case their Lordships say, at p. 366, "it has been frequently recognized by this Board, and may be now regarded as settled law that according to the scheme of the British North America Act, the enactments of the Parliament of Canada in so far as these are within his competency must override provincial legislation."

At p. 367 in the case just cited their Lordships are quoted as follows: "The question must next be considered whether the provincial enactments of s. 18 to any and if so to what extent comes into collision with the provisions of the Canadian Act of 1866. In so far as they do provincial must yield to Dominion legislation and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it."

At any rate, even if the legislative field is open to both Parliaments, it has been decided by the Privy Council in *La Compagnie Hydraulique and Continental Heat and Light Co.* [1909] A.C. 194, 78 L.J. (P.C.) 60, that the Dominion prevails.

A decision of our Supreme Court in *Reg.* v. *Gibson* (1896), 29 N.S.R. 88, would seem at first blush to be binding on me; but on investigation I find that that case was decided by our Court on May 9, 1896, which the decision in *Att'y-Gen'l for Ontario* v. *Att'y-Gen'l for the Dominion, supra,* was decided on May 18, 1896. Our Supreme Court did not have the advantage of the decision of the Privy Council in the Ontario case and, if it had had, I do not think that the *Gibson* case would have been decided in the way it was. My attention has also been called to the case of *R.* v. *Solomon* (1918), 58 D.L.R. 235, 34 Can. Cr. Cas. 171, but at any rate the late Longley, J. in his decision in that case does not enlighten us as to the reasons which prompted his conclusions. To hold that each of the provisions involved in this discussion are in force would be to create the anomaly of permitting one defendant to be convicted under one statute where he would be liable to an extreme penalty of six months imprisonment, while another defendant under the other statute dealing with precisely the same subject matter would be liable to only a penalty of 30

days. This state of affairs would leave the individual at the mercy of the prosecutor. The selection of the particular statute upon which the prosecutor would proceed would largely be determined by his feelings toward the defendant.

I, therefore, think that sec. 28 of the Motor Vehicle Act is at present time not in force in the Province of Nova Scotia, and that the motion to quash the information and summons should have succeeded, and I, therefore, quash the same and the defendant is entitled to be discharged in respect to the same.

Information quashed.

B.C. PERMANENT LOAN CO. v. CANADIAN NORTHERN R. CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay JJ.A. May 29, 1922.

APPEAL (§IIIF—98)—EXPROPRIATION—RAILWAY ACT, 1919 CAN. STATS., CH. 68 — TIME — EXTENSION — JURISDICTION OF COURT—SASK. RULE 11 (*b*).

Where the statutory period under the Railway Act (Can. stats., 1919, ch. 68), for giving notice of appeal has expired, the Court has no jurisdiction under Rule 11 (b) of the Saskatchewan Rules of Court to extend the time.

APPLICATION for an order to extend the time for giving notice of appeal from an award of an arbitrator in expropriation proceedings under the Railway Act, 1919 Can. Stats. ch. 68. Application dismissed.

C. M. Johnston, for claimants.

Colin E. Baker, for respondents.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—This is an application on behalf of Miss Nellie Lucy for an order to extend the time for giving notice of appeal from the award of an arbitrator in expropriation proceedings under the Railway Act, 1919, (Can.) ch. 68.

Section 232 of that Act provides that notice of appeal from an award may be given:—"Within one month after receiving from the arbitrator or from the opposite party a written notice of the making of the award"; and that "upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior court to the said superior court."

The statutory period of 1 month has already elapsed, but this application is made under Rule 11 (b) of the Rules of Court respecting appeals from the District Court. That rule provides that "the Court or a judge thereof shall have power

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to extend the time for appealing . . . on such terms as the Court or judge shall think just."

This rule does not, in my opinion, apply. The right of appeal being given by statute must be exercised strictly in accordance with the terms of that statute. There is no provision in the Railway Act for extending the time for appeal consequently on the termination of the time fixed by the statute, if no notice of appeal has been given, the right of appeal is gone, and there is no appeal to which the practice and proceedings of the Court can apply.

I would therefore dismiss this application with costs.

Application dismissed.

Re STEWART.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. May 10, 1922.

ELECTIONS (§III—80)—MUNICIPAL OFFICE — NOMINATION — MUNICIPAL ACT, R.S.M. 1913, CH. 133, SEC. 79—JURISDICTION OF COUNTY JUDGE TO DETERMINE VALIDITY—NECESSITY OF PROCEEDING BY WAY OF QUO WARRANTO.

The Manitoba Municipal Act, R.S.M. 1913, ch. 133 ,sec. 79, requires all nominations for municipal office shall be made in writing by a proposer and seconder who shall be duly qualified electors of the municipality; a candidate for election whose proposer is not an elector of the municipality, and whose name is not on the voters' list, is not properly before the electors, and cannot be legally elected. The validity of such election proceedings may be determined by a County Judge on petition. It is not necessary to take action by way of *quo warranto*.

[*Tod* v. *Mager* (1912), 3 D.L.R. 350 distinguished.]

APPEAL from a County Court judgment granting a petition to declare an election to a municipal office void. Affirmed.

E. K. Williams, for appellant.

C. W. Jackson, for respondent.

PERDUE, C.J.M., and CAMERON, J.A. concurred in dismissing the appeal.

FULLERTON, J.A.:—At an election for the office of reeve of the municipality of Rockwood held on December 20, 1921, George Wallace and Cyrenus Beckstead were candidates. Wallace was declared elected and, thereupon, a petition under sec. 192 of the Municipal Act, R.S.M., 1913, ch. 133, was presented to His Honour George Paterson, Judge of the County Court of the Judicial Division of Stonewall, praying that it might be determined that said Wallace was not duly elected and that the election was void.

Two grounds are taken in the petition. (a) Because at the time of the said election he was not the owner of freehold es-

tate within the said municipality rated in his own name on the last revised assessment roll of the said municipality of at least the value of $200. (b) Because the said respondent was not nominated by a proposer and seconder who were duly qualified electors of the municipality.

The County Court Judge granted the prayer of the petition and declared the election void on the first ground set out above.

In my view, the second ground taken in the petition is so clearly fatal to the validity of the election that it is unnecessary to consider the first.

Section 79 of the Municipal Act requires that "all nominations shall be made in writing by a proposer and seconder, who shall be duly qualified electors of the municipality." It is admitted that the proposer in the nomination of Wallace was not an elector of the municipality. It follows that Wallace never having been nominated was never a candidate and was never elected.

Counsel for Wallace contends that sec. 192 (c) does not cover the case of a defective nomination and maintains that the only way in which the election can be quashed on such a ground is by proceedings in the nature of *quo warranto*. Section 192 provides that:—

A municipal election may be questioned by an election petition on the ground,—

(a) that the election was wholly voided by corrupt practices or offences against section 250 or section 252, committed at the election; or

(b) that the person whose election is questioned was at the time of the election disqualified;

(c) that he was not duly elected by a majority of lawful votes."

The contention is that the meaning of the words "duly elected" in the last clause are qualified or restricted by the words "by a majority of lawful votes." The provisions of the Municipal Act which enable the validity of an election to be determined on petition by a Judge of the County Court doubtless were intended to take the place of the expensive and somewhat technical proceedings by *quo warranto* and to create a simple, expeditious and less expensive remedy. It appears to me that after dealing with two specific grounds of invalidity in (a) and (b), the Legislature passed (c) as a general comprehensive provision covering every other case in which the validity of an election might be questioned. Sections 150 to 160 of the

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Municipal Act make ample provision for a recount of votes, but if 192 (c) be given the restricted meaning contended for, it would be providing for the same thing being done on petition.

Section 192 is taken from sec. 87 of the English Municipal Corporations Act, 1882 (Imp.), ch. 50. Sub-sections (b) and (c) of sec. 192 of our Act are word for word the same as subsecs. (c) and (d) of sec. 87 of the English Act.

Boyce v. *White* (1905), 92 L.T. 240, 53 W.R. 430, was a case of a petition under sec. 87 of the English Act. The facts there were that the petitioner and the respondent were the only candidates for the office of councillor. Both were nominated, but the respondent at the time of his nomination was absent from the United Kingdom and no written consent by him to such nomination given one month before such nomination was produced at the time of his nomination as required by the statute. The only section of the English statute which authorised a petition in the case was 87 (d) "That he was not duly elected by a majority of votes." The Court held the election void, but no one thought of raising the objection that the petition did not lie.

In my opinion sec. 192 (c) is wide enough to cover the present case.

I would dismiss the appeal with costs.

DENNISTOUN, J.A.:—This is an appeal from the judgment of His Honour Judge Paterson in the County Court of Stonewall on a petition under the Municipal Act, R.S.M. 1913, ch. 133, to set aside the election of the appellant, George Wallace, as reeve of the municipality of Rockwood.

Candidates were nominated and a poll held, the appellant being declared elected by a majority of about 30 votes.

The petition alleges two grounds of disqualification against the appellant:

(a) Because at the time of the election he was not the owner of freehold real estate within the said municipality rated in his own name on the last revised assessment roll of the said municipality of at least the value of $200.

(b) Because the said respondent was not duly nominated by a proposer and seconder who were duly qualified electors of the municipality.

The County Court Judge has given judgment voiding the election on the ground that the respondent, who is now the appellant, did not possess the requisite property qualification; but he did not deal with the second ground of attack.

It appears from the evidence that the appellant is the owner

of a substantial equitable interest in freehold land for which his name appears on the assessment roll. He holds and occupies the land under an agreement for sale and may well be considered to be the "real owner" referred to in sec. 23 (2) of the municipal Assessment Act, R.S.M., 1913, ch. 134, as there distinguished from the registered owner.

To hold that a candidate, for the office of reeve cannot qualify unless he hold the legal estate in freehold lands and that if he have hypothecated or mortgaged that legal estate, or have acquired only an equitable interest in freehold lands, he is not qualified as "owner" is in my view erroneous, but as it is not necessary to decide the point at present, I will leave it open for future consideration when it arises.

On the second ground, there is no difficulty in declaring that the appellant was not duly elected.

He was proposed, when nominations were called for, by a person who was not on the voters' list and not entitled to vote.

By the interpretation clauses of the Municipal Act, sec. 2 (e) "the expression 'election' includes nomination."

Section 79 contains the following:—

"All nominations shall be made in writing by a proposer and a seconder, who shall be duly qualified electors of the municipality."

It was admitted on the argument that the proposer of Wallace was not a duly qualified elector, but it was urged that such an objection could not be taken by way of election petition, but only by way of *quo warranto* proceedings as indicated in *Tod* v. *Mager* (1912), 3 D.L.R. 350, 22 Man. L.R. 136.

That case is clearly distinguishable from the case at Bar as a perusal of it will disclose.

There, the returning officer acted in an unlawful manner and attempted to return one candidate as elected after he was *functus officio* as presiding officer at the nominations and before a poll had been taken.

In this case, the election has been carried to a conclusion by taking the votes of the electors and declaring the result as indicated by a count of the ballots.

The section of the Municipal Act which sets forth the questions which may be raised by election petition is 192, which limits them to three—(a) corrupt practices; (b) want of qualification; (c) "that he was not duly elected by a majority of lawful votes."

In my view the appellant was not duly elected for he was

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never duly nominated and nomination is an integral factor in valid election.

I adopt the view of Cameron, J., in *Tod* v. *Mager*, at p. 357, "thus the words 'by a majority of lawful votes' are merely explanatory and are in no way restrictive of the words 'duly elected.'" That being so an election petition may properly be launched, and the election avoided on the ground that the candidate was never properly before the electors for choice and could not receive any lawful votes whatsoever.

On this ground, I would affirm the judgment appealed from and dismiss this appeal with costs.

Appeal dismissed.

CANADIAN LUMBER YARDS Ltd. v. PAULSON, et al.

Saskatchewan King's Bench, Taylor, J. May 23, 1922.

MECHANICS LIENS (§VIII—60)—SASKATCHEWAN PRACTICE—RULE 124—REPEAL OF FORMER R. 129—EX PARTE APPLICATION—DISCRETION OF DISTRICT COURT JUDGE—SCOPE OF RULE—MECHANICS' LIEN ACT, R.S.S. 1920, CH. 206.

An application under R. 124 may be made *ex parte* for judgment, in an action to realise on a mechanic's lien, where all parties having an interest in the land have been made parties defendant, and have been served with the writ of summons and statement of claim, and no appearance has been entered for any defendant, and while the rule confers on the Judge a discretion to refuse to accept the admission by default as sufficient, it is only in exceptional cases that he should refuse to accept the admissions by default of pleading or to proceed *ex parte* under the rule.

APPEAL from the refusal of a District Court Judge to proceed *ex parte* on an application for judgment under R. 124 (Sask. Rules) in an action to realise on a mechanic's lien. Reversed.

H. J. Schull for plaintiff; no one appearing for defendants.

TAYLOR, J.:—This is an appeal from the decision of a Judge of the District Court. The action was commenced in the District Court on December 23, 1921, and is to realise on a mechanics' lien alleged in the statement of claim to be charged on the lands therein referred to. The owner of the land and all persons alleged to have any interest therein were made parties defendant and were served with the writ of summons and statement of claim. No appearance was entered for any defendant.

Application was then made *ex parte* under R. 124 for judgment, to the Judge of the District Court. Rule 124 provides:—

"In any other action upon default of appearance by one or more defendants, the plaintiff may apply *ex parte* to the Court

or a judge for an order for judgment and the Court or judge shall order such judgment to be entered as the plaintiff appears entitled to, with or without evidence of the truth of the statement of claim (which may be given viva voce or by affidavit) in the discretion of the Court or Judge."

An action to realise upon a mechanics' lien is not one of the class of actions referred to in O. VIII., Rr. 114 to 123, and it follows, therefore, that it is an "other action" referred to in R. 124.

Prior to the recent revision of the rules, there was a special rule applying to actions in respect to mortgages or charges on land where a plaintiff claimed foreclosure, sale or redemption, but this rule, 129, was dropped in the revision and no provision made for obtaining default judgment in an action to realise upon a mechanics' lien, other than under the above quoted R. 124.

Counsel for the plaintiff stated that he applied to the Judge of the Judicial District *ex parte*, for judgment under R. 124, filing at the time the necessary records from the Registry Office to shew that all proper parties were before the Court, and writ of summons with affidavits proving service, and affidavit of non-appearance, (see R. 115).

Counsel states that the practice prevailing in the Province in such actions as this while R. 129 of the former rules was in force was to apply upon notice, supporting the application not only by proof of the recorded title but by an affidavit shewing the state of the account and proving the allegations in the statement of claim; that, thereupon, in some of the District Courts a direction was given referring the matter to the Clerk of the Court and requiring the plaintiff and all other lien claimants to prove their liens before him and to certify the result thereof. Judgment was then entered upon the certificate of the Clerk of the Court. Thus what was intended to be a simple and inexpensive procedure became an involved and costly one. Now, notwithstanding that former R. 129 is no longer in force and, what seems to me, the imperative language in sec. 34 of the Mechanics' Lien Act, R.S.S. 1920, ch. 206, that "upon the trial of any action to realise under a lien the Judge (meaning the Judge of the District Court) shall decide all questions which arise therein or which are necessary to be tried in order to completely dispose of the action, and to adjust the rights and liabilities of all parties concerned, and *shall take all accounts, make all enquiries* and give all directions and *do all other things necessary to try and otherwise finally dispose of the action*,"—the former prac-

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tice, it is stated, is still continued; notice of motion required, and affidavits required to substantiate the allegations in the statement of claim, as well as the recorded title, and the matter referred to the Clerk of the Court. In this particular action following the former practice, the Judge of the District Court refused to proceed without notice of motion being filed for service upon the non-appearing defendants; and from his refusal to so proceed this appeal has been launched.

In my opinion, whatever justification there may have been under former R. 129 for that involved procedure it has now disappeared, and in an action to realise upon a mechanics' lien, upon default of appearance, the plaintiff may apply *ex parte* to the Judge of the District Court for an order for judgment. Evidence will necessarily have to be adduced to shew to the Judge of the District Court that all persons interested in the estate upon which it is alleged the charge exists are before the Court. Whether any further proof of the truth of the allegations in the statement of claim should be given is under the rule in the discretion of the Court or Judge. In the exercise of that discretion, the Judge should, in my opinion, bear prominently in mind that if a defendant desires to contest a plaintiff's claim or defend an action he must enter an appearance. Rule 98. Where a defendant does not appear, or, having appeared, omits to file a defence, he is deemed to have admitted all the allegations in the statement of claim. In England, under analogous practice, as it is stated in the Annual Practice, 1921, p. 441:—

"At a meeting of the judges a majority decided that the Court cannot receive any evidence in cases hereunder, but must give judgment according to the pleadings alone. (*Smith* v. *Buchan*, 58 L.T. 710; *Young* v. *Thomas* (1892), 2 Ch. 135, C.A.) The costs of any affidavits in support of the claim will be disallowed. (*Jones* v. *Harris* (1887) 55 L.T. 884). This, however, does not apply where the defendant is an infant or person of unsound mind."

And the cost of an affidavit verifying the allegations in the statement of claim where no defence was filed in an action by a mortgagee for accounts, foreclosure and sale was refused by the Vice Chancellor in *Perpetual Invest. Building Society* v. *Gillespie*, (1882), W.N. 4.

The admission by failure to appear and defend is no less cogent under our practice than in England. But R. 124 confers on the Judge a discretion to refuse to accept the admission by default as sufficient. There may be something in the nature of the action or proceedings or relating to the plead-

ing itself which would justify the Court in requiring proof of the allegations in the statement of claim to the satisfaction of the Judge, notwithstanding the failure of the defendant to appear and defend himself. In enforcing mechanics' liens, the policy of the statute to enforce the lien expeditiously at a minimum of expense should dominate the proceedings, and, in my opinion, only in exceptional cases of which no comprehensive definition could be attempted, should the Judge refuse to accept the admission by default of pleading. I express this view on a matter which is by the rule left to the discretion of the District Court Judge because lately there have been brought to my notice bills of costs in undefended mechanics' liens action in the District Court running to an unwarranted amount, out of all proportion to the amount involved, and the policy of the statute to which I have referred has been completely overlooked.

I allow the appeal, and hold that the District Court Judge erred in deciding that he should not proceed *ex parte* under R. 124, and refer the matter back to him to deal with on the merits. Counsel did not ask for costs.

Appeal allowed.

BELANGER v. CANADIAN CONSOLIDATED RUBBER Co.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

MASTER AND SERVANT (§V—348)—INEXCUSABLE FAULT—MEANING—DETERMINATION ACCORDING TO CIRCUMSTANCES OF EACH CASE — FAILURE TO PLACE SAFETY GUARDS ON SLOWLY REVOLVING ROLLERS OF CALENDAR MACHINE—NO EVIDENCE OF SUCH DEVICE IN EXISTENCE—INJURY CAUSED BY GROSS CARELESSNESS OF WORKMAN.

There is no exact definition of "inexcusable fault" within the meaning of Art. 7325 R.S.Q. 1909, and the question must be determined in each case as it arises and according to the particular circumstances. The Court held that failure to place a safety guard over slowly revolving rollers on a Calendar machine, and putting an inexperienced workman to work feeding cotton between such rollers without previous instruction, was not "inexcusable fault," there being no evidence that any safetv device was known to the employer, or was in existence, and the work being such that any workman should be able to do it without getting his hands caught in the rollers unless guilty of gross carelessness or neglect.

[See Annotation on Master and Servant, 7 D.L.R. 5.]

APPEAL by plaintiff from the judgment of the Quebec Court of Appeal reversing the judgment of the trial judge in an action brought under the Workmen's Compensation Act. R.S.Q. 1909 arts. 7321 *et seq.* Affirmed.

Rodier, K.C., for appellant.

Casgrain, K.C., for respondent.

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BELANGER v. CANADIAN CONSOLIDATED RUBBER CO.

Davies, C.J.

DAVIES, C. J.:—This action is one brought under the Workmen's Compensation Act of Quebec, R.S.Q. 1909, arts. 7321 *et seq.* The plaintiff claimed not only the ordinary maximum compensation, which indeed was admitted by the defendant company, but alleging "inexcusable fault" on the part of the company claimed $25,000 damages for the injuries sustained by him. These injuries consisted of the loss of both his hands. They were caught and crushed in the machine which he was working, necessitating their amputation. For 3 months previous to the accident he had been working at the back of the same machine receiving the cotton as it passed through, but on the occasion of the accident he had been put to work at the front of the machine feeding the cotton into it between two rollers. The machine in question is called a Calendar and is electrically driven. It consists of two rollers of about 24" (inches) in diameter which turn reversely on each other, and cotton in sheets or layers for the purpose of being pressed to an even surface is passed between them. They revolve at a maximum rate of about 4 revolutions per minute.

The "inexcusable fault" is alleged to have consisted mainly in the fact that the machine was defective in not having been provided with proper safety and protection devices for the workmen employed in running it. Other faults were alleged, but the absence of additional protective devices to those already provided was the main and chief one relied on and the only one, in my opinion, under which the plaintiff could hope possibly to succeed.

Their Lordships of the Judicial Committee in the appeal of *Montreal Tramways Co.* v. *Savignac*, 51 D.L.R. 88, [1920] A.C. 408, 26 Rev. Leg. 278, 89 L.J. (P.C.) 49, stated as their opinion that "it was unnecessary and probably undesirable to attempt a definition of inexcusable fault" leaving the question to be determined in each case as it arose.

If the plaintiff had succeeded in shewing that the work in which he was engaged when injured was dangerous work, and that there were other known protective devices for workmen engaged on Calendar machines of which the company could and should have known, and had neglected to provide, the question before us would have assumed an entirely different aspect. But the evidence seems clear that there were no other protective devices known or in use which the company could have or should have provided. As a fact, the company had an engineer who was continually working looking up new devices for safety apparatus. None so far had been found applicable to this machine. The manufacturers who supplied these Cal-

endar machines did not provide any such additional safety device, other than the apparatus of wire for stopping the machine within 4 seconds. No evidence was given that any safety guard was in use anywhere on machines of the sort in question here. The government inspectors whose duty it is to see that employers are warned to guard dangerous machines when practicable had never given the defendants any notice to provide any additional safety guard on this machine, and I cannot find any evidence establishing that there was anywhere a practicable additional guard in existence or use which should have been known to the defendant company and installed by them.

The work in which the plaintiff was engaged was not specially dangerous work. On the contrary, I have had great difficulty in determining how the plaintiff could have had his hands drawn in between the rollers unless by gross carelessness or neglect on his own part.

He was a workman who had been working on and about the machine which caused the accident for a period of about 3 months, although he had not, previously to the day of the accident, been employed in actually feeding the cotton between the slowly revolving rollers.

Under all the circumstances, I cannot find "inexcusable fault" on the part of the company in not having provided an additional guard for the protection of the workmen feeding the cotton between the rollers.

I would therefore dismiss this appeal.

IDINGTON, J. (dissenting):—The appellant having served as a shipping clerk for some years was given employment in one of the respondent's manufacturing shops by way of taking away from the rear of a Calendar machine pressed cotton which had passed through between the rollers of said machine.

The said machine consists of 2 rollers which are placed one above the other and each 25 inches in diameter at the rate of 4 revolutions a minute.

It was stated in argument and not denied and seems borne out by the evidence that a party engaged, as appellant was, when working at the rear of the machine, could neither see nor learn from where he stood when so engaged how the work was done of feeding the cotton into the front of the machine.

Hence the 3 months he was so engaged were of no service in way of instructing him how to feed the machine and the dangers to be avoided in doing so.

He was only 25 years of age when he was suddenly, on re-

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Idington, J.

turning to work at one P.M. of April 3, 1919, directed by the foreman over him to proceed to the front part of the machine and feed the cotton into it, and he obeyed the order so given.

About half an hour after he had begun doing so his right hand was drawn in between the said rollers and in the effort to extricate it he slipped on the damp floor and so fell that his left hand also was drawn in between the said rollers.

His cries of distress arrested the attention of others and some one of them stopped the machine. As a result of the accident both his hands had to be amputated and thus he is crippled for life.

He was given no instruction of any kind, or warning or help, as any young inexperienced beginner ought to have had, as is abundantly testified by more than one witness.

There was no guard or protective appliance of any kind in front of the machine. Such devices are in use in many ways and of different kinds when the Calendar machine, or its principle is applied to doing other work than the particular kind done in respondent's factory. One witness pretends he has seen the like machine at work elsewhere when serving same purposes as in the respondent's shop and that without any guard other than the appliance used to stop the machine, which only proves how reckless some manufacturers can be.

Electric current was the motive force used to operate the machine in question. It could be cut off by pulling a wire at the side of the machine, about 3 feet or more from where the appellant was standing when engaged at feeding the cotton into the machine.

I am unable to understand people who refer to this as a safeguard or means of protecting the person engaged in feeding the machine. It obviously is not, and when once such a person's hands, or single hand, is drawn in he cannot even stop the machine.

There had been a similar accident about 8 months previously in the use of this machine, whereby the man engaged as appellant was, on the occasion in question herein, had lost part of his hand. Yet no means were actually taken by the respondent to apply any safeguard.

Apparently it is cheaper for people like respondent to pay the occasional small toll extracted from them by the terms of the Workmen's Compensation Act than to invent or apply any invention known to safeguard employees.

The appellant sued respondent for damages resulting to him and the trial Judge held that there was inexcusable fault

on the part of respondent leading to this accident and thus the $2,500 limit of the Workmen's Compensation Act was no bar to his recovery as if suing at common law. He assessed the damages on that basis at $17,500.00. I unhesitatingly agree with his finding that there was inexcusable fault.

I am not so clear as to the findings of inexcusable fault having the necessary legal consequences of damages being recoverable to the full extent that would have been allowable had the Workmen's Compensation Act never been passed.

I was tempted to think in the course of the argument here that there might be implied in the following:—"The Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it, if it is due to the inexcusable fault of the employer," quotation from the Workmen's Compensation Act, the graduating of the scale of damages proportionately to the gravity of inexcusableness thus brought in question.

However, though taking several objections in their factum to the measure of damages, counsel for the respondent do not present any such view, or indeed any view we have given heed to here for many years past.

Even when the amount exceeded that, we might, if trying the case or in sitting in appeal below have allowed; yet mistakes of that kind should not be entertained here and thereby encourage needless litigation.

Agreeing, as I do, with Tellier, J's view of the case, I think that possibly respondent missed a good chance when it failed to act on his suggested reduction.

The measuring of damages such as appellant has to endure by what a young man of twenty-five is earning to my mind is quite fallacious.

And before parting with this case I cannot forbear quoting a sentence taken from the respondent's own regulations, which reads as follows:—

"Employees must receive full instructions from their foremen before operating any machine, and must thoroughly understand such instructions."

If the observance of this injunction had been properly and consistently acted upon I can hardly imagine respondent's foreman, who placed appellant where he met such disaster as in question herein, would have dared to venture on such a fool-hardy step as ordering an ignorant and inexperienced youth to feed such a machine as in question; even if it had been protected or guarded as it was not.

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Anglin, J.

I would allow this appeal with costs throughout and restore the trial Judge's judgment.

ANGLIN, J.:—The material facts sufficiently appear in the judgments delivered in the Court of Appeal and in the opinion of my brother Mignault, in whose conclusions as well as his appreciation of the presentation of the appellant's case by Mr. Rodier I fully concur.

Ordinary liability for the maximum compensation under the Workmen's Compensation Act having been admitted by the defendants, it is only necessary to consider the appellant's claim for augmentation of that amount under art. 7325 (2) based on his allegation that the accident, in which he was very seriously injured, was due to "inexcusable fault" of his employer.

In *Montreal Tramways Co.* v. *Savignac*, 51 D.L.R. 88, their Lordships of the Judicial Committee said:—"It is unnecessary and probably undesirable to attempt a definition of inexcusable fault." I shall not essay the formulation of a definition that is probably impracticable.

The only alleged fault on the part of the defendants which could with any degree of reasonableness be pressed as inexcusable was the omission to provide an efficient guard to prevent the hands of the operator being drawn into the Calendar machine at which the plaintiff was injured. The practicability of such a guard is perhaps sufficiently established by the evidence. But no guard was furnished by the manufacturer of the machine and there is no satisfactory evidence that such a guard was in use anywhere on machines intended for the purpose for which the machine in question was used. The government inspectors, whose duty it is to see that employers are warned to guard dangerous machines when practicable, had not notified the defendants to guard this machine. The evidence falls short of establishing that there was a practicable guard for it which was, or should have been, known to the defendants.

An accident, said to have been somewhat similar to that now under consideration, had happened in the defendant's factory some time before and the evidence warrants the inference that it must have been known to them. But the circumstances of this accident are not stated and it does not appear that it was due to a cause which the defendant could or should have provided against. For aught that is shewn, this former accident may have been wholly due to carelessness on the part of the workman. Indeed, in the present case it is difficult to conceive how the plaintiff's hand could have been drawn between

the rollers unless he was at least momentarily inattentive to what was an obvious danger. So obvious was it that it seems to me to be idle to attempt to found a charge of inexcusable fault on the placing of an adult of ordinary intelligence at the work to which the plaintiff was assigned, however limited his experience.

Having regard to all the circumstances, the plaintiff, in my opinion, has failed to establish a case of inexcusable fault on the part of the defendants.

BRODEUR, J.:—I concur with MIGNAULT, J.

MIGNAULT, J.:—The learned counsel for the appellant—who has pleaded his case very skilfully and with a frankness which does him credit—pointed out that the honourable Judges who have been seized with this case were equally divided in their opinions. This difference of opinion is perhaps explained by the fact that there has been fault on the part of the respondent undoubtedly, but that is not the point to be decided. It is a question of determining if that fault can be termed inexcusable in the sense of art. 7325 R.S.Q. 1909, and it can be held to be quasi-delictual in the terms of arts. 1053 and 1054 of the Civil Code and still fall short of the inexcusable fault referred to in art. 7325.

The phrase "inexcusable fault" is derived from the French Workmen's Compensation Act. In a sense, every fault is inexcusable from the very fact that it is a fault. But the Legislature means here a fault of exceptional gravity, something even more than grievous fault. It has even been said that it it is analogous to criminal intention (Dalloz, Rèpertoire Pratique, verbo Accidents de Travail, No. 226), and in the course of discussion of the bill in the French Senate this phrase was suggested as expressing the idea of the Legislature that the fault in question must be of such gravity as to be inexcusable. In fact, inexcusable fault is generally taken to mean a fault more nearly resembling fraud than grievous fault (Beaudry-Lacantinerie, Louage No. 2270). It is well to remember the origin of this expression in seeking to determine if the employer or the workman has been guilty of inexcusable fault in any particular case.

When that has been said, we can dispense with defining such fault. Indeed the Privy Council refused to attempt that definition in the case of *Montreal Tramways Co.* v. *Savignac*, 51 D.L.R. 88, and the circumstances vary so much in the specific instances which come before the Courts that no general rule can be conceived which would suit the circumstances of each individual case. And indeed the need of a definition will

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be less apparent if we can indicate certain elements which must be present in each case where it is alleged that the workman or the employer has been guilty of inexcusable fault. I accept the elements suggested by M. Sachet (Accidents du Travail, 6th ed., vol. 2, No. 1439) and which the honourable Judge of first instance refers to in his judgment: 1, the will to do or not to do; 2, knowledge of the danger which might result from the act or omission; 3, absence of any justifying or explanatory cause.

And I would add that exaggerating the fault of the employer—exaggeration of the workman's fault is hardly probable, and perhaps rightly so—might easily result in making the increasing of the indemnity due to the workman the rule instead of the exception, as it ought to be under any Workmen's Compensation Act. For this Act is based on the idea of professional risk (Fuzier-Herman, Répertoire, verbo Responsabilité Civile Nos. 1459 and following), a risk which the employer and the workman must assume to the extent prescribed by the Legislature, and it is only when that risk has been increased by an inexcusable fault attributable to one or other of them that it is expedient to diminish or increase the normal indemnity resulting from the valuation of this professional risk under ordinary conditions.

The case which we are called upon to decide gives me an opportunty to apply the principles I have just explained. Bélanger, who had been long in the respondent's employ in the shipping department, had only been employed 3 months on the machines. Up to the day of the accident he had been receiving behind a machine called a "Calendar," the cotton to be coated with a layer of rubber, which passed between large rollers or cylinders turning in opposite directions at a maximum speed of 4 revolutions per minute. On that day, about 1 o'clock in the afternoon, the employee who operated this machine, the man who guided the strip of cloth 4 ft. wide between the rollers, was suddenly incapacitated and the foreman put Bélanger in his place. That was unfortunate for the latter for, half an hour later, he got first his right hand and then the left caught between the rollers, with the result that both hands had to be amputated. He now sues under the Workmen's Compensation Act and asks that the ordinary indemnity be increased by reason of inexcusable fault on the part of his employer. The respondent paid the appellant $2,500, the maximum normal indemnity, and an additional $99.45 for costs of suit. The only question that remains to be decided is whether or not there has been inexcusable fault en-

titling the appellant to a greater indemnity. The Court of first instance, presided over by Surveyer, J., decided in favour of the workman, holding that there was ground for assessing the damages as though the matter were governed by the common law, and gave Bélanger an increased penalty of $15,000. On appeal to the Court of King's Bench Martin and Greenshields, JJ., decided that there had not been inexcusable fault on the part of the employer, the third judge, Tellier, J., being of a contrary opinion; but Tellier, J. expressed the opinion that the indemnity should nevertheless be fixed according to the rules of the Workmen's Compensation Act, and would only have granted the plaintiff an increase of $12,926.84. There is, therefore, this subsidiary question to decide, should I reach the conclusion that this is a case of inexcusable fault on the part of the employer.

I have said that the respondent was undoubtedly to blame, but this fault must not be allowed to influence the decision to the extent of finding inexcusable fault which is, I repeat, the exception under the Workmen's Compensation Act. Thus, the employer was at fault in setting an inexperienced man to work at this machine without having someone watch him to see, at least during his first efforts, that he did not expose himself to danger. The employer was also at fault if the floor where Bèlanger stood was slippery, as he alleges, but other witnesses deny this; or if the cloth which he had to feed between the rollers had folds in it which might catch his hand and draw it between the rollers. But it by no means follows that this fault was inexcusable, and only confusion can follow if we do not set aside the common law theory of fault in this case, for we are confronted with an Act that creates an exception to that theory.

In order to determine if there was inexcusable fault in the present case, we must remember what I have called Mr. Sachet's elements. Was there in all this any will to commit an act or omission, any knowledge of the danger that might result from such act or omission, and was there an absence of any justifying or explanatory cause? I do not think so, at least as regards the faults I have instanced. There was imprudence, especially in allowing an inexperienced workman to operate the machine, and while that imprudence constitutes a fault, it is not inexcusable within the meaning of the Workmen's Compensation Act.

The appellant abandoned at the hearing before us the fault which he imputed to the employer in not having provided a means of stopping the machine in case of accident. Such a

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means was provided in the shape of a handle within reach of the workman and would have stopped the rollers in 4 seconds.

But the appellant insists that the respondent was guilty of inexcusable fault because he did not equip the machine with a protecting apparatus to prevent the workman's hands from getting caught, especially in view of the fact that a similar accident had happened to a workman some months previously thus warning the employer of the danger of these unprotected rollers.

I am quite ready to admit that, if the appellant could say that these rollers were protected in other factories, or that they could be easily protected without hindering the work, and if the employer had known of the previous accident or could clearly appreciate the danger of allowing these machines to remain unprotected, the elements of which Mr. Sachet speaks would be present, and the fault would, therefore, be inexcusable.

But I am convinced, after carefully reading all the evidence, that it is not customary to provide such machines with protective apparatus. Other machines such as those used in laundries are protected, but not the rollers with which we have to deal. And could they be easily protected without hindering the work? It does not appear to me that this has been demonstrated. Some of the witnesses say that the company's engineers studied the question but failed to devise such a guard as the appellant speaks of. And we must beware of statements such as those made by Mr. Gagnon, Deputy Minister of Labor at Quebec. For if Mr. Gagnon could make such a guard, why did he not order it to be installed before the accident, as he had power to do? We find in the present case, as in similar cases, people who have a wealth of suggestions to make after the event. The great pity is that they did not make these suggestions in time to be of use; and supposing that they could themselves suggest an easy and practicable remedy, there is nothing to show that such remedy was known to the respondent before the accident.

There remains to be considered the accident which happened to one Hannah several months before Bèlanger's mishap. I have read Hannah's deposition attentively. I do not find it clear as to just how his accident happened. He may very well have been imprudent or inattentive. Hannah was passing cloth and a layer of rubber between the rollers. Bèlanger was using cloth only. Hannah complains of the means provided for stopping the machine, and argues that there should have been a man beside him for the sole pur-

pose of stopping the machine in case of accident. The appellant no longer complains of the provision made for stopping the rollers. Nor does Hannah mention the need for any other protective apparatus. In short, even supposing that Hannah's accident and its cause had been known to the respondent's officers, which has not been proved, it would also be necessary to prove that, as a result of that accident, the respondent became aware of the possibility of danger and that it might eliminate such danger by taking precautions which it did not take. The record does not warrant the conclusion that the rollers were a source of danger to an attentive man.

I find, then, that there was a fault committed in the case before us which, if it were governed by the common law, would justify the full and complete application of arts. 1053 and 1054 of the Civil Code. But I cannot think that the fault was inexcusable according to the terms of the Workmen's Compensation Act. And as it is a question of an exception provided for by that Act in the evaluation of the indemnity to which the workman is entitled, I would have to be convinced that we had to do with such an exception before feeling justified in granting the increased indemnity claimed by the appellant.

I shall not cite any previous decisions, for those which have been quoted have to do with particular cases, and each case had its own peculiar circumstances. The appellant's case had been very skilfully presented, but I am of opinion that his contentions are not well founded.

I would dismiss the appeal with costs.

Appeal dismissed.

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Saskatchewan King's Bench, Bigelow, J. May 29, 1922.

DIVORCE AND SEPARATION (§IIIE—38)—ACTION FOR DIVORCE BY HUSBAND —ADULTERY OF WIFE—HUSBAND ALSO GUILTY OF ADULTERY.

The Court will not grant a divorce to a husband on the ground of his wife's adultery when the evidence shews that the husband himself has been guilty of the same offence.

[See Annotation on Divorce, 62 D.L.R. 1, referred to in the judgment.]

ACTION by a husband for a divorce. The case was undefended by the wife and came on for trial before Maclean, J. Adultery on the part of the wife was established and a decree *nisi* was granted on December 12, 1921. On February 21, 1922, the Attorney-General obtained leave to intervene.

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Bigelow, J.

The Attorney-General opposes plaintiff's right of action on the grounds:—(a) That the plaintiff committed adultery with one Donka Balchuk at various times during the year 1911. (b) That the plaintiff by his conduct conduced to the adultery of the defendant in that he turned the defendant out of his house, leaving her to her own resources to make her living and support her child, and refused to provide a home, protection or necessaries of life for the defendant for a period of about 14 years.

E. L. McLaren, for plaintiff.

P. M. Anderson, for Attorney-General.

BIGELOW, J.:—Plaintiff and defendant were married in 1905. They lived together for about 6 months at the house of the plaintiff's father and mother. They quarrelled considerably, and I find that plaintiff told defendant to go away and not come back any more.

There is a conflict of evidence as to whether plaintiff drove his wife out of the house, or whether she deserted him. The evidence of the defendant and her brother is that plaintiff drove her out of his house. The plaintiff and his brother-in-law John Jastrensky say that she deserted the plaintiff.

I cannot place any reliance on the evidence of the plaintiff. The plaintiff swore at the trial before Maclean, J. that he had not been living with any other woman. At the trial before me, it was proved beyond any doubt that about 10 years ago Donka Balchuk went to his house as house keeper and slept with him and had sexual intercourse with him. She left him because he told her he could not marry her and she would have to work for nothing.

Nor can I place any reliance on the evidence of the plaintiff's brother-in-law John Jastrensky. At the trial before Maclean, J. when, I suppose, it was considered necessary to prove marriage between plaintiff and defendant—that witness swore as follows:—

"Q. I understand you were present at the time they were married? A. Yes. Q. You saw them, I believe, get married? A. Yes, I saw them."

At the trial before me, on cross-examination by counsel for the Attorney-General, that witness admitted that he was not present at the wedding at all. So these two witnesses, the plaintiff and John Jastrensky give me the impression of being ready to swear to whatever was necessary.

It may be that the defendant and her brother are just as untruthful, but the evidence they gave is against the interests

of the defendant, who, I believe, is just as anxious as the plaintiff to be divorced.

It is perhaps not surprising that after 15 years more definite and conclusive evidence cannot be obtained to show who was to blame for the separation.

I find that the plaintiff drove the defendant away from his home without reasonable excuse; that he never properly supported her, and that he never contributed anything to her support or the support of their child after they separated. This is sufficient ground for refusing a divorce. *Keslering* v. *Keslering* (1921), 61 D.L.R. 44, 14 S.L.R. 367, where it was held by our Court of Appeal that such conduct on the part of the husband conduced to the infidelity of the wife, and was sufficient reason for dismissing the husband's action. Several authorities were referred to support Lamont, J. who concludes at p. 48:—

"These authorities shew that the petitioner by throwing his wife aside, and by his wilful neglect of her, and his refusal to continue to act the part of the husband to her, forfeited his right in the discretion of the Court to a divorce, on the ground of her subsequent infidelity.

See also *Jeffreys* v. *Jeffreys* (1864), 33 L.J. (P.) 84, where a petition for dissolution of marriage by reason of the adultery of the wife was dismissed on the ground that the petitioner before the adultery had wilfully separated himself from the respondent without reasonable excuse.

See also *Groves* v. *Groves* (1859), 28 L.J. (P.) 108, where the Court refused to dissolve the marriage on the ground that plaintiff had been guilty of wilful neglect which had conduced to the adultery.

Another reason why the plaintiff cannot succeed is because he himself has been guilty of adultery. Section 31 of 1857 ch. 85 (Imp.) provides:—

"That the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during marriage been guilty of adultery." etc.

In *Barnes* v. *Barnes* (1868), 38 L.J. (P.) 10, a petition of the husband against the wife was refused on account of the petitioner's adultery. The Judge Ordinary at p. 11, says:—

"The cases are few in which the Court would be justified in visiting with the penalty of adultery a guilty wife whose husband has also been guilty of adultery."

In *Wyke* v. *Wyke*, [1904] P. 149, 73 L.J. (P.) 38, a decree *nisi* was rescinded, and the petition of the wife was dismissed on the ground of her adultery. Bucknill, J., at p. 151, says:—

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"In *McCord* v. *McCord* (1875), L.R. 3 P. & M. 237, Sir James Hannen thus stated the position: 'The instances in which the Court has pronounced a decree for dissolution of marriage, notwithstanding the adultery of the petitioner, are very rare. I am only aware of two cases, that of *Joseph* v. *Joseph* (1865), 34 L.J. (P. & M.) 96, where the petitioner had committed what may be called innocent adultery by marrying again in the mistaken belief that his wife was dead, and the case of *Coleman* v. *Coleman* (1866), L.R. 1 (P. & M.) 81, where it appeared to the Court that the petitioner had been compelled by her husband to prostitute herself.' At page 241 of the report the President pointed out that whilst he would not say that under no circumstances would the Court grant relief to a guilty petitioner when he or she had been fully forgiven for an act of adultery, yet the Court would never act on a loose and unfettered discretion, as Lord Penzance had expressed it in *Morgan* v. *Morgan* (1869), L.R. 1 (P. & M.) 644, but always on some definite principle which would serve as a future guide."

Reference is made in the *Wyke* case to the cases of *Symons* v. *Symons*, [1897] P. 167, 66 L.J. (P.) 81, and *Constantinidi* v. *Constantinidi*, [1903] P. 246, 72 L.J. (P.) 82, 52 W.R. 190. I quote from Bucknill, J. at p. 152:—

"I refer to *Symons* v. *Symons*, [1897] P. 167, decided by the President (Sir F. H. Jeune). There, the wife was petitioner, and she obtained a decree *nisi* on the grounds of her husband's adultery and desertion. The Queen's Proctor intervened, alleging her adultery. It is not necessary to refer to the facts of that case; but I quote the language of Jeune, P., [1897] P. at p. 174. He said: 'I have no doubt that the husband's adultery and cruelty before his desertion and his prolonged desertion were the *main causes* of the wife's adultery, and he was guilty therefore of misconduct conducing to her adultery. So far as I know, this has not yet been decided to be one of the circumstances on which the discretion to allow a divorce may be exercised.' And he said, referring to the facts of that case, ((1897) P. at p .177): 'On principle, there appear to me to be strong reasons for holding that such wilful neglect or misconduct by a husband should constitute matters, possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce shall be granted against him.'

In that case the decree nisi was made absolute. That decision was followed by *Constantinidi* v. *Constantinidi and Lance* [1903] P. 246. There, the husband was petitioner, and a decree nisi

was granted. The President pointed out, during the arguments, that in *Symons* v *Symons* he found as a fact that the husband (the respondent) was actually responsible for and drove his wife to commit adultery; by which I understand that his misconduct conduced directly to her adultery. In his judgment, the President said that s. 31 conferred 'a discretion on the Divorce Court, without imposing specifically any limitations or any direction with regard to its exercises.'

Whilst accepting that dictum as binding, it seems to me that it goes farther than any previous authority on the subject. Each case, must, of course, be determined according to its facts; no feeling of sympathy, as, for instance, on behalf of an ill-treated woman, as in this case, can be entertained; nor may I listen to the appeal that she made to me, that if she can obtain her divorce to-day, another man is ready to marry her and take her child. The only question is this: Was her misconduct caused directly by her husband's cruelty and adultery? It is not enough that I could find, using the language of Lord Penzance in *Morgan* v *Morgan and Porter* L.R. 1 P & M 644 that her conduct was 'more or less pardonable or capable of excuse.' Perhaps it was to some extent, and, in a sense, her husband's misconduct conduced to that which she did three years after she left him, because, but for his cruelty to her and his adultery with her sister, she would probably be living with him now. Her leaving him was directly caused by his conduct; but, in my opinion, her subsequent adultery was not."

See also *Clarke* v. *Clarke* (1865), 34 L.J. (P.) 94; also *Evans* v. *Evans*, [1906] P. 125. Sir Gorell Barnes, President at p. 130 (P.) says, quoting from the judgment of the Court of Appeal in *Constantinidi* v. *Constantinidi*, [1905] P. 253, 74 L.J. (P.) 122, 54 W.R. 121:

"In the course of his judgment Vaughan Williams, L.J. expressed himself as follows [1905] P. at p. 270: 'I will now deal with the principles which, in my opinion, ought to govern the exercise of the statutory power of varying marriage settlements in cases of divorce. First of all, it is to be remembered that in the exercise of the powers conferred by the Divorce Acts the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer respectively *inter se*, but also to the interests of society and public morality, which generally require that the relief and benefits the Courts have the power of giving under those Acts shall scarcely be given to those who themselves have been guilty of matrimonial infidelity.'"

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And at p. 133:—

"Separation between husband and wife may arise through many causes, some of which may be put down to the conduct of one of the parties—for example, wilful separation, drunkenness, immorality, violence of temper, etc; and others not—for example, separation for reasons of health, business or professional purposes, insanity, etc. But is it to be said that in every case the husband or wife, as the case may be, is to be at liberty to commit adultery, and that if he or she is in a position to prove adultery against the other party to the marriage his or her own adultery is to be excused if the separation is due to the conduct of the other? This idea was repudiated by Sir Creswell Creswell in *Latour* v. *Latour and Weston* (1861), 2 Sw. & Tr. 524, 529, and by Lord St. Helier in *Synge* v. *Synge* [1900] P. 180, 207.

It may be that this is harsh law. In some cases it seems to me that it would be better in the interests of society, as well as the parties, to exercise the discretion by granting the divorce, such as *Wyke* v. *Wyke* where the petitioner, the wife, stated that if she could obtain a divorce another man was ready to marry her and take her child. In a very complete article on the Law of Divorce in Canada by C. S. McKee, reported in 62 D.L.R. 1. the author points out at pp. 40,—41: "In Scotland, the petitioner's guilt was no bar, and it is doubtful if the guilt of both is not a greater reason for sundering the tie than the guilt of one. Lord Daysart in his evidence before the British Royal Commission stated that he often felt that in intervening as King's Proctor to have the applications refused on the ground of the petitioner's adultery, he was doing more harm than good. On the other side, that the applicant must come with clean hands is an old principle of British justice, and one which acts as a check on immorality."

But I am not here to change the law, and must interpret it in accordance with the decisions of the English Act and our own decisions. After a careful perusal of the authorities, I am convinced that where the petitioner is guilty of the same offence as the respondent, it must be very rarely that the Court would be disposed to exercise its discretion in favour of the petitioner.

In my opinion this is not such a case. The petitioner's adultery prevents him from obtaining a divorce.

The decree *nisi* is set aside, and the action is dismissed. Costs to be paid by the plaintiff to the Attorney-General.

Action dismissed.

ZEIDMAN & LAMARRE v. AMERICAN FURNITURE Co. & LAVERY (Bailiff).

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Quebec Superior Court in Bankruptcy, Panneton, J. April 21, 1922.

BANKRUPTCY (§II—15)—JUDGMENT BY CREDITOR—ASSIGNMENT UNDER ACT BY DEBTOR—SEIZURE AND SALE OF DEBTOR'S GOODS UNDER EXECUTION—BANKRUPTCY ACT AS AMENDED BY 1920 GEO. V., CH. 34, SEC. 31—FRAUDULENT PREFERENCE—RETURN OF PROCEEDS OF SALE TO TRUSTEE.

Where a creditor has obtained judgment against a debtor, who subsequently makes an assignment, under the Bankruptcy Act, within the time mentioned in sec. 31 of the Act as amended by 1920 Geo. V., ch. 34, and after the assignment the creditors take an execution under which the goods are sold by the sheriff, and the proceeds of sale paid over to the creditors. Such judicial sale and payment of the proceeds constitutes a preferential payment and is null and void under sec. 31 of the Act.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION by authorized trustee under the Bankruptcy Act to recover the proceeds of the sale of certain goods sold under an execution.

J. W. Michaud, for trustee.

J. N. Decary, for respondent.

PANNETON, J.:—On November 29 last Philip Aranoff and Morris Merson, doing business together under the name and style of American Furniture Co. took an action against S. Zeidman to recover $75, the balance of the purchase price of a gramophone. Judgment was rendered on December 6 in this action condemning the defendant to pay the said sum of $75 with interest and costs.

On December 13, the defendant made an assignment of his property in the hands of the trustee, Vincent Lamarre. On January 9, last, the plaintiffs in the above mentioned action took an execution against the said Zeidman by virtue of which the above mentioned gramophone was seized along with other effects. On January 11 the trustee gave notice of Zeidman's assignment to J. N. Decarie, attorney for plaintiffs in the said action. On January 21 the goods seized were sold for $120.

Whilst these proceedings were being taken after the assignment, the said Zeidman proposed a composition to his creditors which was accepted by them and approved by the Court. The said Zeidman and the said trustee, Vincent Lamarre, made a petition to order the bailiff who had made the above mentioned seizure and sold the said goods seized, to return to them the proceeds of the sale. This petition was served on the respondents of January 27 and was presented to the Court on January 28 last. The goods seized had been sold on January 21, and as there was no opposition to the seizure, the bailiff paid

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the proceeds of sale to the attorney for the plaintiffs, the American Furniture Co.

The petition alleges the composition and all the above mentioned facts relating to the assignment. This petition was contested by the respondents who alleged amongst other things that the plaintiffs had sold the goods seized because they had no knowledge of the composition that Zeidman had no right of property in the above mentioned gramophone and that the other articles were household effects and, particularly, that the petition was too late.

The composition was not carried out because the endorsers offered refused to go surety. There is nothing to shew that the goods seized were not subject to seizure and the presumption is that they were. There is no ground for applying the principle of art. 13, sub-sec. 14, for the goods were already in the hands of the trustee by virtue of the previous assignment. No demand of abandonment was made because the composition was not carried out. Article 31, sub-sec. 2 as amended by 10-11 Geo. V., ch. 34, applies to the present case, the judicial sale and payment of the proceeds to the plaintiffs constitutes a preferential payment and is null.

Considering that the petitioners are entitled to have paid over to the trustees, V. Lamarre, the sum of $120, the proceeds of the sale, less $45 being the amount of costs in the matter, leaving a balance of $75 owing to the said trustee.

The Court orders the said P. Aranoff and Morris Merson to pay $75 to the petitioner, V. Lamarre, the whole with costs against the said P. Aranoff and Morris Merson amounting to $25 for the costs of the petitioners' attorney besides disbursements.

Judgment accordingly.

Re ESTATE OF W. H. CLARK.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Hyndman, Clarke and Walsh, JJ. May 9, 1922.

DESCENT AND DISTRIBUTION (§IE—24)—MARRIED WOMEN'S RELIEF ACT—ALTA. STATS. 1910, 2ND SESS., CH. 18—SCHEME OF ACT—ORDER FOR PAYMENT OF AMOUNT CERTAIN—SHRINKAGE IN VALUE OF ASSETS OF ESTATE—EXCLUSION OF OTHERS INTERESTED—ORDER MADE FOR PAYMENT OF WIDOW'S SHARE UNDER THE ACT.

The scheme of the Married Women's Relief Act (Alta. Stats. 1910, 2nd sess., ch. 18) is to place a widow who has been unfairly dealt with in as good a position as if her husband had died intestate, but where the assets of the estate are of a fluctuating and speculative character and an order has been made which was intended to give her no more than that, but has become by events which have since happened through no fault of anyone, an instru-

ment under which the entire net estate may become hers to the exclusion of the others interested, such order will be set aside, and her share limited to the amount she is entitled to under the Act, such amount not to be based upon the estimated value of the estate as sworn for probate, but a sum actually worked out and realised in the due course of administration.

[*McBratney* v. *McBratney* (1919), 50 D.L.R. 132, 59 Can. S.C.R. 550, applied.]

APPEAL by leave of the Appellate Division, by a brother and legatee under the will of the deceased, from an order made on July 7, 1914, granting relief to the widow under the Married Womens' Relief Act.

F. C. Jamieson, K.C., for appellant.

H. H. Parlee, K.C., for widow. *N. R. Lindsay*, for executor.

The judgment of the Court was delivered by

WALSH, J.A.:—We granted leave to appeal, in the face of the strong objection of counsel for the widow, notwithstanding that more than 7 years had elapsed since the making of the order, because no notice of the application for it had been given to the appellant or apparently to any other of the specific legatees whose legacies aggregate $20,000, because notice of the making of the order only came to the appellant shortly before the leave to appeal was applied for and because the order threatens to largely, if not entirely, consume the assets of the estate remaining after payment of debts and costs of administration and thus deprive the appellant and the other unpaid legatees of their legacies, either wholly or in part.

The will gave the widow all of the household furniture and other household effects and an annuity of $2,000 so long as she should remain unmarried. The order appealed from gives her in lieu of the annuity of $2,000 (and so allowing her to retain the furniture), 125 shares in the capital stock of W. H. Clark & Co. Limited, and an annuity of $5,000 during the remainder of her life. There is nothing in the material before us to shew the value of the furniture unless it is the furniture mentioned in the widow's affidavit filed on her original application and which she valued at $2,000. The par value of the shares awarded her is $100 and that appears to be their present intrinsic value, though 7 years ago they were thought to be worth much more. The appellant does not object to relief being given the widow. What he objects to is the quantum of it under this order.

On the application for probate the gross value of the estate was sworn at $282,605.03. The Provincial Treasury Department revised this valuation and increased it to $597,492.37. There is nothing before us to shew how this was done. The bald

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statement is made that it was done. Presumably, however, it was under the provisions of the Succession Duties Act. The executor did not concur in this increase. On the contrary its manager says that the value sworn to by him on the application was a fair one. There is nothing before us to justify an acceptance of this revised valuation.

There has been a great shrinkage in the value of the assets since July, 1914. The executor now values at $141,474 the same assets which it then valued at $282,605.03, a difference due to depreciation in the value of shares held by the estate in the capital stock of various companies and of the real estate owned by the testator.

The only liabilities of the estate in 1914 were two of a contingent character aggregating $110,000, based upon guarantees given by the testator. They are still on foot for the same amount. The only other present liability is for succession duty. Basing it apparently upon the increased value given to the assets on the re-valuation above referred to it amounts with interest to $36,850.83.

The legacies to the appellant and the other unpaid specific legatees amount with interest to $20,749. Under the will they were to be paid in priority to the annuity to the widow. The cost of an annuity of $5,000 to the widow in 1914 would have been $75,500. She has been paid in all $2,850 in respect of the annuity given to her by the order appealed from. Though Mr. Parlee objected strongly to the present condition of the estate being taken into consideration on this appeal, we allowed affidavits to be read proving the above facts and they are uncontradicted.

If the widow's application was being made now it is obvious that it would be beyond our power to give to her the quantum of relief allowed her under this order. Since *McBratney* v. *McBratney* (1919), 50 D.L.R. 132, 59 Can. S.C.R. 550, it is settled that our discretion under the Act in favour of a widow is restricted in extent to the value of the share which she would have taken in the estate under an intestacy, in this case one-third of the net estate. If there was nothing to be deducted from the undisputed present value of the assets as developed in the course of an apparently unobjectionable administration, namely $141,474, it is, of course, quite apparent that at the outside only one-third of this sum, namely $47,158 would be available for the widow and that would fall short by $28,342 of the amount required to buy her the annuity of $5,000 given to her by the order. When the amount of the di-

rect and indirect liabilities which must be provided for out of these assets is taken into account and the value of the 125 shares which she gets under the order in addition to the annuity and of the furniture which she retains under the will is considered, the excess of the relief granted her over that permissible upon the present state of affairs is, of course, considerably increased. Even on the basis of the sworn value of the estate, namely $282,605.03, the relief granted hardly appears to be justified. The succession duties and costs of administration would, of course, come first out of this amount. The contingent liability of $110,000 then existed as a possible charge on the estate, to some extent at least. The fact that now nearly 8 years later it is still on foot for its full original amount shews how great the danger is that the estate may be called upon for a part, if not all, of this liability. Putting the 125 shares awarded her at their par value of 100 each, or $12,500 in all, (though it is obvious that they were then given a much greater value, though how much the material does not disclose) and the cost of the annuity at $75,500, we find the total capitalised value of her relief $88,000 in addition to the household stuff, to justify which the net value of the estate should be $264,000, a net value which could only be reached by entirely disregarding the contingent liability of $110,000. The executor's affidavit, filed on the original application, besides giving the facts as to the assets and liabilities, estimated the net annual income of the estate at $9,763.50, derived largely from dividends on the shares in the W. H. Clark Co. whose profits, as he said, would necessarily vary from year to year and that it would not be possible to pay the proposed annuity and maintain and educate the infant children as provided by the will out of the annual revenue. He now swears that, in his opinion, "the assets of the said estate are not sufficient to enable the executor to pay the said debts, provide for the said contingent liabilities, pay the said legacies, pay the arrears of annuity claimed by Mrs. Agnes Jane Clark, and pay the annuity of $5,000" payable to her under the terms of the order.

I think we should not determine this appeal by taking the condition of the estate in either of these periods as the basis for fixing the quantum of the widow's relief. It is inadvisable in such an estate as this or in any other estate, the value of whose assets is problematical and the ultimate amount of whose liabilities is incapable of absolute determination, to award relief to the widow by allowing her a fixed or arbitrary amount, either by way of a lump sum or in the form of an

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annuity. The scheme of the Act is to place a widow who has been unfairly dealt with in as good a position at the best as if her husband had died intestate. The most that she can possibly get is what her distributive share would have been under an intestacy and that is not an amount based upon the estimated value of the estate as sworn for probate, less the estimated liabilities and costs of administration, but a sum actually worked out and realised in the due course of administration. This case illustrates very clearly the danger of acting upon values which are in reality but estimates of assets of a fluctuating or speculative character and of endeavoring to measure up the risk of the estate being called upon to liquidate liabilities of a contingent character. An order made in pursuance of a Statute which authorises the award to the widow of not more than one-third of her husband's net estate and which order was, I take it intended to give her no more than that, has become by events which have since happened through the fault of no one, an instrument under which the entire net estate may become hers to the complete exclusion of those interested in the other two-thirds. That, of course, should not be, and the only way to prevent such an injustice is to limit the relief to the widow's distributive share or such part thereof as may be awarded her by way of relief. That is the scheme which commended itself to all of the judges of the Supreme Court of Canada in the *McBratney* case. For instance Anglin, J. put it thus at p. 143:—

"I would, therefore, allow the appeal and direct a judgment declaring the widow entitled to receive one-half of her husband's net estate. What that will amount to can best be determined after the administration has been completed and all questions as to the extent of the assets and liabilities have been disposed of."

Of course, when something short of the full value of the distributive share is to be awarded, greater difficulty may be experienced in working it out on this basis. In some cases it may be done by allotting a smaller fraction of the net value than one-half or one-third, as the case may be. In cases in which the awarding of a fixed sum cannot be avoided its payment should be made conditional upon that amount being ultimately found to be within the value of the widow's distributive share and payment should be ordered only in such amounts as may from time to time be available therefor, having regard to the ascertained value of such distributive share.

This is a case in which I think the widow is entitled to the

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full one-third share of the net estate and I would vary the order appealed from by allowing the same to her. This, of course, will make the other two-thirds of the net estate available for the other purposes of the will. She will be charged with the various sums already paid to her under that order. There is no reason why the executor should not from time to time advance to her such sums as may be available for her in respect of this share and pay to her the balance when the amount of it is ascertained on the final winding up of the estate and this it must do.

It may be that she may prefer the provisions of the will to this relief under the altered circumstances of the estate. If so, I think she should be allowed to take them. Although when she made her application she elected against the will, she did so really under a misapprehension and in fairness she should not be bound by it. If she elects to take under the will she may do so by notice in writing delivered to the executor not later than September 15, of this year. Failing the delivery of such notice she will be deemed to have accepted the relief hereby awarded her.

The costs of all parties of the application for leave to appeal and of this appeal taxed under column 5 (Rule 27 not to apply) shall be paid to them out of the estate. I take it that this judgment will make it unnecessary to pursue further the application for advice and directions referred to this Division by Simmons, J. If so, the costs of all parties of that application shall be taxable and payable as above, but if anything remains to be done with respect to it, it may be spoken to by any one of them upon notice to the others.

Judgment accordingly.

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Supreme Court of Canada, Idington, Duff, Anglin and Mignault, JJ., and Bernier J. (ad hoc). November 21, 1921.

RECORDS AND REGISTRY LAWS (§IIIB—17) — VERBAL SALE OF LAND—ACTION AGAINST EXECUTOR TO ENFORCE — REGISTRATION OF MEMORIAL—SALE BY EXECUTRIX TO THIRD PERSON—REGISTRATION OF TITLE TO THIRD PERSON—JUDGMENT IN FAVOUR OF CLAIMANT IN ACTION — PRIORITY OF REGISTERED DEED OVER JUDGMENT—R.S.Q. CH. 37, ART. 5—REGISTRATION ORDINANCE (QUE.) 1841, CH. 30, ART. 1.

A person who claims title to certain real property by verbal sale from a testator, and pending trial of an action against his executor to enforce the sale registers a memorial setting forth his pretension that he has acquired the property in this way, and afterwards obtains judgment upholding his claim, cannot claim priority of title over a purchaser for value whose title from the executor is registered after registration of the memorial but be-

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fore the rendering of the judgment where there is no absolutely convincing evidence of fraud. Knowledge of the action to obtain title at the time of registration of the deed is not sufficient to establish fraud. The registered title takes precedence over the judgment under the Registration Ordinance (Que.) 1841, 4 Vict., ch. 30, art. 1, and R.S.Q. ch. 37, article 5.

Appeal in a petitory action by the appellant against the respondent, and appeal by respondent in an action in radiation of hypothec against appellant. Judgments affirmed.

St. Germain, K.C., for appellant.

Geoffrion, K.C., and *Décary*, K.C., for respondent.

IDINGTON, J.:—I would dismiss this appeal with costs. I agree that there are some suspicious circumstances tending to establish fraud but when the mere fact of knowledge is eliminated therefrom by virtue of art. 2085 I cannot say that the Courts below have clearly erred in failing to find fraud, and thereby render inoperative the provision in said article.

DUFF, J.:—On the whole I think the charge of fraud fails and as on that point I agree with the view taken in the Courts below it is unnecessary to discuss it. I observe only with respect to art. 2085 that while it deprives notice or knowledge of an unregistered right of any effect as prejudicing the title of the purchaser who complies with the provisions of the law in relation to registration it does not follow that such knowledge may not be cogent evidence which, coupled with other circumstances, may afford adequate proof of fraud on part of such purchaser disentitling him to reply upon the rights which otherwise would be his. On the other hand it is important to be on one's guard against applying this process of inference in such a way as virtually to equiparate knowledge itself with fraud thereby in effect sterilizing the enactment of the article.

Mr. St. Germain's contentions subdivide themselves under two heads. 1. He invokes art. 2089 and argues that the respondent did not derive his title from a person who is "the same person" as the appellant's auteur. The provisions requiring consideration under this head are arts. 2082, 2089 and the first two paragraphs of 2098. Textually they are as follows:—

"2082.—Registration gives effect to real rights and establishes their order of priority according to the provisions contained in this title.

2089.—The preference which results from the prior registration of the deed of conveyance of an immovable obtains only between purchasers who derive their respective titles from the same person.

2098.—All acts *inter vivos* conveying the ownership of an immoveable must be registered at length, or by memorial.

In default of such registration, the title of conveyance cannot be invoked against any third party who has purchased the same property from the same vendor for a valuable consideration and whose title is registered."

The farm in question was orally sold in October, 1910, to the appellant's wife by J. B. Brien, *dit* Desrochers, who died in the following month leaving a will by which he appointed his wife the usufructuary for life of his estate and his sole testamentary executrix with power to dispose of the estate. In January, 1911, she sold the farm to the respondent by a notarial deed which was registered in the following August. In February, 1911, the appellant's wife filed in the registry a declaration setting forth the facts in relation to the oral sale (a declaration admittedly without effect under the registration provisions of the Code) and, on some day prior to July, 1911, she commenced an action to enforce her rights under this sale. In this action judgment was given in her favour in June, 1913, by the Superior Court and this judgment was confirmed in September, 1914, by the Court of King's Bench, 23 Que. K.B. 565.

Mr. St. Germain argues that the respondent's title is derived at least in part through a sale by Madame Desrochers as devisee under her husband's will and that Madame Desrochers in her quality as such devisee is not within the meaning of the article "the same person" as her husband, the contract with whom constitutes in essence the basis of his client's title. Whether the respondent does in truth take his title in part from Madame Desrochers as devisee or whether it ought not rather to be held that he derives his title in its entirety from her as executrix of her husband's will is a debatable point. I assume that Madame Desrochers who in the deed of conveyance professed to act as testamentary executrix of her husband as well as in her own personal right did convey the interest vested in her by the devisee to her as usufructuary in her capacity as owner of the usufruct and not in her capacity as executrix.

The question then arises whether art. 2085 applies where the 'titles' coming into competition are on the one hand a 'title' derived directly by a sale for valuable consideration from the owner and on the other hand a 'title' derived by such a sale from a donatee, devisee or legatee of the same owner.

Before proceeding to an examination of the language of art. 2089 and of 2098, which must be considered with it, let us note the general effect of these provisions of the Code on the

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subject of registration. By the first of the articles above quoted registration "gives effect to real rights and establishes their priority." Certain classes of rights are, by art. 2087, exempt from registration, but this provision does not concern us here. The object of the provisions as of all analogous systems is to facilitate the acquisition of title to land and to enhance the security of the possessors of such titles by diminishing the causes and occasions of uncertainty, an object too obviously important to require comment. The common law rule is that one can give a title only to that of which one is owner is profoundly modified by these provisions. Speaking generally notwithstanding one has made a sale of one's real property for valuable consideration and notwithstanding the property has, as between the parties, passed to the purchaser yet the title of the earlier purchaser may be displaced outright through the superior activity of a subsequent purchaser (for valuable consideration) in registering his own.

On the other hand, it must be noted that the system of registration set up by these provisions of the Code is, broadly, a system of registration of instruments rather than a system of registration of titles. Speaking without reference to some possible exceptions at present immaterial, registration does not in itself afford protection *erga omnes*. As usual in a system of registration of instruments as contrasted with a system of registration of titles, registration is available only in favour of the recipient of a given title through transfer or devolution as against another claiming to have acquired the same title, that is to say, claiming to have acquired a title from the same ultimate source. Registration may protect A who has acquired the title of B either directly or mediately as against C who claims also to have acquired the title of B and would have been able to make good his claim but for the obstacle created by the competition of A; but registration would not assist a purchaser relying upon a transfer from a grantee under a patent from the Dominion Government as against another deriving his title by grant from the Crown in right of the province where the property was prior to its transfer in point of law the property of the province. This appears to be the characteristic of the system which arts. 2089 and 2098 are intended to mark, the first speaking from the point of view of the advantages attached to prior registration and the second envisaging the situation with special reference to the penalty incurred in consequence of default in registration. Referring to the language of art. 2089 the words "purchasers who derive their

respective titles from the same person" seem on the fair construction of them to apply to and to include purchasers who claim to have acquired the same title. The language of art. 2098 ought to be read with that of 2089 and construed by the light of it. The narrow construction contended for by Mr. St. Germain would greatly restrict the operation of these provisions and impair their efficacy in furtherance of the object designed to be secured by them.

Under the second head Mr. St. Germain contends that the question in controversy was determined by earlier litigation. Mr. St. Germain is on solid ground when he argues that where a title to real estate is in controversy *res judicata* is not necessarily limited in its effect to the immediate parties to the action. It has often been said that the real basis of the *res judicata* doctrine is to be found in the considerations indicated in the *brocard* interest *rei publicae ut sit finis litium*. From this point of view the rule would entirely fail of its purpose if it were possible to evade it by successive transfers of the property in dispute. But here again we are under the dominion of this system of registration. I find nothing in these articles implying such an exception as Mr. St. Germain must establish in order to make good his argument. There is nothing here to indicate that a registered title is subject to a claim based upon some unregistered transaction merely because that claim has been put in suit prior to the date of the instrument or contract upon which the registered title rests. It is perhaps unfortunate that the articles contain no provision for the registration of *lis pendens*. But that *lis pendens* should override rights which otherwise would follow from registration *lis pendens* necessarily unregistered because there is no provision for such registration—would constitute a most serious defect which one is not sorry to find is not disclosed on a scrutiny of these provisions.

ANGLIN, J.:—This appeal in my opinion fails. The deposit and recording in the registry office of a protest formulating the claim of the plaintiff to the property in question was not registration of the right in or to that property which the Court subsequently held that her oral contract gave her.

The plaintiff and the defendant were purchasers who derived their respective titles from the same person (auteur). The contract of the former was with the testator, Desrochers; her title was the judgment of the Court declared to be equivalent to a deed from his executrix. The contract and title of the latter were with and from the executrix *es-qual*. The defend-

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ant is entitled to the benefit of priority of registration established by art. 2089 Civil Code.

The plaintiff's judgment against Derochers' executrix, recovered after the conveyance to the defendant, was nothing more than an enforcement of the rights conferred by Desrochers' unregistered oral contract with the plaintiff. Those rights, declared by art. 1025 C.C., are, by art. 1027 C.C. expressly made subject to the special provisions of the code for the registration of titles and claims to property. The plaintiff's judgment gave her no higher right than the contract which it purported to enforce. The prior registration of the defendant's deed therefore prevails against it.

While there is not a little in the evidence to suggest fraud, it is not so clearly shewn as to warrant our making the finding for the plaintiff on that issue which she failed to obtain in the Superior Court, the Court of Review, and the Court of Appeal. Notice of knowledge of prior unregistered right, however, direct and distinct, does not suffice to render subject to it the registered title of a subsequent purchaser for value.

MIGNAULT, J.:—This case refers to a dispute between two persons who claim the same immovable by virtue of two translatory titles, and the judgment appealed from decided the dispute in favour of the respondent, who has priority of registration.

On October 11, 1916, the appellant's wife, since deceased and represented by the appellant as tutor to their children who are their mother's heirs, bought this property from a certain Jean Baptiste Brien, *alias Desrochers* by a verbal sale. The latter died shortly afterwards leaving a will by which he gave the usufruct of his estate to his wife, Dame Marguerite Bricault, whom he named as his testamentary executrix with very broad powers of alienation.

Marguerite Bricault refused to sign a deed of sale in favour of Mrs. Samson when put in default to do so, and action was brought against her to compel her to sign such deed. Marguerite Bricault contested this action, alleging that only *pourparlers* had taken place and that a sale had not been made, but the Superior Court gave judgment in favour of the appellant and his wife on June 23, 1913. Marguerite Bricault appealed the case and the judgment was confirmed by the Court of King's Bench on September 30 (1914), 23 Que. K.B. 565, sub-nom. *Bricot* v. *Brien*). Each of these judgments was registered shortly after it was rendered.

Up to the time when he obtained judgment in the action

to compel the granting of title, the appellant had no title which was capable of registration, since the sale was verbal, but in February, 1911, before the date of the respondent's title, his wife caused a notice of his claim to be registered in the form of a memorial to the effect that he had bought the property by verbal sale.

On March 3, 1911, while the action respecting the title was progressing rather slowly, on account of the delays of procedure and the press of judicial proceedings to which it was subjected, the respondent bought this property from Marguerite Bricault in her quality as testamentary executrix, and his deed of sale was registered in the month of August of the same year. At the time of acquiring the property, the respondent knew that the appellant's wife had sued Marguerite Bricault to obtain a title, but as he has priority of registration he argues that this knowledge does not affect the validity of his purchase. The appellant, who now has a judicial title, contests this argument. The Superior Court and the Court of King's Bench gave judgment in favour of the respondent against the appellant, but he won his case in the Court of Review by a unanimous judgment, and in the Court of King's Bench Pelletier, J. was for confirming the judgment of the Court of Review. This difference of opinion amongst the Judges who have been seized of the present case makes it quite clear that is not easy of solution.

The respondent's priority of registration cannot be doubted and if the question of registration outweighs all the other questions raised by the appellant, the latter cannot succeed in his appeal to this Court. For the registration of the memorial setting forth Mrs. Samson's pretention to have acquired the property by verbal sale cannot avail as a registration of the right of property which was finally recognised by the Courts, and there is no provision of the Code authorising the registration of such notice, and furthermore, it is only a notice, and the respondent invokes art. 2085 which renders such a notice useless as against a person having priority of registration. This article, derived from the R.S.Q., ch. 37, art. 5, and from the Registration Ordinance of 1841, 4 Vict. ch. 30, art. 1, reads as follows:—

"The notice received or knowledge acquired of an unregistered right belonging to a third party and subject to registration, cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent trader."

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The conditions required here are acquisition for value, registration of the title and lack of registration of the title of the third party. When these conditions exist, then, in spite of notice or knowledge of the third party's right, the title which has been registered takes precedence of the unregistered or subsequently registered right without regard to its date. And although the title of posterior date, where it is a question of successive sales made by the same person, is derived from a person who does not own the property and does not confer any right according to the provisions of the Civil Code, nevertheless, in the interests of third parties and for their protection, if this title, posterior in date, has been registered first, it takes precedence over the first sale which was not registered or which was only registered later. As Lacoste, C.J., pointed out in the case of *Barsalou* v. *The Royal Institution for the Advancement of Learning* (1896), 5 Que. K.B. 383, our system of registration has profoundly modified our law. It is expedient to have this remark in mind in studying the case submitted to us.

Thus, after declaring that sale is a purely consensual contract without any necessity for delivery as formerly (art. 1025), the Code subordinates this rule, when a sale of an immovable and the rights of third parties are in question, to the registration laws, (art. 1027). But in order for priority of registration to give recognition to a second sale in preference to a former sale, both sales must have been made by the same *auteur* (art. 2089); the English version says "*the same person*," or, to use the words of art. 2098, by the same vendor.

The appellant says:—"I have bought from Jean Baptiste Brien, *alias* Desrochers, the respondent bought from Marguerite Bricault as testamentary executrix. It is true that I sued the latter to obtain title, but I could not do otherwise, since Brien or Desrochers was dead, and his testamentary executrix was the only person who could give me title. The two sales were, therefore, made by two different persons." If this were so, arts. 2085, 2089 and 2098 would not apply to the present case and priority of registration would be of no importance, the question to be decided being to determine which of the two vendors had the right to sell the immovable.

The argument advanced by the appellant on this point resembles another contention made by his attorney in a very skilful manner, namely: that there was *res judicata* between the appellant and the respondent as regards the former's right of ownership.

Let us first discuss this question of *res judicata*. The re-

spondent is the successor by particular title of Dame Marguerite Bricault. Now a successor by particular title is bound by a judgment rendered against his *auteur* before he acquired his rights, or before the fulfilment of the formalities which make it possible to set them up against third parties. If the transfer of the rights of a successor by particular title takes place while action is pending, he is equally bound by the judgment which determines their existence or nature since that judgment has a retroactive effect to the date when the action began. I borrow from Huc, vol. 8, No. 314, an expression of this doctrine which is universally accepted regarding the first point, and is, as regards the second, in accordance with the views of most of the authors with the single exception, as far as I am aware, of Demolombe, Contracts, vol. 7, Nos. 552 and following:—

"314. As regards successors by particular title they are regarded as having been represented by their *auteurs* in judgments affecting the latter rendered before they acquired their rights, or, more accurately, before their rights became opposable to third parties by the fulfilment, if such should be the case, of all the formalities required for that purpose (Comp. art. 939; L. March 23, 1855, art. 1, art. 1690).

If the transfer took place before the action was commenced, the resultant judgment cannot be said to be against the successor. Judicial decisions are similar to contracts which only take effect as regards third persons in possession of real rights, if they are anterior to the time when such rights became opposable to persons who had no part in creating them. There is no difficulty in admitting this as regards rights of property, usufruct and other dismemberments of this nature. But the matter is disputed as regards hypothecs and it has been held that the result of an action posterior in date to the creation of such real right, which is in reality a dismemberment of the *jus abutendi*, would extinguish the right of a hypothecary creditor who was not a party to the case. The reason for so holding appears therefore to be the same. We shall return to this point again later.

Finally the transfer may take place between the institution of the action and the judgment. It seems that this hypothesis must be assimilated to the first, since the judgment has a merely declaratory effect and takes effect as of the date on which the action was commenced. Consequently it is sufficient that the title of the successor by particular title should be posterior in date to the commencement of the action between him and his *auteur*, or that this title should only have taken effect as

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regards third parties after the commencement of the action, in order that the *res judicata* between the auteur and the third party should be opposable to the successor, acquirer, donee, hypothecary or privileged creditor, usufructuary or owner of a servitude."

If there were *res judicata* against the respondent, it would be on the fact that on October 15, 1910, Jean Baptiste Brien *alias* Desrochers sold to Mrs. Samson the property that the respondent subsequently bought from his testamentary executrix, for that is the point which was pronounced upon in the action to obtain title. It is as though the appellant held a notarial deed of sale given him that day by Brien *alias* Desrochers. According to the rules of civil law, irrespective of the registration laws, the appellant, on this hypothesis, must win.

But there are just such registration laws, and we have seen that they have profoundly modified our civil law. Article 2085 presupposes that the third party has an established real right anterior in date to that which has been registered, or rather, the writing which establishes it has not been registered and should have been.

If the effect of the *res judicata* in the present case is that the respondent cannot now contest the fact that Mrs. Samson bought this property from Jean Baptiste Brien *alias* Desrochers on October 15, 1910, that is equivalent to saying that she had a title anterior to the respondent's, just as though she produced a deed of sale passed before a notary on October 15, 1910. But this title was not registered before the respondent's and the latter, notwithstanding the knowledge which he had and the presumption of *res judicata* which prevents his contesting it, can nevertheless avail himself of the omission to register it.

For this reason, the doctrine of *res judicata* does not provide an answer to the objection based on art. 2085.

But the appellant maintains that this is not a case of two sales by the same vendor. He says, with a certain amount of plausibility, that the sale of October 15, 1910, set this particular property apart from the succession of Jean Baptiste Brien *alias* Desrochers, that it is not subject to the dispositions of his will, and that therefore the testamentary executrix had no mandate from the vendor.

In my opinion this is the chief difficulty in this case. But this difficulty will be lessened if we can say, as the respondent argues, that Jean Baptiste Brien *alias* Desrochers, Mrs. Samson's vendor, and his testamentary executrix, the respondent's vendor, are, in a judicial sense, the same person. For then we

shall have the very situation contemplated by art. 2085, a second contract of sale made by a non-proprietor, but which takes precedence of the first contract by reason of priority of registration.

Finally, let us consider the hypothesis most favourable to the appellant: a sale by Jean Baptiste Brien *alias* Desrochers of the immovable in question—one which sets that immovable apart from his succession and revokes *pro tanto* the mandate given to his testamentary executrix to sell his property. It is noteworthy that art. 897, respecting the tacit revocation of a legacy through the alienation of the thing bequeathed, only applies ordinarily to legacies by particular title. But let us suppose that there has been revocation in the present case, although it would be more exact and quite sufficient to say that the immovable was set apart from the succession. In that case can the appellant argue that the respondent's title is null?

Unfortunately, I am forced to the conclusion that the registration laws once more stand in his way. For I suppose that he now has a title emanating from the testator. But that title was only registered after the registration of the respondent's contract. On the other hand the will of Jean Baptiste Brien *alias* Desrochers had been duly registered when the sale to the respondent was made with, the counsel for the appellant tells us, the declaration required by art. 2095 containing the description of the immovable in question. In these circumstances, can the appellant, with his unregistered sale emanating from the testator, attack the title of the third party who contracted with the testamentary executrix on the strength of the registration of the will and the declaration describing the immovable? I would answer this question in the negative, for otherwise the protection of third parties by registration would be entirely illusory. Certainly no greater effect should be given to the appellant's title than if Jean Baptiste Brien *alias* Desrochers had, after it was given, sold the property without right to the respondent, and in that case priority of registration would settle the dispute.

Only one point remains. Are Jean Baptiste Brien *alias* Desrochers and Marguerite Bricault, his testamentary executrix, the same person from a juridical point of view? A testamentary executor is the mandatory of the testator from whom he derives all his powers. Now the acts of the mandatory are acts of the mandator, for *qui facit per alium facit per se*. The law allows a testator to give a mandate which commences at the very time when an ordinary mandate ends, namely, at the

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death of the mandator. But as a general rule this mandate produces the same effects as a mandate *inter vivos* and, the acts of the mandatory being those of the mandator, a sale by a testamentary executrix made under such a mandate to sell is, juridically speaking, a sale made by the testator. There is juridical identity of persons, then, in the present case.

There is also the question of fraud. I must admit that the respondent's good faith seems open to suspicion, but I cannot go so far as to say that there was fraudulent collusion between him and Marguerite Bricault, who has herself committed a very evident fraud upon the appellant. None of the Judges, excepting Pelletier, J. reached the conclusion that there was fraudulent collusion, even in the Court of Review which maintained the appellant's action. If the Superior Court had decided that there had been fraud, I should not have felt justified with the proof in record, to reverse its judgment, but the Judge who saw all the witnesses dismissed the appellant's allegation of fraud. In these circumstances, I do not think that this Court, the fourth to be seized with the case, should now entertain this accusation of fraud.

From every point of view I am forced to the conclusion that the appeal is unfounded. However, the appellant has a real grievance for, with all possible diligence, after his initial indiscretion in making a verbal purchase of an immovable, he could not possibly secure the protection of registration. This reveals a defect in the law of the Province of Quebec. In the other Provinces, when an action is commenced in respect of an immovable, authorization can be obtained summarily from a judge to register what is called a *lis pendens*, and then third parties deal with the proprietor at their own risk and peril. No such thing exists in the Province of Quebec, and this defect should receive the attention of the Legislature.

In this case I have no choice but to follow the law as it exists, with the result that the appeal must be dismissed with costs.

BERNIER, J. (ad hoc):—Two appeals are submitted to us, one in a petitory action by the appellant against the respondent, and the other in an action in radiation of hypothec by the respondent against the appellant.

The Superior Court gave judgment in favour of the respondent in both cases, but the Court of Review and, on appeal, the Court of King's Bench, reversed the Superior Court judgment.

The principal points to be decided are the following:—

1. Does the document registered on February 23, 1911, by the appellant or his vendor, embodying a declaration that he bought a certain property from the late Jean Baptiste Brien *alias* Desrochers by verbal sale on October 13, 1910, amount to the registration of a real right sufficient to protect his rights as required by law? I do not think so. This document is unilateral, it is not a memorial of a title or of a written contract made between the parties; it merely states a purchaser's right. This is not the inscription or memorial that the Code speaks of with reference to the registration of a deed of sale.

2. The appellant could not register the judgment on the action to obtain title which he took against the testamentary executrix of the late Desrochers, namely, Dame Marguerite Bricault, until July 18, 1913, whereas the respondent bought the same land from her on March 3, 1911, and registered his title on April 4, 1911.

In these circumstances did that judgment, which took effect retroactively as of the date when the action to obtain title was instituted, namely, the end of the year 1910 or the beginning of 1911, give the appellant a right of property in the thing sold to him? No, for the registration of the respondent's title, having been made before the registration of the appellant's judgment, deprives the latter of the benefit of his verbal purchase and of the judgment confirming his rights. (Arts. 2098, 1027, 2085, 2089). The registration of real rights is a matter of public order; the articles of the Code referring to it cannot therefore be interpreted in a sense different to that which they indicate very clearly. To attempt to make distinctions when the Codes makes none; to invoke the retroactivity of a judgment in order to obtain preference for its registration over the previous registration of a contract, would be to countenance the discretionary observance of unequivocal provisions of law. Consequently, as regards third parties, a sale of an immovable is only perfected by the registration of the deed of sale; this formality is essential, although in principle a sale is perfected by mere consent of the contracting parties. The registration laws constitute an exception to many principles of civil law, since one individual can sell the same immovable to two purchasers successively, and give to the second, if he registers his title before the first, a valid right of ownership.

3. Do the two contracts in the present case emanate from the same vendor, in a legal sense?

The respondent's vendor was the testamentry executrix of

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the appellant's vendor. Furthermore she had power under the provisions of the will to sell the assets of the succession. She was also heir in usufruct to these very assets. I am of opinion that she had, in these various qualities of heir, mandatory and executrix, the legal seizin necessary to continue the juridical personality of the testator. She represented the testator; she had, perhaps, no greater right than he to sell the property in question; but she was in the same position as he would have been in, that is to say, she was in the position of a person who had sold a thing to two successive purchasers of whom the second registered his title before the first.

4. The appellant claims that the testamentary executrix and the respondent committed a deliberate fraud in order to deprive him of his rights. The evidence is not absolutely convincing on this point, as it ought to be in order to decide in favour of the appellant.

The respondent certainly knew of the rights which the appellant quite truthfully claims; he also knew that, when he registered his deed, the latter had commenced his action to obtain title. But this knowledge is not sufficient to establish fraud on his part. Such knowledge, says art. 2085 C.C., cannot prejudice the rights of an acquirer for value by virtue of a title that has been duly registered.

Even supposing that there was bad faith—and this has not been conclusively proven—there is not sufficient evidence to enable us to say that the respondent and his *auteur* fraudulently conspired to deprive the appellant of his rights. Nor has it been proved that the respondent's deed of purchase was fictitious. I would dismiss the appeal with costs.

Appeal dismissed.

CARTER v. VADEBONCOEUR.

Manitoba Court of Appeal, Perdue, C. J. M., Cameron and Dennistoun, JJ.A. May 10, 1922.

AUTOMOBILES (§IIIB—221)—MOTOR VEHICLES ACT, R.S.M. 1913, CH. 131—AMENDMENT 1920 CH. 81, SEC. 10—RIGHT OF WAY—FAILURE TO OBSERVE—COLLISION—NEGLIGENCE—DAMAGES.

The provision of the Motor Vehicle Act R.S.M. 1913, ch. 131, as amended by 1920, ch. 81, sec. 10, which gives the person to the right hand the right of way, does not justify such person in holding his course, and assuming up to the moment of collision that the other will give way, and although the other party is negligent in failing to observe the rule as to precedence, the party having the right of way cannot recover where he is himself responsible for the collision, and having ample time to avoid it, misjudges the situation and strikes the other party.

[*C.P.R.* v. *Smith* (1921), 59 D.L.R. 373, 62 Can. S.C.R. 134, referred to. See also Annotation, Automobiles and Motor Vehicles 39 D.L.R., 4.]

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CARTER v. VADEBONCOEUR.

Dennistoun, J.A.

APPEAL by plaintiff from a County Court judgment in an action for damages to a motor car, caused by a collision. Affirmed.

A. E. Johnston, for appellant.

H. V. Hudson, for respondent.

The judgment of the Court was delivered by

DENNISTOUN, J.A.:—Appeal from His Honour Judge Paterson in the County Court of Carman.

Motor cars driven by the plaintiff and the defendant respectively came into collision at the center of intersecting road allowances in the country.

The plaintiff was travelling from east to west and the defendant was travelling from south to north. The defendant's car reached the point of crossing first and had almost cleared the front of the plaintiff's car when the latter struck the former. The defendant was travelling at from 18 to 20 miles per hour and the plaintiff at from 7 to 8 miles per hour.

When the plaintiff was 99 feet from the center of the intersection of the road allowances he saw the defendant's car approaching from the south, and did not lose sight of it until the collision occurred. He states that he kept the beaten track of the roadway which was wide enough for four cars to travel abreast, and that he did not vary the direction of his course either to the right or to the left. He held straight on his course until he struck the defendant's car.

The defendant says he did not see the plaintiff's car until there was a prospect of collision, and then he accelerated his speed as the best thing to do in the emergency.

There was no reason why the defendant could not see the plaintiff's car. The plaintiff saw him and he should have seen and probably did see the plaintiff. Both of them were taking chances.

The point of impact was about 2 feet from the rear end of the defendant's car on the hub of the right rear wheel, which makes it clear that a moment's delay on the part of the plaintiff would have enabled the defendant to clear the front of the plaintiff's car without contact.

The plaintiff saw the defendant's car approaching and had ample time to avoid a collision, but he relies on the provision of the Motor Vehicle Act, R.S.M. 1913, ch. 131, as amended by 1920, ch. 81, sec. 10, which reads as follows:—

"42. Whenever a person operating a motor vehicle meets another person operating a motor vehicle or driving any draft animal at a crossroad or intersection of roads or streets, the

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person to the right hand of the other shall have the right-of-way."

At Common Law the plaintiff was clearly at fault in running into the defendant but his case is, that having the right-of-way by statute, he was justified in holding to his course and in assuming up to the moment of collision that the defendant would give way.

Both parties knew the rule of the road and the inference to be drawn from their conduct is that neither of them was relying upon it for the simple reason that neither of them, until too late, expected a collision to take place.

It must be assumed both were equally anxious to avoid impact and in my view, concurring with the trial Judge, both of them were negligent.

Eash of them misjudged the speed at which the cars were approaching and thought there was time and room to pass each other with possibly a bare margin of safety.

Had the plaintiff not felt safe in holding his course he had ample time to stop his car and could have done so in 8 or 10 feet, or could have swerved a few feet to the left. He relied upon his own judgment and it failed him, and he ran into the defendant's car. He was the author of his own injury.

In Halsbury's Laws of England, vol. 21, at p. 412, *sub nom.* "Negligence," it is stated:—

"Non-observance of the rule of the road, while casting upon the person who neglects it a more stringent obligation to take care, is not of itself conclusive evidence of civil liability for the consequences of an accident; and there may be occasions when, in order to avoid an accident which would otherwise be inevitable, it is not only justified but required."

The statutory rule of the road does not abrogate the principles of the Common Law which govern a person using a highway and impose upon him the obligation *sic utere tuo ut alienum non laedas.* The rule does afford an evidential test as to the negligence of one or other driver which may be decisive in many cases in fixing responsibility, but it does not justify a driver in taking the risk of a collision which he might easily avoid under circumstances which would indicate to a man of ordinary prudence that an accident was likely to occur. *Paulsen* v. *Klinge* (1918), 104 Atl. Rep. 95.

Where there has been a breach of statutory duty in failing to blow a whistle or ring a bell nevertheless the contributory negligence of the plaintiff in failing to look before crossing a

railway line will defeat his action. *C.P.R.* v. *Smith* (1921), 59 D.L.R. 373, 62 Can. S.C.R. 134. Alta. S.C.

In the case at Bar the defendant was negligent in failing to observe the plaintiff in time to permit the latter to take precedence in accordance with the direction of the statute, but that was not the cause of the accident. The plaintiff himself is responsible for the collision for, having ample time to avoid it, he misjudged the situation and struck the defendant.

I think the trial Judge was right and the appeal should be dismissed with costs.

Appeal dismissed.

ESTEN v. ESTEN.

Alberta Supreme Court, Walsh, J. June 7, 1922.

DIVORCE AND SEPARATION (§III—10)—ACTION BY HUSBAND—EVIDENCE OF ADMISSION OF ADULTERY BY WIFE—NO CORROBORATIVE PROOF—POWER OF COURT TO GRANT.

If in a divorce action, there is evidence not open to exception of admissions of adultery on the part of the principal respondent, it is the duty of the Court to act on such admissions although there is a total absence of all other evidence to support them, but such admissions of a wife, unsupported by corroborative proof should be received with the utmost circumspection and caution, and where it is evident that such admissions were put forward with the intention and for the purpose of freeing the guilty party from an irksome marriage tie, the Court cannot grant a divorce on such uncorroborated evidence.

[*Robinson* v. *Robinson* (1859), 1 Sw. & Tr. 362, 164 E.R. 767; *Williams* v. *Williams* (1865), L.R. 1 P. & D. 29, 35 L.J. (P.) 8; *Getty* v. *Getty*, [1907] P. 334, 76 L.J. (P.) 158; *Weinberg* v. *Weinberg* (1910) 27 Times L.R. 9; *Collins* v. *Collins* (1916), 33 Times L.R. 123; *C.* v. *C.* (1919) 46 D.L.R. 666, applied. See Annotation on Divorce 62 D.L.R. 1.]

UNDEFENDED action by husband for divorce.

A. E. Burley, for plaintiff.

WALSH, J.:—This is an undefended divorce action, the husband being the plaintiff. The only evidence in support of it is that of the plaintiff, who swears to statements made by the defendant to him of her relations with another man which, if they can be relied upon, undoubtedly prove that she was unfaithful to him. There is no doubt of my right to act upon these confessions alone. The question is whether or not I should do so.

In the leading case of *Robinson* v. *Robinson* (1859), 1 Sw. & Tr. 362, 164 E.R. 767, Cockburn, C.J., in delivering the judgment of the Court, says at pp. 393-4:—

"If therefore there is evidence not open to exception of admissions of adultery by the principal respondent it would be

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the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution. . . . . Nevertheless if after looking at the evidence with all the distrust and vigilance with which as we have said it ought to be regarded the Court should come to the conclusion, first that the evidence is trustworthy, secondly that it amounts to a clear, distinct and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence and afford to the injured party the redress sought for."

The Court refused the divorce in that case.

In *Williams* v. *Williams* (1865), L.R. 1 P. & D. 29, 35 L.J. (P.) 8, the Judge ordinary in following this case said "in each case the question will be whether all reasonable ground for suspicion is removed." The divorce was granted upon admissions made by the wife.

In *Getty* v. *Getty*, [1907] P. 334, 76 L.J. (P.) 158, a divorce was granted upon similar evidence as the Judge thought the circumstances removed any ground for suspicion that might exist and justified him in acting on the confession as it stood.

In *Weinberg* v. *Weinberg* (1910), 27 Times L.R. 9, the President granted a divorce upon the uncorroborated evidence of the plaintiff as to his wife's mode of life and her admission to him that she was living the life of a prostitute. He said "the true test seemed to be whether the Court was satisfied from the surrounding circumstances in any particular and exceptional case that the confession was true."

In *Collins* v. *Collins* (1916), 33 Times L.R. 123, Shearman, J. said that he would never act on an uncorroborated confession made by a spouse who wished the marriage tie to be dissolved, but in this case he was satisfied of the honesty and truth of the wife's confessions and that she had made them with the object of being forgiven by the petitioner and of preventing the marriage tie from being dissolved. He said that cases of this kind must be looked at with the most jealous scrutiny. He granted the decree *nisi*.

In *Brierley* v. *Brierley*, [1918] P. 257, 87 L.J. (P.) 153, an entry in the register of births of a child on information supplied by the wife (the defendant), non-access on the part of the husband being proved, was accepted as *primâ facie* evidence of the date as well as of the fact of the birth and, there-

fore, inferentially of the misconduct of the wife and a decree *nisi* was granted.

In *Hartley* v. *Hartley* (1919), 35 Times L.R. 298, there was a confession by the wife but there was also her evidence at the trial of a criminal charge against her husband when she admitted in cross-examination that she had been living with the co-respondent, which was held to be more than a mere confession and to justify the granting of a decree *nisi*.

In the Saskatchewan case of *S.* v. *S.*, [1920] 2 W.W.R. 295, Bigelow, J. said that though it was very undesirable that petitions for divorce should depend upon the evidence of the solicitor for the petitioner, still if his evidence could be construed as an admission of adultery he would consider it his duty to act on it.

The remarks of the Judges in these cases justify what I said in the first Alberta divorce case, *C.* v. *C.* (1919), 46 D.L.R. 666, "I would hesitate very long before granting a divorce either to a man or woman upon nothing but the uncorroborated admission of the defendant."

The plaintiff's evidence in brief is that he and the defendant were married on June 11, 1921, and they lived together as man and wife until early in the following July. She then told him that she did not love him and did not want to live with him and thereafter they did not sleep together. On July 22, when he went home at mid-day she seemed to be very nervous and when he started to go upstairs as usual she asked him not to do so as there was a man there whom she called Dick whom she loved. He gave her $100 and said she would have to go which she did, but before leaving she told him that she had been Dick's mistress and that she had come from Ottawa to marry the plaintiff so that she might be with Dick. She wrote to him from Spokane in October the following note: "Please do not write to me again. I would rather die a thousand times than go back to you. I do not care to accept any more of your assistance and I hope to be able to give you your freedom by a divorce if I live long enough." This was followed on the same day by the following note: "A few hours later. Please forgive me the wrong I have done you but I cannot go back to you as it would only be a sacrilege. Won't you please pity and understand other people's weaknesses. All I ask is to please understand and forgive."

I am thoroughly convinced of the honesty of the plaintiff's evidence. I am sure that he has told me the truth. There is nothing however in the circumstances to corroborate or even

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to strengthen the story which his wife told him. It is not that of a woman seeking forgiveness who hopes by an honest confession of her wrong-doing to avert a rupture. It is rather the unsolicited admission of one who tired of the marital tie places in her husband's hands the means of severing it in the hope that he will use it and thereby free not only himself but her. He had it in his power once to confirm or disprove her story when she stopped him from going upstairs on the day she told him that her lover was there but he did not avail himself of it. That this man should be there at a time when the plaintiff, in the ordinary course of events, would be home for his mid-day meal seems to me rather unreasonable. Her story of her reason for marrying the plaintiff strikes me as very improbable. Her hope as expressed in her first note to give him his freedom by a divorce is at least suggestive. The impression left upon my mind by her story is that having found her union with the plaintiff disappointing she determined to free herself from it with the minimum of scandal and so this story of her liaison with a lover was put forward. It may be perfectly true, but it is not proved to my satisfaction. If I granted this divorce, I would feel equally bound to do so in every case in which the plaintiff's case rested upon a bald admission of wrong-doing made by the defendant. Such an admission is self-serving when he or she who makes it is eager to escape the bondage of an unhappy marriage and so cannot be regarded in the same light as an admission against interest.

Though I feel much sympathy for the plaintiff who impressed me greatly with his sincerity, I feel that I cannot act upon the evidence which he has placed before me. I, therefore, dismiss the action, but so far as I have the power to do so, I direct that it be without prejudice to his right to bring a fresh action if he discovers further evidence of his wife's infidelity.

Judgment accordingly.

DUNCAN v. INTERNATIONAL EDITORIAL ASSOCIATION.

Manitoba Court of Appeal, Perdue, C. J. M., Cameron and Dennistoun, JJ.A. March 10, 1922.

CONTRACTS (§IE—65)—WORK AND MATERIAL FURNISHED ON BUILDING—PARTICULAR WORDS, AUTHORISING WORK—AUTHORITY—PRIMARY LIABILITY OR AS GUARANTOR—STATUTE OF FRAUDS—EVIDENCE.

Whether particular words, not in themselves conclusive amount to a promise to be primarily liable, for work done and materials furnished or only to a guaranty is a question of fact to be determined by the circumstances of the case, and where there is suffi-

cient evidence to justify the trial Judge's decision, it must stand, notwithstanding contradictions of that evidence, to be found in the testimony of the other party to the action.

[*Mountstephen* v. *Lakeman* (1870), L.R. 5 Q.B. 613 (1871), L.R. 7 Q.B. 196; (1874) L.R. 7 H.L. 17, followed.]

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Cameron, J.A.

APPEAL by defendant from the trial judgment in an action to recover money owing for work done and material furnished. Affirmed.

W. H. Trueman, K.C., and *D. R. C. MacLean*, for appellant MacMillan.

W. S. Morrisey, for respondent.

The judgment of the Court was delivered by

CAMERON, J.A.:—The plaintiff, a contractor, residing in Winnipeg, brought this action against the International Editorial Association (Inc.) and N. T. MacMillan for work done and materials provided in the completion of an hotel building at Vanderhoof, B.C. The association is a corporation having its head office in Chicago and the defendant MacMillan resides in Winnipeg and, it is alleged, acted as agent for the association. Alternatively, it is stated that the defendant warranted his agency and if there was none, is liable on such warranty, and also that if he was not authorized by the association to order the work in question he is personally liable. The defendant, MacMillan, in his statement of defence denied that he was liable on any of these alleged grounds.

Though the association was duly served with the statement of claim, it filed no defence, did not appear at the trial, and there further proceedings against it were abandoned by the plaintiff.

At the trial Curran, J. gave judgment for the plaintiff against the defendant MacMillan for the full amount claimed $906.37 and costs. This amount is not disputed, but the defendant appeals on the ground that he assumed no primary liability to the plaintiff in the matter and that if he was liable as guarantor the action must fail because of the Statute of Frauds.

There is a conflict in the evidence between that of MacMillan and his employee Tyrrell on the one hand and the plaintiff on the other. As the trial Judge found in favour of the plaintiff it is obvious that if there be found in his evidence sufficient to justify the verdict it must stand notwithstanding contradictions of that evidence to be found in the testimony of the defence. Consideration of the evidence is, therefore, narrowed down to the conversations between the plaintiff and MacMillan and Tyrrell.

Duncan had put in a tender for the work and was informed that a formal contract must be drawn up and signed. That was

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delayed owing to the non-arrival from Chicago of Mr. Grant, who was connected with the association. As a matter of fact, no contract was ever signed. Duncan was anxious to go on with a preliminary inspection of the building. MacMillan's authority from the association which appears in the correspondence clearly empowered him only to arrange a contract and did not extend to such preliminary work.

The following can be taken as the crucial part of Duncan's evidence relating to MacMillan's liability:—

"Q. You wanted to get ahead right away with it? A. Yes. Q. You told MacMillan this, did you? A. Yes, I told him that repeatedly, MacMillan, each time that I spoke with him I told him that, and Tyrrell, I told him that repeatedly too, I told him that, and he told me that the contract was not ready until Grant came up from Chicago to sign that contract, and that he would not be up until February 27. Q. What did you say to that? A. I told him that I was anxious to get started, and I would a good deal rather go right away if he would give me his word that everything was all right. He said everything was all right, and told me to go ahead. We had been sitting in MacMillan's private general office, and it just struck me then that I didn't know anything about Grant. That was the first that I had heard of him, and I told MacMillan then that it was him (MacMillan) that I was dealing with, and him I was relying upon. I didn't know anything about the other people in Chicago, and I had no opportunity of finding out anything about them. He told me it was all right to go ahead."

Can there be any doubt that, in these circumstances, the effect of MacMillan's words was to lead Duncan to believe that he, MacMillan, was making himself personally liable to him? I think there cannot be.

"Whether particular spoken words, not in themselves conclusive, e.g., 'Go on and do the work and I will see you paid,' amount to such a promise or only to a guaranty is a question of fact to be determined by the circumstances of the case," Pollock on Contracts, 8th ed. 165.

The trial Judge has here found the fact in favour of the plaintiff, there is ample evidence to support his finding and that is an end of the case.

There was no contract of any kind at any time between the plaintiff and the association. MacMillan had no authority to accede to the plaintiff's request to go on with his preparations and in doing so he adopted voluntarily the very course taken

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by the defendant Lakeman in *Mountstephen* v. *Lakeman* (1870), L.R. 5 Q.B. 613, 39 L.J. (Q.B.) 275; (1871), L.R. 7 Q.B. 196, 41 L.J. (Q.B.) 67 (in the Exchequer Chamber) and (1874), L. R. 7 H.L. 17, 43 L.J. (Q.B.) 1188, 22 W.R. 617, Lakeman was held liable in the Exchequer Chamber and in the House of Lords. Lord Cairns says, at p. 23 (L.R. 7 H.L.) that the words used "You go on and do the work . . . and I will see you paid" naturally mean:—

"You go on and do the work; do not concern yourself upon the subject of whether you have an order from the board, or have not such an order. You go on and do the work and I will be your paymaster, I will see you paid."

He goes on to say that if that be the *primâ facie* meaning of the words then:—

"I think there was ample and strong evidence to go to the jury that the go-by was entirely given to the question of an order of the local board and that *Mr. Lakeman* stepped in and undertook himself, as a matter of primary liability, to pay for the work that would be done."

That is precisely what MacMillan did in this case according to Duncan's testimony which the trial Judge accepted.

There could not possibly be here a contract of suretyship. There cannot be such, unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time; but until there is a principal debtor there can be no suretyship. Per Lord Selborne in *Lakeman* v. *Mountstephen, supra,* at p. 24.

The appeal must be dismissed with costs.

Appeal dismissed.

WALPOLE v CANADIAN NORTHERN R. Co.

Saskatchewan Court of Appeal, Haultain, C. J. S., Lamont and Turgeon, JJ.A. December 14, 1921.

MASTER AND SERVANT (§V—340)—ACTION UNDER FATAL ACCIDENT'S ACT R.S.S. 1920 CH. 62—WIDOW RESIDENT IN SASKATCHEWAN AT TIME OF COMMENCING ACTION—WORKMAN RESIDENT OF BRITISH COLUMBIA AT TIME OF ENTERING INTO CONTRACT OF EMPLOYMENT —RIGHT OF ACTION TAKEN AWAY BY WORKMEN'S COMPENSATION ACT 1916 (B.C.) CH. 77—RIGHTS OF PARTIES.

In an action in Saskatchewan under the Fatal Accident's Act R.S.S. 1920, ch. 62, by the widow and infant daughter, for damages for the death of an engineer, in the employ of the defendant company and a resident of British Columbia at the time of the accident, the Court held that as the action was founded on a wrong committed in British Columbia it was necessary to consider both the law of Saskatchewan and of British Columbia; that the

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Workmen's Compensation Act of British Columbia, 1916, (B.C.) ch. 77, sec. 6, gave the Workmen's Compensation Board exclusive jurisdiction in the matter, and that deceased by entering into the contract of employment in British Columbia must have intended to be governed by the law of British Columbia, and that as the statutory conditions attached to his contract would have been a complete answer to any action brought by him against the defendant company in British Columbia, the action in Saskatchewan must be dismissed.

APPEAL by plaintiff from the trial judgment, in an action under the Fatal Accidents Act, R.S.S. 1920, ch. 62. Affirmed.

D. Campbell, for appellant.

O. H. Clark, K.C., for respondent.

HAULTAIN, C.J.S.:—In this case the appellant claimed damages from the respondent under the Fatal Accidents Act R.S.S. 1920, ch. 62, on behalf of herself and her infant daughter, for the death of Thomas William Walpole, the husband and father, and alleged negligence on the part of the respondents in respect of Walpole's death, which occurred on April 17, 1919, in British Columbia, while he was acting as an engineer in charge of a locomotive as an employee of the respondent. The plaintiff, at the time of the accident, was living with her husband in British Columbia. On June 6, 1919, administration of his estate was granted to her in that Province. She left British Columbia in the latter part of July, 1919, and took up her residence in Saskatoon in this Province. The British Columbia letters of administration were resealed in this Province on October 30, 1919, and this action was begun on November 4, of the same year. The case was tried by Bigelow, J., with a jury. The jury returned a verdict in favour of the appellant, and, in answer to a question submitted to them, found that the accident was caused by the negligence of the respondent, and that the negligence consisted in not keeping a bridge in repair. The trial Judge, however, dismissed the action; holding, as the appellant was domiciled in British Columbia at the time of the accident, that the Workmen's Compensation Act 1916, B.C. ch. 77, gives the Workmen's Compensation Board exclusive jurisdiction in the matter in question. The present appeal is from that decision.

This action is founded on a wrong committed out of the jurisdiction, consequently a consideration of the law both of Saskatchewan and of British Columbia will be necessary.

The respondent's right of action here is subject to the condition that the deceased, if death had not ensued, would have been entitled to maintain an action and recover damages in this Province in respect of the wrongful act, neglect or default

which caused his death. As the *locus delicti* was British Columbia, it must first be established that the wrongful act or neglect would have been actionable if death had not ensued and the act had been done in Saskatchewan. That, I think, may be taken as clearly established. That point having been reached, it now becomes necessary to consider to what extent the deceased would have been affected in prosecuting his claim in this Province by the law of British Columbia.

The rights and liabilities of the parties to this hypothetical action under the *lex loci delicti* seem to be exclusively dealt with and declared by Part I. of the Workmen's Compensation Act 1916 (B.C.) ch. 77. In this connection it must be borne in mind that the deceased at the time of the accident was a resident of British Columbia working under a contract of employment made in that Province, in an industry or undertaking within the scope of Part I. of the Act in question. Section 6 of the Act provides that where, in any industry within the scope of Part I., personal injury by accident arising out of and in the course of the employment is caused to a workman, compensation as provided by the Act shall be paid by the Workmen's Compensation Board out of the Accident Fund. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong, and "accident" includes "a wilful and an intentional act not being the act of the workman and a fortuitous event occasioned by a physical or natural cause." (Sec. 2).

The primary meaning given to "accident" in the New English Dictionary is, "anything that happens," and, subject to the exceptions in sec. 2 and sec. 6 (3), that might be a very apt interpretation of the word as used in the Act so far as it applies to a workman. The accident fund is raised and maintained by taxation imposed by the Act on employers. The liability to pay compensation is that of the Board and not that of the individual employer. The object of the Act is to "provide insurance benefits for persons whose contract of employment arises within the Province and it is not directed to the very different purpose of making the employer directly compensate his workmen. . . . . ." *Workmen's Compensation Board* v. *C.P.R. Co.*, 48 D.L.R. 218 at p. 223, [1920] A.C. 184, 88 L.J. (P.C.) 169.

By sec. 11 (1) the Act declares that "the provisions of this Part (Part I.) shall be in lieu of all rights of action to which a workman or his dependents are entitled, either at common law or by any Statute, against the employer of such workman for or

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by reason of any accident which happens to him arising out of and in the course of his employment. . . . ." and the section further expressly enacts that "no action against the employer shall lie in respect of such accident."

It will thus appear that the only right possessed by the deceased at the time of his death, in the Province where he and his family were residing at the time of the accident, where the contract of employment was made and the employment was being carried on, and, where the accident happened, was "the result of a statutory condition of the contract of employment made with a workman resident in the Province for his personal benefit and for that of members of his family dependent on him." *Workmen's Compensation Board* v. *C.P.R. Co.*, 48 D.L.R. 218 at p. 221.

As to statutory conditions to be read into a contract of employment under the Workmen's Compensation Act (England), see remarks of Farwell, L.J. in *Darlington* v. *Roscoe & Sons*, [1907] 1 K.B. 219-230, 76 L.J. (K.B.) 371, 375.

The deceased would therefore have had no right of action either at common law or by statute in British Columbia. His only right under the law of that Province was the right to compensation, of which, under the Act, he could not divest himself (sec. 12), and which, under that Act, was to be in lieu of all rights of action theretofore possessed against the employer by reason of any accident. And further, and, in my opinion, more important still, he would have been absolutely prohibited by the Act from bringing any action against the employer in respect of such accident. These were statutory conditions attached to his contract of employment made by him as a resident of British Columbia, in that Province. These conditions were binding on him at the time of his death, and would have been a complete answer to any action brought by him against the respondent company in British Columbia.

From the foregoing I would draw the conclusion that the deceased, if death had not ensued, would not have been entitled to maintain an action in this Province for the wrong in question. By entering into the contract of employment in British Columbia, both parties must be assumed to have intended that the contract should be governed by the law of British Columbia. By that law the respondent acquired a right to immunity from all claims of the deceased in respect of the accident in question. By the same law the deceased acquired no right against the respondent. It is stated by Mr. Dicey, as a general principle of private international law, that "Any right which has been

duly acquired under the law of any civilized country is recognised and in general enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts." Conflict of Laws, 2nd ed. pp. 23, 24.

Story, J. has observed in his Conflict of Laws, p. 32, "It is difficult to conceive upon what ground a claim can be rested to give to any Municipal laws an extra territorial effect, when those laws are prejudicial to the rights of other Nations or to those of their subjects."

This passage is quoted with approval by Selwyn, L. J. in delivering the judgment of the Privy Council in *The Halley* (1868), L.R. 2 P.C. 193, 5 Moo. P.C.C. (N.S.) 263, 16 E.R. 514.

In delivering the judgment of the Court in *Ellis* v. *M'Henry* (1871), L.R. 6 C.P. 228 at p. 234, 40 L.J. (C.P.) 109, 19 W.R. 503, Bovill, C. J., said:—

"In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England; and is a principle of private international law adopted in other countries. It was laid down ..... by the Court of Exchequer Chamber in the elaborate judgment delivered by my brother Willes in *Phillips* v. *Eyre*, L.R. 6 Q.B. 1."

With this statement with regard to obligations by contract by the Court which was composed of Bovill, C.J., Willes, Keating and Brett, JJ., may be read the dictum of Willes, J., in *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, at p. 30, 40 L.J. (Q.B.) 28:—"And by strict parity of reasoning where an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided."

On this point see also observations of Lord Esher, M.R., in *Gibbs* v. *Societè Industrielle etc.* (1890), 25 Q.B.D. 399, 59 L.J. (Q.B.) 510.

C.P.R. v. *Parent* 33 D.L.R. 12, 20 C.R.C. 141, [1917] A.C. 195, 23 Rev. Leg. 292.

Phillips v. *Eyre* (1869), 9 B. & S. 343, L.R. 4 Q.B. 225, 38 L.J. (Q.B.) 113, 17 W.R. 375; L.R. 6 Q.B. 1, 40 L.J. (Q.B.) 28, also the cases cited above.

See also opinion of Story, J., cited in *Huber* v. *Steiner*

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(1835), 2 Bing. (N.C.) 202, 132 E.R. 80 and remarks of Tindal, C.J., thereon at p. 83 (E.R.); also *Harris* v. *Quine* (1869), L.R. 4 Q.B. 653, 38 L.J. (Q.B.) 331, 17 W.R. 967.

The facts and the foreign law involved in *Machado* v. *Fontes* [1897] 2 Q.B. 231, 66 L.J. (Q.B.) 542, 45 W.R. 565, are so entirely different from those of the present case as to make the principle of decision in that case inapplicable. In that case there was no "peremptory bar" to the jurisdiction (per Rigby J. at p. 235) as I have attempted to shew there is in the present case. The law of Brazil did not say positively that no civil action for libel shall lie, neither had the defendant in that case a positive immunity from liability for libel created by the statutory conditions of a contract made between him and the plaintiff. In any event, the decision in that case, while not expressly differed from, does not appear to have been followed by the Privy Council in *C.P.R.* v. *Parent, supra*, and seems to be in conflict with an earlier decision of the Court of Appeal in *The M. Moxham* (1876), 1 P.D. 107, 46 L.J. (P.) 17, 24 W.R. 650, in treating English law as extending to Brazil, and creating rights and liabilities in respect of an act done in Brazil which are not created by the law of that country. See Law Quarterly Review, vol. 13, pp. 233, 234. There was no substantive right originating in British Columbia which Walpole would have acquired by law in that Province and which would have still belonged to him (being transitory) if he had come into Saskatchewan. Neither was there a corresponding liability which would have followed the respondent.

If I am correct in finding that the deceased if he had lived could not have maintained an action in this Province, then, by sec. 3 of the Fatal Accidents' Act, R.S.S. 1920, ch. 62, the appellant's action must fail. Even if this preliminary obstacle did not exist to the action of the personal representative in this Province, that action would fail for the following reason. Under the law of British Columbia the appellant would have had no right of action against the respondent for the death of the deceased. In the first place, the provisions of the Workmen's Compensation Act, which apply equally to the dependents as to the workman himself, would, for the reasons already given, be a complete bar to an action either here or in British Columbia. The Families' Compensation Act, R.S.B.C. 1911, ch. 82, is, so far as the provision constituting the new right of action is concerned, identical with Lord Campbell's Act. The appellant would have no cause of action against the respondent under that Act. Section 11 of the Workmen's Compensation Act takes away that

right of action, both directly, by saying that no such action shall lie, and indirectly, by doing away with the right of the deceased to have maintained an action. Apart from the Families' Compensation Act, the common law principle with regard to death as an injury has not been modified in British Columbia, except by Part II of the Workmen's Compensation Act, which has no application to the present case.

The appellant, therefore, under the law of the Province where the accident occurred which caused Walpole's death, has neither a statutory right to sue nor any other right against the respondent. That, according to the principles of international law as applied in *C.P.R.* v. *Parent, supra,* affords a complete answer to this action.

The reason for the decision appealed from is to the effect that, because the appellant and the deceased were domiciled in British Columbia at the time of the accident and the statute of that Province gives the Workmen's Compensation Board exclusive jurisdiction in the matter in question, the action should not be entertained by the Courts of this Province.

There can be no question that the Board is given exclusive jurisdiction *in British Columbia.* So far as Walpole and the respondents are concerned, they may be assumed to have agreed to that exclusive jurisdiction by the statutory conditions attached to the contract of employment. If the parties have agreed to the forum and the law in which and by which their rights and liabilities are respectively to be pursued and determined, a foreign court would not usually intervene.

It is held in *Workmen's Compensation Board* v. *C.P.R. Co.,* 48 D.L.R. 218, at p. 221, that the right conferred on the defendants under sec. 8 is the result of a statutory condition of the contract of employment made with a workman resident in the Province (as in this case) for his personal benefit and for that of members of his family dependent on him. This would, I should imagine, apply equally to the rights conferred on dependents under the other sections of the Act. I can find no direct authority on this point, but it may be implied from the decision in *The Buenos Ayres, etc., Rly. Co.* v. *The Northern Rly. Co.* (1877), 2 Q.B.D. 210, 46 L.J. (Q.B.) 224, 25 W.R. 367, that an allegation in a statement of defence asserting that jurisdiction over the subject matter of the claim is, either by law or contract, vested exclusively in the foreign court, would be, if proved, a good defence to the action in England. The United States in *Galveston H. & S.A. Rly. Co.* v. *Wallace* (1912), 223 U.S. 481, at p. 490, decided that "where the statute creating the right

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provides an exclusive remedy to be enforced in a particular way or before a special tribunal the aggrieved party will be left to the remedy given by the statute which created the right."

The principle adopted by the English Courts is not founded on want of jurisdiction, but on the ground that the action in England under the special circumstances of the case is vexatious, oppressive or unjust, or that the parties have themselves chosen a forum. The present case seems to come within that principle.

I am therefore of opinion that the appeal should be dismissed, with costs.

LAMONT, J.A.:—I concur in the conclusions reached by Haultain, C.J.S., and my brother Turgeon, and my reasons therefor may be very briefly stated as follows:

Section 11 of the Workmen's Compensation Act of British Columbia takes away from a workman and his dependents any and every right of action which he or they may prior to the passing of that Act have had against an employer in respect of an accident causing injury or death to an employee, and in lieu thereof gives a right to the compensation provided by the Act. For the reasons given by me in *McMillan* v. *C.N.R.* (1921), 63 D.L.R. 257, the obligation of an employer to pay compensation is not a liability arising by reason of the act complained of, namely, the negligence of the company. This Workmen's Compensation Act received judicial interpretation by the Privy Council in *Workmen's Compensation Board* v. *C.P.R.*, 48 D.L.R. 218. In that case the crew of one of the railway company steamships had been lost when the vessel sank outside Canadian waters. The dependents of the members of the crew, having applied for compensation under the Act, the railway company brought an action for an injunction restraining the Board from paying compensation.

Section 8 of the Act provides that where an accident happens while the workman is employed elsewhere than in the Province which would entitle him or his dependents to compensation if it had happened in the Province, the workman or his dependents shall be entitled to compensation. Viscount Haldane, at pp. 221, 222, in referring to the right to receive compensation, said:—

"The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the Province for his personal benefit and for that of members of his family dependent on him. Where the services which he is engaged to perform are of such a nature that they have to be rendered both within and without the Province, he is given a right which enures for the benefit of himself

and the members of his family dependent on him, not the less that the latter may happen to be non-resident aliens. This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province."

From this language I take it that the provisions of the Workmen's Compensation Act are to be considered as part and parcel of every contract of employment entered into in British Columbia. If that is so, then it was a term of the contract of employment between the defendant company and the deceased Walpole that, in case of injury or death resulting to him from an accident arising out of and in the course of his employment, neither he nor his dependents would have any right of action against the defendants, whether the accident was the result of their negligence or otherwise. Such an agreement, whether express or statutory, is, in my opinion, binding upon the plaintiff, and is a complete answer to the plaintiff's claim.

I would therefore dismiss the appeal with costs.

TURGEON, J.A.:—I think the principles referred to by me in the case of *McMillan* v. *C.N.R.*, 63 D.L.R. 257, apply to this case, and that, therefore, the appeal must be dismissed. The facts are different in two respects. In the case at Bar the workman was killed, and this action is brought on behalf of his widow and children; and, while the deceased met his death through an accident which happened in the course of his employment, the finding of the jury upon the facts might be construed to mean that his death was due to the negligence of the defendant company in its corporate capacity. In this latter case the defence of common employment could not have been set up by the defendants in an action at common law in British Columbia prior to the passing of the Workmen's Compensation Act by the Legislature of that Province. *Ainslie Mining Co.* v. *McDougall* (1909), 42 Can. S.C.R. 420. Assuming this to be the case, however, I think the result must still be the same, as the only right arising out of the accident in British Columbia, in the present state of the law in that Province, is the right to compensation provided by that Act. *C.P.R. Co.* v. *Parent*, 33 D.L.R. 12. This right, in my opinion, is of the nature of a contractual right created by statute, and the statute which creates it expressly extinguishes any right of action which the deceased might otherwise have had. There was therefore no action for damages which might have been maintained by the deceased had he lived, and consequently

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no action accrues to the appellant under the Fatal Accidents Act of this Province (under which Act this action purports to have been brought), or under the similar statute in force in British Columbia and known there as the Families Compensation Act.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

LEGAULT v. DUFRESNE.

Quebec Superior Court in Bankruptcy, Panneton, J., April 21, 1922.

BANKRUPTCY (§III—26)—LEASE OF LAND—RELEASE FROM ALL DEBTS INCLUDING RENT—RENEWAL OF LEASE—GIFT OF RENT—ASSIGNMENT UNDER BANKRUPTCY ACT—RIGHT OF TRUSTEE TO SELL OR DISPOSE OF LEASE—LIABILITY TO BANKRUPT FOR RENT WHILE IN POSSESSION.

Where the owner of a building makes a gift by gratuitous title of all the debts owing to her by the party in possession of the building including that due by virtue of a lease of the premises to him, and two days afterwards leases the same premises to the same lessee for a long period for which such owner cancels or makes a gift of the rent to such lessee, an assignment under the Bankruptcy Act does not include this lease and the bankrupt is entitled to enjoy such lease without interference by his creditors and the lease cannot be sold by the trustee. The trustee is responsible to the bankrupt for rent of the premises during the time of his occupation.

[See Annotations 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

PETITION by a bankrupt for an order that he is entitled to the enjoyment of a certain lease, and that such lease is unseizable and cannot be sold or transferred by the trustee, also that he is entitled to certain moneys as wages. Petition granted.

Camirand and *Camirand*, for petitioner.

Elliott and *David*, for trustee.

PANNETON, J.:—In his petition the petitioner alleges in substance the following, and this is what the evidence establishes:—That about January 30, last, he made an assignment of his property in the hands of the respondents for the benefit of his creditors; That pursuant to this abandonment the respondents took possession of the shop bearing civic number 316 Bleury in the City of Montreal, and of the goods and moveable effects which had up to that time belonged to the petitioner, and that they have since continued to occupy the said shop without paying any rent;

That the petitioner had occupied this shop for many years, at first under a lease which was in force prior to March 18, 1919, on which date Dame Philomène Lumina Durand, owner of the building, made him a gift by gratuitous title of all the debts owing to her by the petitioner, including that due by virtue of the

said lease, and by the deed creating this gift she also cancelled any debt which he might appear to owe her in the future either for rental for the lodgings which he occupies with her family and herself or for rental of the above mentioned shop or for any other cause or consideration whatsoever, and added in the said deed that what she gave to the petitioner should not be seizable by any of the petitioner's creditors, that she made the gift for the sustenance of the petitioner's family and for the maintenance and education of his children. On March 21, 1919, that is to say two days after the remission of debts and gift, the said Dame Durand leased the same property to the petitioner for the same price, but for a period of 15 years, and since the lease that was in force on March 18, 1919, had been made for 10 years there still remained almost 8 years for it to run for which period she cancelled or made him a gift of the rent by the said deed.

The trustees-respondents gave the petitioner no notice regarding the rent, included the said lease in the petitioner's assets and proceeded to advertise the lease and rent for sale in spite of the fact that it was stipulated in the said lease that the petitioner could not sub-let the premises in whole or in part without the written consent of the said Dame Durand.

The petitioner further alleges that the trustees withheld the whole of the salary or commission which he earned from a certain Vesberg and refused to pay him the unseizable portion thereof, amounting to $314.

The petitioner concludes his petition as follows:—"That the respondents be ordered by this Court to give up the premises number 316 Bleury St., Montreal to the petitioner; that the said premises which the petitioner occupied at the time of his assignment at No. 316 Bleury St., by virtue of the lease mentioned in para. 2 of the present petition be declared to belong to the petitioner by virtue of the said lease and the gift referred to in par. 4 of this petition; that the above mentioned lease be declared unseizable;that the respondents have no longer any rights to its; that they have no longer any interest in it; that the said lease cannot be legally transferred, assigned or sold by the respondents; that the latter be condemned to repay to the petitioner the sum of $134 being the unseizable portion of the commissions illegally withheld from him by the respondents; that the petitioner be declared the creditor of the respondents for the amount of rent due by reason of the occupancy of the said premises by the respondents since the date of the present assignment; that the respondents be ordered by this Court to abstain from selling

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the above mentioned lease on the 17th of this month, the whole with costs against the respondents and against any party whom it may please this Court to condemn."

The trustees did not file any written contestation of this petition but objected to it verbally on the ground that the above mentioned deed by Dame Durand is under private signature and they maintain that it purports to create a gift of an immovable which can only be made by a notarial deed, and that, furthermore, the said deed was annulled by the lease of March 21, made two days later. As to the money claimed for salary or commission, they do not admit that this money earned in such a manner is a salary and consequently claim that no part of it is exempt from seizure.

Considering that the said writing of March 18, is legal in form in view of the fact that what is mentioned in it as being given to the petitioner is not an immovable thing or right; that the lease of March 20 merely had the effect of renewing the lease in force on March 18 for another 5 years and that in view of the fact that the said Dame Durand cancelled the petitioner's obligation to pay rent in future and that such rent was declared exempt from seizure by the petitioner's creditors, the said lease of March 20, 1919 and the rent due thereunder do not form part of the petitioner's assets which the trustees are entitled to take possession of; that the said sum of $134 is the unseizable portion of the petitioner's salary which he is entitled to receive as not forming part of his assets in the hands of the said trustees, which sum the said trustees have retained;

The Court declares that the authorized assignment made by the petitioner to the said trustees does not include the lease of the property hereinabove described as bearing civic number 318 Bleury, in the city of Montreal; the said petitioner is entitled to enjoy the said lease nor can his creditors benefit thereby or interfere in any way; that the said lease is unseizable and cannot be sold or transferred by the said trustees and orders the said trustees to refrain from selling the said lease, and further the Court declares the petitioner to be the creditor of the respondents for the amount of rental and occupation of the said premises since the date of the assignment in this matter, and the said trustees are ordered to pay to the petitioner $134, the whole with costs against the said trustees.

Judgment accordingly.

MORTIMER v. SHAW.

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Saskatchewan Court of Appeal, Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

DAMAGES (§IIIG—151)—ASSESSMENT OF BY TRIAL JUDGE—INTERFERENCE WITH AMOUNT BY APPELLATE COURT.

The amount of damages awarded by the Judge who tries an action will not be interfered with by a Court of Appeal unless clearly unreasonable and unsupported by the evidence or unless the Judge is shown to have committed some error of law or fact, or to have been guilty of partiality.

APPEAL by defendant from the trial judgment in an action for damages for assault. Affirmed.

Avery Casey, K.C., for appellant,

E. D. Noonan, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—This is an action for damages for assault tried by a Judge of King's Bench without a jury. In view of the findings of fact of the trial Judge, which are amply supported by the evidence, there can be no doubt that the defendant is liable to the plaintiff for an unjustifiable assault, and the only question to be considered now is whether or not the damages awarded are excessive. The trial Judge awarded $1,000 for general damages, $180 for the hospital bill, $95 for physician's fees, and $25 for drugs. Great difficulties confront us in dealing with the question of damages. The rule which applies to a Court of Appeal and which limits our discretion is very stringent. It was laid down by the Supreme Court of Canada in *Levi* v. *Reed* (1880), 6 Can. S.C.R. 482, and re-affirmed in *Cossette* v. *Dun* (1890), 18 Can. S.C.R. 222, that the amount of damages awarded by the Judge who tries the case should not be interfered with by a Court of Appeal unless clearly unreasonable and unsupported by the evidence, or unless the Judge is shewn to have committed some error of law or fact, or to have been guilty of partiality.

In this case, bearing the above rule in mind, and after giving the most careful attention to the evidence of the physicians who were called upon at the trial, I do not see how any reduction of the damages can be justified. The assault occurred on January 15, 1921. The medical evidence shewed that the plaintiff had not fully recovered from its results at the time of the trial in September, 1921. He remained in the hospital from the day after the assault until May 2. It is contended that the whole of this hospital bill should not have been allowed as special damages, as he was not necessarily confined to the hospital during all that time by reason of the assault. But it is not shown that he was suffering from any ailment not due to the assault,

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except a cold, and this cold apparently had nothing to do with his going to the hospital or remaining there, and he stayed in the hospital until the physician attending him deemed it advisable for him to leave. The physician describes his symptons as those resulting in all probability from the assault and says that if he had thought the plaintiff was in fit condition to leave the hospital at an earlier date he would have told him so. We are largely in the hands of the medical experts in matters of this kind, and no attempt was made to show that the physician was acting unskilfully or dishonestly. Nor do I see, applying the rule I have referred to above, how we can, in view of the evidence, reduce the amount ($1,000) allowed for general damages. It is exceedingly difficult, or I may even say impossible to fix an amount which will appear on its face to correspond exactly with the damage done. All we can do is to examine the evidence and then determine whether, upon that evidence, the amount awarded is so clearly unreasonable that it must be reduced. I can arrive at no such conclusion, and I am, therefore, of the opinion that the judgment should be allowed to stand.

I would dismiss the appeal with costs.

Appeal dismised.

WINFREY v. CLUTE.

Alberta Supreme Court, Appellate Division, Scott, Stuart, Beck, Hyndman and Clarke, JJ.A. May 26, 1922.

HUSBAND AND WIFE (§IIIA—143)—ALIENATION OF WIFE'S AFFECTIONS—PROOF OF MARRIAGE—ADULTERY—ENTICING—EVIDENCE.

Strict proof of marriage is required in cases of divorce, bigamy and crim. con., but in other actions such as alienating affections the marriage may be proved by cohabitation and the reception of the parties by everyone as man and wife. The Court also held that under the circumstances a two-days' stay at a hotel by the defendant and plaintiff's wife was insufficient evidence on which to infer adultery, but even if adultery had been proved, that fact was under the circumstances insufficient to justify the inference of enticing.

APPEAL by defendant from a judgment against him for $1,000 in an action by a husband for alienating the affections of his wife and enticing her to leave his home. Reversed.

The judgment appealed from in so far as it relates to the question of law raised during the trial, namely, whether the proof of marriage was sufficient, is as follows:—

WALSH, J.:—At the close of the trial I found the facts in favour of the plaintiff and assessed against the defendant the damages which I thought he should pay, but I reserved my judgment until I could consider and decide Mr. Maclean's

objection to the sufficiency of the proof of the marriage of the plaintiff to the woman whom he calls his wife. The action is one for alienating the affections of this woman and enticing her from the plaintiff's home. The marriage is denied by the statement of defence.

The only direct evidence of the marriage is in the plaintiff's examination in chief as follows:—"Q. Where were you married? A. Kansas City. Q. When? A. June 19, 1912. Q. To whom? A. Miss Irma Jane Wilson. Q. How many children were there of that union? A. Two." And in cross-examination Mr. Maclean asked him the following question:—"Mr. Winfrey, you were married in 1912, weren't you:" to which he answered, "Yes, sir."

Throughout the examination and cross-examination of the various witnesses the plaintiff and this woman are constantly referred to as man and wife. For instance in her examination by Mr. Maclean, counsel for the defendant, the following questions were asked and answers given:—"Q. Your husband has testified that after your marriage in 1912 you lived with him at Kansas City until 1916, when you came to Alberta? A. Yes, sir. Q. And at the time of your marriage to Mr. Winfrey had you any affection for him? A. Yes, sir."

The fact is undisputed that for 8 years following what was at least a form of marriage these people lived together as man and wife, 4 years in the United States and 4 years in this Province, during which she bore his name and his children. This action was originally framed as a divorce action in which the present defendant was a co-defendant. It assumed its present form under a judgment of the Appellate Division ((1921), 59 D.L.R. 248, 16 Alta. L.R. 422) following a condonation of the matrimonial offences alleged against the woman in question by the statement of claim.

No objection to the proof of the marriage was taken at the close of the plaintiff's case. Mr. Maclean said that he had an objection to make, without specifying it, but he would reserve it until he had called his witnesses and the evidence was closed.

The authority relied on by Mr. Maclean in support of his objection is *Zdrahal* v. *Shatney* (1912), 7 D.L.R. 554, 22 Man. L.R. 521, 20 Can. Cr. Cas. 205, a judgment of the Manitoba Court of Appeal. That was a criminal conversation case in which much stronger proof of an actual marriage is required than in the ordinary run of cases. The Court divided evenly, two of the Judges being of the opinion that in such an action both the law of the country in which the marriage took place

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and compliance with it must be proved as facts in order to shew that the marriage was an actual one while the other two held that an actual marriage might be proved by the evidence of the plaintiff alone. In the result the verdict for the plaintiff stood though proof of the marriage rested entirely upon his own evidence, the effect of which is described by one of the Judges as being "that he went through a ceremony which he believed made himself and the woman, man and wife." If this was an action for criminal conversation instead of for the comparatively innocent offence of alienating the affections I do not think that the above decision would be an authority against the plaintiff. Be that as it may, I do not think it applicable to this case. Bigamy, divorce and criminal conversation are the only causes of action or prosecution which according to the authorities can be successfully prosecuted only when the clearest proof of an actual marriage is submitted to the Court, and this cause of action is not within this category. In the criminal conversation case of *Morris* v. *Miller* (1767), 4 Burr. 2057, 98 E.R. 73, the earliest and still one of the leading cases on the subject Lord Mansfield intervening in the argument that marriage could be proved by cohabitation, name and the reception of the woman by everyone as the man's wife, said, "It certainly may be done so in all cases except two; one is in prosecution for bigamy and this case (if such proof cannot be received here) is the other."

In other cases, however, I think that the authorities justify the statement that where a man and woman have cohabited for a long time and under circumstances which have given them the reputation of being married, a lawful marriage between them will be presumed though there may be no positive evidence of it. As Lord Cranworth put in in the *Breadalbane* case (1867), L.R. 1 H.L. Sc. and Div. 182, at pp. 199, 200: "Where a man and woman have long lived together as man and wife and have been so treated by their friends and neighbours, there is a *prima facie* presumption that they really are and have been what they profess to be." Lord Lyndhurst in *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163, 7 E.R. 365, said that this presumption of law is not lightly to be repelled. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. This language was approved by the Lord Chancellor in *Piers* v. *Piers* (1849), 2 H.L. Cas. 331, at p. 362, 9 E.R. 1118. This last mentioned case is authority for the proposition that where there is evidence of a marriage ceremony having been performed followed by the cohabitation of the parties to it

everything necessary for the validity of the marriage will be presumed unless decisive evidence to the contrary is given.

Although the proof of this particular marriage might have been made much stronger out of the mouths of the parties to it I think there is sufficient to justify me in presuming that it did in fact take place in the entire absence of any evidence to the contrary and so I find in favor of it.

Wm. Short, K.C., and *N. D. Maclean*, K.C., for appellant.

A. C. Burley for respondent.

SCOTT, J.A.:—I agree with the result reached by my brother Beck, that the appeal should be allowed with costs and the action dismissed with costs.

I entertain considerable doubt, however, whether the trial Judge erred in his finding that the evidence relating to what occurred on the occasion of the defendant's two-days' stay, with the plaintiff's wife, at the Corona Hotel was sufficient to establish adultery between them.

But even if that evidence was sufficient to establish such adultery there was not, in my opinion, sufficient evidence to shew that the defendant enticed her to leave the plaintiff, which is the gist of the action.

STUART, J. A. (dissenting):—I am not sure if I had tried this case that I should have reached the same conclusion as the trial Judge did.

But the trial Judge saw the parties and must have been not sufficiently impressed with the truthfulness of the wife and the defendant to believe and accept their denial of adultery at the hotel.

He made the inference from all the circumstances that adultery had occurred. It seems to me that it is impossible to say that he was not reasonably justified in making that inference.

There is of course nothing in the way of direct or even circumstantial evidence of a previous enticing. The trial Judge seems merely to have inferred the existence of a previous enticing from the fact of the adultery. But the charge is one also of alienating affections. I suppose that means that the defendant by taking the initiative in advances had turned the affections of the wife from the husband towards himself. There is here also no evidence at all of previous actions of this character

But there is evidence that the defendant, knowing that the husband was searching for the wife, actively interfered to prevent him discovering her whereabouts.

I have much hesitation about the case but on the whole I do

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not feel justified in interfering with the inferences of fact made by the trial Judge. I agree that the evidence is rather weak as to enticing and alienating because I suppose that it is quite possible that, even assuming adultery to have been committed, the wife may have been the seducing party. That, however, strikes me as being improbable in the circumstances of this case. It is scarcely likely that adultery occurred without the defendant having either made seductive advances or having encouraged and responded to seductive hints from the other side. Either of these things would I think, in law have constituted alienation of affections. Of course it may be said that if the wife makes the first advances there can have been no affection to alienate. But human nature is weak. And an affection that was merely flickering faintly with life might be finally killed by the act of adultery. Would even this not be an alienation of affection?

Then there is the circumstance that although the plaintiff when dropping the divorce claim was allowed to proceed with the action against Clute both for *crim. con.* and for enticing and alienating, he nevertheless deliberately dropped the charge of *crim. con.* and in his amended claim alleged merely enticing and alienating. And now he is apparently forced to rest this case upon an inference to be drawn from an act of adultery, which charge he had dropped. There may have been a reason for this owing to the temporary reconciliation with the wife. Nevertheless although the procedure and situation looks peculiar there is, as far as I can see, no legal obstacle in the way of the plaintiff proving adultery as a piece of evidence from which the enticing and alienating should be inferred.

Upon the whole, but with hesitation particularly in view of the opinions of the other members of the Court, I would be in favor of dismissing the appeal.

BECK, J.A.: — The defendant appeals from a judgment against him for $1,000 in an action by a husband for alienating the affections of his wife and enticing her to leave his home.

The original statement of claim was amended and framed in this way consequent upon the decision of this Division in *Winfrey* v. *Clute* (1921), 59 D.L.R. 248, 16 Alta. L.R. 422. The judgment of Walsh, J., the Judge whose judgment is now in appeal is reported herewith, insofar as it relates to the question of law raised during the trial, namely whether the proof of marriage was sufficient. I think the decision in that respect was correct, namely that strict proof of marriage is required in cases of divorce, bigamy and *crim. con.* but not in other

actions. If this were an action for *crim. con.* the evidence of the marriage would, I think, be insufficient.

The judge at the conclusion of the trial gave orally his reasons for finding upon the evidence that the plaintiff had established his case as set up in the statement of claim. A transcript of the stenographic report of his reasons is before us. The conclusion I have come to from a study of the evidence is that although there is room for great suspicion that on an occasion of a two-day's stay at the Corona Hotel, Edmonton, in August, 1920, adultery took place between the defendant and the plaintiff's wife, an inference to that effect ought not, under the circumstances to be drawn. The plaintiff knowing all the circumstances in relation to that episode, which were brought out at the trial, unless it be some fuller explanation against such an inference, arranged that he and his wife should live together again, as they in fact did from December 10, 1920, to January 4, 1921, the plaintiff discontinuing this action, then one for divorce, as against his wife; and the plaintiff in his evidence at the trial being asked:—"Did you believe she had been guilty, or not, at that time," (i.e. when he took his wife back)? answering: "Well, there was a doubt in my mind." Both the defendant and the plaintiff's wife positively deny adultery. It is to be remembered that even if adultery were proved on this particular occasion, there could be no recovery in respect of it; for two reasons, first, a case of *crim. con.* is not set up, and, secondly, the proof of marriage given would be insufficient in such a case.

This episode can be used and the Judge used it, only as the foundation for an inference that the defendant enticed away the plaintiff's wife. But just as I think there was not sufficient evidence under the circumstances to infer adultery, so I think too even assuming adultery to have been proved, that fact, if it be so, is under the circumstances insufficient to justify the inference of enticing and it is upon that finding alone that the Judge draws the inference of enticing. There is much in the evidence the truth of which must be accepted to rebut such an inference.

The wife had not been brought up to farm work; she had been a stenographer—her mother a designer and fitter in a store; her step-father and mother lived in the Province; when she was away from her husband she was for the greater part of the time with her mother or her aunt. She never lived with or in the same locality as the defendant. If the defendant and the plaintiff's wife desired opportunities for illicit intercourse,

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such opportunities occurred daily on the farm before the wife left on the first occasion and were extremely few and difficult afterwards. The more reasonable inference, it seems to me, is that the wife was quite dissatisfied with her life on a farm in a remote district, where her life was a hard one; that she had little if any affection for her husband; that her mother was always ready to befriend her; and that, her mother looking after the children, she could find an occupation in a town or city to her liking—in fact she began and proposed to continue training as a nurse with her aunt in Nevada. There is nothing to indicate that she had any sex-liking for the defendant and consequently, it seems to me, there should be no inference drawn that it was by reason of an enticement of his that she left her husband on either occasion.

I would, therefore, with much respect for the opinion of the trial Judge, allow the appeal with costs and dismiss the action with costs.

HYNDMAN and CLARKE, JJ.A., concur with BECK, J. A.

Appeal allowed.

REX v LEE SOW.

British Columbia Supreme Court, Macdonald, J. May 6, 1922.

CRIMINAL LAW (§IIB—49)—TRIAL ON CHARGE ENTITLING TO ELECTION UNDER SEC. 777 CRIM. CODE—REFUSAL OF ADJOURNMENT TO CONSULT COUNSEL—CONVICTION—SEC. 786 OF CRIMINAL CODE—CERTIORARI—UNFAIR TRIAL.

An accused being tried before a Magistrate for an infraction of the Opium and Narcotic Drug Act, Can. Stats. 1911, ch. 17, has a right, before electing under sec. 777 of the Criminal Code, as to whether he will be tried summarily by the Magistrate or in the regular way by a higher Court, to an adjournment, for the purpose of obtaining counsel or advice from any source that may be deemed reasonable, and where such adjournment is refused and he is compelled to make his election without advice and his trial is proceeded with in the same manner such trial is contrary to sec. 786 of the Code and cannot be said to be a fair trial, and a conviction on such trial will be quashed on *certiorari*.

[*R.* v. *Lorenzo* (1909), 16 Can. Cr. Cas. 19; *R.* v. *Farrell* (1907), 12 Can. Cr. Cas. 524, 15 O.L.R. 100; *R.* v. *Chow Chin* (1920), 57 D.L.R. 708, 34 Can. Cr. Cas. 228, 29 B.C.R. 445, followed.]

APPEAL by way of *certiorari* to quash a conviction for infraction of the Opium and Narcotic Drug Act. Can. Stats. 1911, ch. 17. Conviction quashed.

A. J. B. Mellish, for appellant. *Oscar Orr*, for Crown.

MACDONALD, J.:—On January 31, 1922, Lee Sow was tried before C. J. South, Deputy Police Magistrate of the City of Vancouver, under the Opium and Narcotic Drug Act—1911—ch. 17, on a charge of selling cocaine and morphine. By an amendment to this Act (1921), ch. 42, it was provided, that any

person found guilty of such offence became liable, upon indictment, to imprisonment for any term, not exceeding 7 years. The Magistrate utilized the provisions of sec. 777 of the Criminal Code and, with the consent of the accused, held the trial, as if he had been indicted. He was convicted and sentenced to the penitentiary for 5 years.

By *certiorari* proceedings, Lee Sow, now seeks to quash the conviction, and thus set aside the warrant of commitment, issued thereunder.

Objection was taken to the jurisdiction of the Magistrate. It was contended that there was no power vested in Mr. South, as Deputy Police Magistrate of the City of Vancouver, to try indictable offences under said sec. 777 of the Code. Sub-section 1 of this section provides that, in Ontario any person charged, before a Police Magistrate, or Stipendiary Magistrate, for any offence for which he might be tried "at a Court of General Sessions of the Peace . . . . may, with his own consent, be tried before such Magistrate."

This mode of trial by sub-sec. 2 of such section was declared: "To apply also to district magistrates, and judges of the sessions in the province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns, having a population of not less than 2500 . . . ."

It was decided in *R.* v. *Rhamat Ali*, (No. 2) (1910), 15 B. C.R. 175, 16 Can. Cr. Cas. 193, that sec. 777 applied to British Columbia, and conferred jurisdiction upon the Police Magistrate of the City of Vancouver.

Another point raised, requiring consideration, was, that aside from any question of jurisdiction, the trial was so conducted that it could not support a valid conviction. The accused was entitled upon being brought before the Magistrate for trial, to a full and complete defence. Martin, J., in *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86, referred to a defect in the procedure being fatal to a conviction, even though the course taken by the Magistrate was pursued with the best of intention. Here, the accused, after the information had been read to him by the interpreter, was informed by the Magistrate that the charge might be tried forthwith before him without the intervention of a jury, or to remain in custody or under bail, and be tried in the ordinary way by a Court having competent jurisdiction. That he had the right to choose whether he would be tried in the Police Court or in a higher Court. The interpreter then stated to the Court that the accused wished an adjournment until he could see his cousin. This request for an adjournment,

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for the purpose of obtaining counsel or advice, was refused, and the accused was called upon to elect, through an interpreter, and plead to the charge. I think that before an accused person is compelled to make such an election, through an interpreter, presumably employed by the Court, he should, if he so desires, be entitled to an adjournment for the purpose of obtaining counsel or advice from any source that might be deemed reasonable. Under the circumstances, Lee Sow, was required to make his "election," if it can be so termed, without advice and his trial proceeded in the same manner. Counsel for the Crown could not cite any authority in support of any proposition that this was a fair trial. It was not along the lines intended by sec. 786 of the Code, which provides that:—

"In every case of summary proceedings under this the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor."

In *R.* v. *Lorenzo* (1909), 16 Can. Cr. Cas. 19, Britton, J., was of the opinion that because the request for the adjournment of the trial for summary conviction, for selling liquor without a license, was not granted, for the purpose of obtaining witnesses, that the defendant did not get a fair trial as "he was not allowed a fair and reasonable opportunity to make his defence." He considered the decision in *R.* v. *Farrell* (1907), 12 Can. Cr. Cas. 524, 15 O.L.R. 100, as binding upon him. This position, and the necessity for a fair trial, was referred to by Hunter, C.J., in the case of *R.* v. *Chow Chin* (1920), 57 D.L.R. 708, 34 Can. Cr. Cas. 228, 29 B.C.R. 445. There witnesses, who it was alleged could probably give material evidence, were sought to be secured and, while there was overwhelming evidence given to convict the Chinaman, still, the opportunity was not afforded to the defence of obtaining the evidence of such absent witnesses. An accused person "must be convicted according to law." In the *Farrell* case, a party accused of selling liquor, was refused an adjournment by the Magistrate on account of the absence of his solicitor. The facts there outlined are quite similar to those here present and Anglin, J. after reciting them, and referring to the fact that the accused person was not even granted an adjournment of a few hours, and was compelled to proceed with his trial without witnesses, adds at p. 107:—

"The defendant was, under the circumstances of this case, entitled to a reasonable adjournment, not as of grace, but as of right—not upon terms but unconditionally.

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Of course, these remarks would not always be entitled to weight, but I think, in my opinion, are applicable to the present application.

I draw a distinction between the right of a person to have an adjournment, for consultation at least, before giving his consent to a certain Court exercising criminal jurisdiction, and where such Court has an absolute right to try an offence summarily and refuses a request for adjournment, to enable an accused person to secure counsel. It might, generally speaking, appear unfair and unreasonable not to grant an adjournment for such a purpose but there might be occasions in which a Magistrate, having this ample power would feel justified in exercising his discretion and refusing such an adjournment and the consequent delay. There is authority, deciding that a Magistrate has such right. *Vid. R.* v. *Irwing* (1908), 14 Can. Cr. Cas. 489; *Reg.* v. *Biggins* (1862), 5 L.T. 605; *Reg.* v. *Griffiths* (1886), 54 L.T. 280.

I fully appreciate the difficulties that the authorities encounter, in dealing with the drug traffic and in endeavoring to destroy its pernicious effect in the community. At the same time, it is most necessary that every person charged with an offence should receive a fair trial. There has been a departure from this fundamental principal. It follows that the jurisdiction of the Magistrate was affected and the conviction should be quashed. There will be protection to the Magistrate and no costs.

Conviction quashed.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons, Hyndman and Clarke, JJ.A. May 30, 1922.

EQUITY (§IA—2A)—LEASE OF FARM LAND—BREACH OF COVENANTS—LESSOR ENTITLED STRICTLY TO FORFEITURE—RELIEF AGAINST BY COURT—JUDICATURE ACT ALTA. STATS. 1919 CH. 3 SEC. 35 (8)—POWERS OF COURT UNDER.

Section 35 (8) of the Judicature Act Alta. Stats. 1919 ch. 3, which gives the Court power to relieve against penalties and forfeitures is not confined to cases in which the old Court of Chancery would have done so, but applies to cases in which power has been given to the High Court of Justice in England subsequently to 1873, and from time to time. This power includes the right to relieve against forfeiture or lease of farm property for non-performance of the terms, where although the landlord may, in strictness be entitled to forfeiture, the breaches are such as call for the exercise of the power to relieve by the Court.

APPEAL by defendant from a judgment at the trial of an action, claiming (1) an injunction restraining the defendant from

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entering upon certain land and from cutting or interfering with the crops and (2) damages for wrongfuly entering and cutting the crop whilst the same was unfit for harvesting. Held, that the plaintiff by reason of breaches of covenants was entitled to forfeit the lease, but relieving against such forfeiture on terms.

J. J. O'Connor, for appellant.

H. P. O. Savary, K.C., for respondent.

STUART, J.A.:—The facts in this case are set out in the judgment of Hyndman, J., with the result of which I concur. But I think it desirable to add something regarding the power of this Court to relieve from a forfeiture and the rules upon which it should be exercised.

In the first place, it seems to me that there has been an inclination in some cases to confuse the jurisdiction of the Court to relieve with the rules of equity as to the cases in which the Court will exercise that jurisdiction. It seems to me that these are two different things. Yet, inasmuch as the power exercised by the Court of Chancery in England to relieve from penalties and forfeitures or, indeed, any of the original powers of the Court, never had a statutory basis but was simply assumed by the Chancellors and developed; the inevitable result was that in the precedents the existence and extent of the power or jurisdiction was confused with the question of the rules upon which it should in particular cases be exercised. Whenever, we find expressions to the effect that the Court of Chancery has no jurisdiction to relieve from a particular penalty or forfeiture all that can really be possibly meant is that, according to the settled practice of the Court, relief will not be given. There never was any authoritative statement in general terms either by statute or otherwise of the extent of the jurisdiction of the old Court of Chancery either with relation to penalties and forfeitures or any other subject. All we have are precedents deciding that in such and such particular cases the Court will or will not exercise jurisdiction by acting so as to give an equitable remedy. The English Judicature Act of 1873 gave no general definition of the equitable jurisdiction of the new High Court of Justice other than to say that it should possess all the jurisdiction theretofore "vested in or capable of being exercised by" the High Court of Chancery.

Our Judicature Act, both that of 1907 and that of 1919 contains this clause:—

"Subject to appeal as in other cases the Court shall have power to relieve against all penalties and forfeitures and in granting such relief to impose such terms as to costs, expenses,

damages, compensation and all other matters as the Court sees fit."

This clause has never been inserted in the English Judicature Act but is to be found in the Ontario Act. There seems to be some doubt whether the clause gives the Court any wider jurisdiction than that possessed by the English Court of Chancery before the Judicature Act. Holmested and Langton, 4th ed. at p. 91 says in reference to the clause:—"The former Court of Chancery had power to relieve against forfeitures. This section *seems* to confer on the Supreme Court more ample power." But the authors do not cite any specific Ontario decision on the point. In *C. P. R.* v. *Meadows* (1908), 1 Alta. L.R. 344, I expressed the opinion that the clause gave no wider power. But mine was a dissenting judgment although Scott, J., in whose judgment the other members of the Court concurred did not specifically discuss the subject.

My present view is that what I said in *C.P.R. Co.* v. *Meadows* may quite well be correct. It may be, for the reasons I have already given, that the extent of the pure jurisdiction may not have been enlarged, that the old Court of Chancery did have in theory just as wide powers, but that according to the rules of equity adopted by that Court the *exercise* of the jurisdiction was confined to certain well defined cases.

The real question upon the clause is, not so much whether the extent of the jurisdiction has been enlarged, as whether, in view of the fact that we now have a statute in these wide general terms whereas there was no statutory basis to the old jurisdiction, the Court ought not to consider itself at liberty to exercise the jurisdiction in a wider field and in cases where the old Court of Chancery would not have done so. In my opinion the enactment of a statutory authority in such general terms when there was no necessity for it at all if the Court was intended to exercise the power only in the cases in which the old Court of Chancery would have done so is quite sufficient justification for extending the field within which the power may be exercised. The section speaks clearly of "*all* penalties and forfeitures" without limitation, and I have no doubt that, the Court being given by statute a certain power, it ought to exercise that power whenever it deems it just and equitable that it should do so. In this view it makes little difference whether we look upon the statute as having widened the power or not. That question becomes purely academic.

In the case of *Warner* v. *Linahan* (1919), 46 D.L.R. 31, 14 Alta. L.R. 422, the Court was evenly divided, but a reading of

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the case will show that the division of opinion rested more upon the question whether the case was one in which the circumstances made it equitable to relieve. Harvey, C.J., and Ives, J., who were against the granting of relief, do not rest their decision upon a lack of jurisdiction to grant it and do not refer to the section of the Judicature Act at all. But it seems to me that one may infer from what was said that the power to relieve was not really doubted but rather assumed.

I have no doubt, therefore, that the Court does now possess the jurisdiction to grant relief. But there is another aspect of the matter arising out of certain other sections of the Judicature Act to which attention ought to be directed. I refer to sec. 35; sub-secs. 1 and 2 of that section read as follows:—

"1. If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, the Court shall give to such plaintiff or petitioner such relief as would be given by the High Court of Justice in England in a suit or proceeding for the same or a like purpose.

2. If any defendant claims to be entitled to any equitable estate or right or to relief upon any equitable ground against any deed, instrument or contract or against any right, title or claim asserted by any plaintiff or petitioner in such cause or matter, the Court and every Judge thereof shall give to every equitable defence so alleged such and the same effect by way of defence against the claim of such plaintiff or petitioner as the High Court of Justice in England would give if the same or like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or like purpose."

These subsections appear for the first time in our local legislation in 1893. They are to be found in the Civil Justice Ordinance of that year and have been continued in the same form ever since. They were obviously copied from the English Judicature Act of 1873. But upon one important point there is such a peculiar and striking change that it is desirable to quote the first of the English sections. This section (sec. 24 sub-sec. 1) reads as follows:—

"If any plaintiff or petitioner claims to be entitled to any equitable estate or right or to relief upon any equitable ground against any deed, instrument or contract or against any right, title or claim whatsoever asserted by any defendant or respondent in such cause or matter or to any relief founded upon a legal

right, *which heretofore could only have been given by a Court of Equity*, the said Courts respectively and every Judge thereof shall give to such plaintiff or petitioner such and the same relief *as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose properly instituted before the passing of this Act.*"

And there is a similar section relating to a defendant which I need not quote but which is obviously the origin of our sub-sec. 2 above quoted.

Now, in the above section (1), just quoted, attention should be directed to the two phrases which I have caused to be italicized. The first of these phrases is omitted from our Act but I do not propose at the moment to make any inference therefrom, although the omission might, in an easily conceivable case, make a considerable difference. But the change in the phraseology of the concluding phrase is, to my mind,, exceedingly significant. The English statute refers only to "such and the same relief as ought to have been given *by the Court of Chancery*. . . . before the passing of this Act." Reference to the Ontario Judicature Act will show that the corresponding section in it also uses the same expressions for it says (sec. 16, sub-sec. 1) "Such and the same relief as ought to have been given by the Court of Chancery. . . . before the passing of that Act" (i.e. The Ontario Judicature Act 1881).

It will thus be seen that both the English and the Ontario Act impose on the Court the duty of giving only such relief as *ought* to have been granted by the Court of Chancery before the Judicature Acts were passed.

Now, turning to our section let us observe the very marked difference. An analogous enactment would have read "such relief as ought to have been granted by the English Court of Chancery before the passing of the Judicature Act 1873." But the Legislature even in 1893 seems very deliberately to have adopted much different language. It said, "such relief as *would* be granted by the High Court of Justice in England in a suit or proceeding for the same or like purpose."

There is no period of time referred to, and it is not to the old Court of Chancery that reference is made but to the High Court of Justice. It seems to be perfectly plain that when the clause was first enacted in 1893 the Legislature practically said, "We will not hold the plaintiff down to the relief which the old Court of Chancery ought to have given prior to 1873 but we shall impose on the Court the duty of giving such relief as the High Court of Justice in England would give in the like case, that is

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to say as it would *now* give, that is, in 1893." It seems perfectly plain that the Legislature meant to enact that if any wider power had been given to the High Court of Justice in England between 1873 and 1893 to grant equitable relief then the Court should grant the same relief which the High Court of Justice would now (i.e. in 1893) give. It is possible, of course, that all that was intended was to clothe the Court only with the power and duty which the Judicature Act bestowed in 1873 upon the new High Court of Justice. On the other hand it is just as possible and in my opinion extremely likely that the Legislature intended to add to the Court also those powers and duties which might in the mean time by English legislation have been added to the High Court of Justice, whether by amendment to the Judicature Act or by any special statute. If the purpose had been to set the fixed date, 1873, the language I have above suggested could easily have been used. But the Legislature did not use that language. Its words contain no reference whatever to a past date. The words speak very plainly of the present time (that is 1893 for the first ordinance). And we still have our statute of 1919 using the same language. The Legislature seems to have acted upon much the same principle as it did in the case of the Rules of Procedure and Practice. See 1910 2nd. sess. ch. 2, sec. 3.

It seems to me, therefore, to be very plain indeed that we have here an express adoption of any later powers and duties that may have been given to or imposed upon the High Court of Justice in England subsequently to 1873 and always up to the present time as time goes on.

Nevertheless, I am not prepared as yet to hold that this has led to the introduction of the provisions of sec. 14 of the Conveyancing and Law of Property Act 1881 (Eng.) ch. 41, which deal with the necessity of notice being given before a right of re-entry or forfeiture can be enforced by action and with the power of the Court to relieve. There has been no argument on the point. All I desire to do at present is to point out that there may be serious ground for contending that the provisions of that section of the Conveyancing &c. Act of 1881 may be, partially at least, applicable here particularly in view of the omitted phrase to which I have referred.

I should be surprised to find that we are still in 1870 so far as the power of the Court to relieve from forfeiture of leases is concerned. This would be a strange result of our tendency to accept as good everything that once existed in England and to forget that in 50 years even the people of England have discov-

ered that some of their old laws should be amended or repealed.

I can only understand the omission of our Legislature to deal with the question of relief from forfeitures of leases upon the theory that it was thought that the general clause (sub.-sec. 8 of sec. 35) of the Judicature Act would cover the case.

The existence of the special provisions of sec. 17 saying that the Court shall have power to relieve against a forfeiture for breach of covenant or condition in any lease to insure against loss or damage by fire does not in my opinion prevent the application of the wider provisions of sec. 35 (8). The two sections come in a way from different sources. Section 17 is first found in the Supreme Court Act ch. 3 of 1907 while sec. 35 (8) was introduced as an amendment to the old Judicature Ordinance by the Statute Law Amendment Act of 1907. As originally passed they were in different Acts and for this reason I do not think we should allow sec. 17, by a mere inference as to what the Legislature intended to cut down the wide general meaning of sec. 35 (8). It is not what we think the Legislature intended but what it said and what its words mean, it is its intention in this sense that we must regard.

I would, therefore, give the widest general effect to the words of sec. 35 (8) and apply them in this case as my brother Hyndman has done.

BECK, J.:—I concur in the judgment of my brother Hyndman.

In *Royal Trust* v. *Bell* (1909), 2 Alta. L.R. 425, I held that this Court had a general power to relieve against forfeiture. I still adhere to the opinion I then expressed fortified, as I am, by the additional reasons of my brother Stuart.

SIMMONS, J.A. concurs with STUART, J.A.

HYNDMAN, J.A.:—The plaintiff is the owner of section 18-23-26-w4th in this Province and by instrument dated April 11, 1921, she demised same to the defendant for the term of 1 year from the date thereof at the rental of one-third share of the whole crop grown thereon.

It was covenanted in and by the said lease that the defendant would, in the proper season, in a proper and husbandlike manner, summer fallow 200 acres of the said land, to be ploughed to a depth of 6 inches; also in the proper season, in a good and husbandlike manner seed to wheat or such other grain as the lessor should consent to in writing, all of the said land then in tillage, save such as should be summer fallowed as provided by the said lease.

Defendant also covenanted and agreed that he would use for

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seed only good grain, free from dirt and weed seed, and properly bluestoned or otherwise chemically treated.

It was further covenanted and agreed that the defendant would use his best endeavour and improved methods of husbandry to prevent the growth of and exterminate all noxious weeds, and that he would care for and protect the crops.

In addition to the above written stipulations, there was a verbal understanding (not of course binding) that the defendant would reside in the dwelling house on the land during the tenancy, but contrary thereto, defendant rented another property some miles away and did not, thereafter, live on the plaintiff's land.

The lease contained the usual provisions and conditions and among them the right of re-entry in case of breach by the lessee of the covenants therein.

Pursuant to his lease defendant entered upon the land and put in crop 369 and a fraction acres in approximately equal proportions of wheat and oats.

The plaintiff alleges that the defendant committed the following breaches and defaults:—

"(a) The defendant did not use for seed good grain free from dirt and weed seed. (b) The defendant did not clean the seed grain used by him upon the said land by fanning mill or otherwise, so as to remove therefrom dirt and weed seeds therein. (c) The defendant did not blue stone or otherwise chemically treat any part of the seed sown upon the said lands, and did not commence seeding in the proper season. (d) According to the terms of the said indenture of lease the defendant was required to summerfallow 200 acres and to seed to wheat or other grain all of the remaining portions of the said land then under cultivation which amounted to approximately 420 acres, but the defendant contrary to the terms of the said lease only seeded 340 acres, leaving approximately 80 acres of the said land unsown, in addition to 200 acres thereof left for summerfallowing. (e) The defendant did not use his best endeavours or improved methods of husbandry to prevent the growth of or exterminate noxious weeds and neglected and refused to do anything whatsoever to prevent the growth of or remove the weeds although requested so to do, and permitted the weeds upon the said land to go to seed. (f) The defendant did not care for and protect the crop upon the said land, but permitted cattle to break into the said land, and feed upon the crop thereon, and made no effort to protect the said crop from destruction by grasshoppers, although requested so to do. (g)

The defendant did not in the proper season of the year 1921 or at any time summerfallow in a good and husbandlike manner or at all 200 acres of the said land or any part thereof."

As a result of the alleged breaches the plaintiff entered into possession. Subsequently defendant returned to the land and commenced to cut and harvest the crop growing thereon.

The plaintiff then brought this action, claiming (1) an injunction restraining the defendant from entering upon the land and from cutting, etc., or in any way interfering with the crops, and (2) payment of the sum of $500 damages for wrongfully entering and cutting the crop whilst the same was unfit for harvesting.

A defence and counterclaim was filed denying the allegations with regard to breaches and defaults and claiming:—

"(a) Two-thirds of the said grain threshed and grown on the said lands and two-thirds share of the straw and roughage. (b) Damages $4 per acre for 190 acres $760. (c) Damages $1.50 per acre for 180 acres, $270. (d) 80 cents the depreciation in price for the full two-thirds share of the wheat and 20 cents for the full two-thirds of the oats grown on the said lands, being the decrease in price by reason of the grain not having been sold at the proper time. (e) The defendant's solicitor and client costs. (f) Damages for defendant's loss of time, and loss of time of outfit, and expense and charges in having injunction varied. (g) Damage for loss by reason of cattle of plaintiffs pasturing and injuring crop. (h) Such other and further relief as to this Honourable Court may seem meet. (i) Costs of this action."

An interim injunction was granted, but was afterwards by order of Stuart, J., varied, allowing defendant to cut and put the crop in stook. Subsequently by another order of Ives, J., the landlord was permitted to thresh and market the crop and by arrangement between solicitors the grain tickets were held by Mr. Savary until the judgment of the trial Judge.

The question for determination, therefore, is, whether the defendant committed such breaches of contract as entitled the plaintiff to determine the lease.

The case is undoubtedly one of great concern to the defendant for the reason that he spent much valuable time on the land, ploughing, harrowing, and seeding about 370 acres, in addition to the cost of the seed and the use of his farm implements, machinery and horses, all of which is totally lost to the defendant if the judgment stands as correct.

As to the summer fallowing, the lease provides:—"He will, at

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the proper season of each year of the said term, in a proper husbandlike manner, summer fallow 200 acres of the said land to be ploughed to a depth of 6 inches."

The defendant testified that on July 8 he went to the farm with the intention of beginning the summer fallowing and had equipment sufficient to complete the work in 10 days. On arriving at the place, he found another man in charge, pursuant to the plaintiff's act of forfeiture, and the greater part of the summer fallowing done. Had he been able to go on he should have finished up about July 26. There is nothing in the evidence to shew that the defendant, if not prevented by the plaintiff, might not have done the work within the time mentioned.

There was much evidence given on behalf of both parties, with respect to the time when summer fallowing ought to have been done. One set of witnesses testify that it ought to be done as early as possible and not later than the end of June, and equally reliable witnesses say it is quite all right if done any time during the months of June and July. I am satisfied that no strict rule can be laid down and it is purely a matter of opinion and varies with the seasons and locality. What one farmer might consider was all right another of the same class might say was all wrong.

That being the case, then, is it possible, until the whole of the summer fallow season has elapsed, for the lessor or anyone else to say as a fact that a breach of this condition has occurred? Where is the exact line to be drawn? It seems to me that difficulties of this kind, being matters of judgment and opinion, ought to be provided against by fixing such dates by the terms of the agreement. Otherwise the difficulty of proving as a fact under the circumstances of a case such as this is very great.

A close scrutiny of the evidence on this point does not satisfy me that the plaintiff has established by preponderance of evidence, as he must do, the *onus probandi* being upon him, the fact that a breach was actually committed entitling him to forfeit the lease.

In Moore on Facts, vol. 1. p. 54, under the heading "Preponderance of Evidence Rule," it is said "The general rule in civil cases is that the party having the burden of proof of any essential fact must produce a preponderance of evidence thereon . . . And the evidence in a lawsuit, like a line of battle or a chain of military defences, is 'no stronger than its weakest point.' When the evidence tends equally to sustain either of

two inconsistent propositions, a judgment or verdict in favour of the party bound to maintain one of them against the other party is necessarily wrong. Preponderance means the most weight. It is as correct a definition as can be given."

Placing the testimony adduced by the defendant against that of the plaintiff it seems to me it is quite as reasonable as that of the plaintiff's. If that is so then the burden of proof required has not been discharged and the fact not established. See also 13 Hals. p. 433.

With reference to particulars a. b. c. in the plaintiff's claim, i.e., that proper seed was not used, it seems to me, if a breach of this covenant did take place, the evidence shews clearly that the plaintiff waived his right to forfeiture because of it. Plaintiff went to the farm on several occasions during the seeding operations and saw the seed used and lodged certain complaints resulting in the defendant securing different seed. Even the new seed to the knowledge of the plaintiff was not "clean." Notwithstanding this, according to the plaintiff's evidence, a conversation took place between them quite a time after all the seeding had been completed, at which no objection to or mention was made of past alleged violations of terms of the lease, but the plaintiff's object in seeing him was to ascertain when he intended to begin the summer fallowing. The necessary implication from this must be that plaintiff elected not to forfeit but to continue the lease. The lease then as of this date must be held to have been in good standing.

The only possible breaches which happened thereafter were those with respect to weeds and the destruction of grasshoppers.

Now, I think it would be most unreasonable to expect that any farm in this country is capable of being made entirely free from weeds. Nevertheless, the evidence does shew that there were weeds on this land which it was the defendant's duty to exterminate to the best of his ability. This he did not do, and consequently in strictness the plaintiff had the legal right to forfeit the lease. The same may be said with regard to the question of the grasshoppers.

However, in my opinion there are breaches which call for the exercise of the power of the Court to relieve against, which power is conferred by sub-sec. 8 of sec. 35 of the Judicature Act, ch. 3, of statutes of 1919, which enacts:—

"Subject to appeal as in other cases the Court shall have power to relieve against all penalties and forfeitures and in granting such relief to impose such terms as to costs, expenses,

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damages, compensation, and all other matters as the Court sees fit."

It was held by Beck, J., in *Royal Trust Co.* v. *Bell*, 2 Alta. L.R. 425, that such provision extended to cases between landlord and tenant, and this was affirmed in *Warner* v. *Linahan* (1919), 46 D.L.R. 31.

Relief, however, should be granted only on the condition hereinafter mentioned.

I think, therefore, that the judgment of the Court ought to be (1) That the plaintiff by reason of the breaches of covenant with regard to the killing of weeds and poisoning of grasshoppers was entitled to forfeit the lease, but (2) That said forfeiture should be relieved against and the defendant declared entitled to two-thirds share of the crop on the terms and conditions that out of the said two-third's share of the crop or the proceeds thereof there shall be deducted—(a) the reasonable cost to the plaintiff of the summerfallowing of the said 200 acres and the land agreed to be summerfallowed instead of being cropped; (b) the reasonable cost of killing the weeds and poisoning grasshoppers; and (c) the reasonable and proper cost of threshing, hauling and marketing the grain.

Should the parties fail to agree (as I think they should endeavour to do) as to the proper allowances which ought to be made with respect to said items, then there shall be a reference to the Clerk of the Court, the costs of such reference to be settled by the Judge to whom application is made to confirm such report.

The plaintiff should have the costs of the action and counterclaim and the defendant the costs of the appeal. The action of *Harper* v. *Snider* should be dismissed without costs to either party up to the date of the order of consolidation.

CLARKE, J.A. concurs with STUART, J.A.

Judgment accordingly.

CORPORATION OF POINT GREY v. SHANNON.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

STATUTES (§IIA—104)—THE MUNICIPAL ACT AMENDMENT ACT, B.C.—CONSTRUCTION—LAND HELD IN BLOCKS OF 3 ACRES OR MORE—AGRICULTURAL PURPOSES — ASSESSMENT OF — DISCRETIONARY POWER OF COURT OF REVISION.

Section 219, sub-sec. 3 (c), of the Municipal Act Amendment Act, 1919 B.C. Stats., ch. 63, is an enactment giving power to the Court of Revision to fix the assessments of blocks of land of 3 or more acres, when used for agricultural purposes, at their value for such purposes without regard to their value for other purposes. The statute is clear, positive and mandatory in its language, and does not confer any discretionary power on the Court.

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CORPORATION OF POINT GREY v. SHANNON.

Davies, C.J.

APPEAL by the Corporation of Point Grey from the judgment of the British Columbia Court of Appeal (1921), 62 D.L.R. 248, affirming by an equal division of opinion the judgment of Macdonald, J. setting aside an assessment of the Court of Revision on lands within the corporation. Affirmed.

Lafleur, K.C., for appellant.

McVeity, for respondent.

DAVIES, C.J.:—This is an appeal from the Court of Appeal of British Columbia which, on an equal division of opinion dismissed an appeal from the judgment of Macdonald, who in his turn had allowed an appeal from the assessment of the Court of Revision assessing the lands of William Shannon and another, the now respondents, at their actual value and not at their agricultural value.

The trial Judge held that on the proper construction of sec. 219 of the Municipal Act Amendment Act, 1919 (B.C.), ch. 63, all the lands of the respondents lying to the west of Granville St. came within the amended section of the statute, clause (c), ss. 3, and in being used for agricultural purposes should be assessed at an amount not exceeding $250 per acre.

The amended section of the Act of 1919 replaced a section of the Act of 1917, ch. 45, sec. 46, which was as follows:—

"The Court of Revision shall have power to reduce the assessed value of lands held and used solely for agricultural or horticultural purposes to such amount as may seem just and equitable notwithstanding that the same may be fixed thereby at an amount equal to its actual value for agricultural purposes. This section shall not apply to any lands the area of which is less than three acres."

That amended section reads as follows: "The powers of such Court shall be . . . (c) To fix the assessment upon such land, as is held in blocks of 3 or 4 acres and used solely for agricultural or horticultural purposes and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes."

The question in the appeal before us was whether this amended section was to be construed as discretionary or mandatory.

It is, in my opinion, necessary to read clauses (b) and (c) of ss. 3 of sec. 219 of the Act of 1919 in order to gather their true meaning and intent.

Sub-section 3 of sec. 219 reads as follows (Cited at length in judgment of Duff, J. post p. 164.)

Now clause (c), as I have said, was introduced into the Act

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of 1919 in substitution of the clause I have above quoted from the Act of 1917. That section vested in the Court of Revision a discretionary power "to reduce the assessed value of land held and used solely for agricultural or horticultural purposes to such an amount as may seem just and equitable."

It clearly vested in the Court of Revision a discretionary power to reduce the assessed value of lands held and used solely for agricultural purposes, but did not apply to any lands the area of which was less than 3 acres. It gave apparently no power to increase the assessment of such lands and its language was somewhat indefinite.

The amendment, clause (c) of sub-sec. 3 of sec. 219 of the Act of 1919 gave expressly no such discretionary power. Its language is mandatory and, in my opinion, clear and definite. The preceeding clause (b) had vested a judicial discretion in the Court of Revision with respect to the various assessments made in the roll and so to adjudicate upon them that they "shall be fair and equitable and fairly represent the actual value of each parcel of land and improvements within the municipality."

Clause (c), however, which follows, dealing with "lands held in blocks of three or more acres and used solely for agricultural or horticultural purposes and during such use only" explicitly directs the Court of Revision to "fix the assessment at the value which the same has for such purposes without regard to its value for any other purpose or purposes."

The general discretionary power given to the Court by clause (b) does not and cannot in my judgment apply to such agricultural land. That is made an exception of. The Court is directed to fix the value which the land has for agricultural purposes only, and to make the intention of the Legislature absolutely clear, the words are added "without regard to its value for any other purposes."

The Court had to find first that the land was held in blocks of three or more acres and was used solely for agricultural purposes and when they had so found was to fix the value which the lands had "for such purpose without regard to its value for any other purpose or purposes."

No language could be used more clearly expressing the meaning of the Legislature.

I can find no possibility of any discretion being vested in the Court other than that expressly given. The Court is directed "to fix the assessment upon lands which they find exceed in area blocks of three or more acres and which are used

solely for agricultural or horticultural purposes" at the value which the lands have "for such purpose without regard to its value for any other purposes."

I repeat I can find no room whatever for the introduction of any discretion on the part of the Court of Revision beyond that which the clause expressly gives of finding the value of the lands for agricultural purposes irrespective of its value for any other purposes.

The reasonableness of unreasonableness of this provision is not of course open to consideration on our part. We have to deal only with the language used by the Legislature which, as I have said, is, in my opinion, clear and distinct and not open to any doubt. Clause (c) is undoubtedly an exception to the general discretionary powers given and imposed upon the Court by clause (b). The only discretion given the Court in clause (c) is that of finding whether the lands are bone fide and solely used for agricultural or horticultural purposes, and when that is so found then the duty is imposed upon the Court of assessing the lands at the value which the lands have for "agricultural purposes without regard to its value for any other purpose or purposes."

For these reasons, I would dismiss the appeal with costs and so confirm the judgment of Macdonald, J.

IDINGTON, J.:—This is an assessment appeal which turns upon sec. 219 of the Municipal Amendment Act, 1919, of British Columbia, which enacted as follows:—(Cited at length in judgment of Duff, J. post p. 164.)

It is sub-section (c) quoted, that we are especially herein concerned with, but I quote the other sections as means of illustrating the nature of the duty imposed by said sub-section (c) which is so much in dispute between the parties concerned herein that the Court of Appeal was equally divided.

The appellant contends that the said sub-section (c) gave only discretionary power to the Court of Revision to determine whether or not such lands as in question herein should be given or denied the partial exemption provided for under the circumstances indicated from taxation upon the full actual value of the properties in question.

It seems to me that if appellant's contention is correct then the duty of the Court of Revision was merely that of a regulative, administrative or executive jurisdiction, and, if so, there exists no jurisdiction in this Court to hear this appeal for all such like cases are expressly excluded by the first section of the amendment of the Supreme Court Act, 1920 (Can.), ch. 32.

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I incline to the opinion that the Legislature intended by said sub-section (c) to confer only a judicial discretion such as in the sub-section immediately before and after same, and imposed the duty thereby to exercise the power conferred.

All the powers given by this sub-section (3) (c) of sec. 219, are classed thereby as of the same character and certainly most of them are clearly of a judicial character.

In either alternative, this appeal should be dismissed with costs.

I very much doubt if now there is any way of getting special leave, to bring an assessment appeal before this Court, as was suggested in argument herein, for sec. 41 of the Supreme Court Act which long was the basis for such appeals was repealed by said Amending Act of 1920 just now referred to.

And the question arises as to whether what remains or is substituted, will permit of any leave to appeal.

The enumerated subject matters which may form the basis for such leave do not seem to comprehend assessment appeals.

DUFF, J. (dissenting):—The single question raised by this appeal concerns the construction and effect of one of the enactments of the Municipal Amendment Act of 1919, ch. 63. The enactment in question is clause (a) of ss. 3 of sec. 219. Sub-section 3 enumerates the powers of the Court of Revision, and it will be convenient to set it out in full. It is in the following words:—

"Sub-sec. 3:—The powers of such Court shall be:—

(*a*) To meet at the time or times appointed, and to try all complaints lodged with the assessor in accordance with the provisions of this Act;

(*b*) To investigate the said roll and the various assessments therein made, whether complained against or not, and so adjudicate upon the same that the same shall be fair and equitable and fairly represent the actual value of each parcel of land and actual value of the land and improvements within the municipality: Provided however, the said Court shall not during the year 1920 reduce the assessment of any parcel of land to an amount below ninety per cent. of the amount for which such parcel of land was assessed on the assessment roll next preceding;

(*c*) To fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purpose or purposes;

(*d*) To direct such alterations to be made in the assessment roll as may be necessary to give effect to their decision;

(*e*) To confirm the roll either with or without amendment.

(*f*) Any member of the Court may issue a summons in writing to any person to attend as a witness, and any member of the Court may administer an oath to any person or witness before his evidence is taken;

(*g*) No increase in the amount of assessment and no change in classification from improved to wild lands shall be directed until after five days' notice of the intention to direct such increase or change, and of the time and place of holding the adjourned sittings of the Court of Revision at which such direction is to be made, shall have been given by the assessor in the manner set out in section 214 to the assessed owners of the land on which the assessments are proposed to be increased or changed as to classification, and any party interested or his solicitor or agent if appearing shall be heard by the Court of Revision."

The respondents applied to the Court of Revision to have the authority reposed in that Court by clause (e) exercised in relation to certain property of theirs in the municipality which had been valued by the assessor in the usual way; that is to say, in conformity with the rule laid down in sec. 207 of the Act that land "shall be assessed at its actual value." The application was rejected and on appeal to Macdonald, J., that Judge held that by the clause in question a duty was imposed upon the Court of Revision as regards lands satisfying the description of the clause (lands held in blocks of three or more acres and used solely for agricultural or horticultural purposes) to "fix the assessment upon such lands" according to the standard laid down in the clause itself. There being no dispute upon the point that the respondents' property falls within the category described, the Judge allowed the appeal. On appeal to the Court of Appeal the Judges of that Court were equally divided in opinion, the Chief Justice and Galliher, J., taking the view that a discretion is reposed by the clause in the Court of Revision and that the decisions of the Court in exercise of that discretion are not reviewable on appeal; while the other two Judges constituting the Court, McPhillips and Eberts, JJ. sustained the view of Macdonald, J.

The municipality now appeals. The B.C. Municipal Act (for the purposes of assessment and taxation) provides for the appointment of an assessor whose duty it is in each year to prepare an assessment roll in which he is, among other things, to state

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the value of lands assessed, the value of improvements upon them, and to classify all such lands as wild lands or otherwise; in valuing lands and improvements he is to follow the rules prescribed by sec. 207 already referred to. It is moreover the duty of the assessor after having sent certain notices to make a statutory declaration to the effect that he has set out in the roll to the best of his judgment and ability "the true value of the land and improvements" within the municipality, to return the roll to the clerk of the municipality. The statute set up a Court of Revision which is to consist of the members of the council of 5 members thereof appointed at the first meeting of the council and the Act explicitly provides that any person appearing on the roll as the owner of lands or improvements may at any time not later than 10 days before the first annual meeting of the Court complain of any error or omission in the assessment prejudicially affecting him and in particular that any land or improvement in respect of which he is assessed has been valued too high or too low. (Sec. 216 ss. 1, 2). In the year 1917 by ch. 45 of the statutes of that year, sec. 46, a provision was for the first time introduced authorizing the Court of Revision to deal with agricultural lands in a special way, and that provision was in these terms:—

"223a:—The Court of Revision shall have power to reduce the assessed value of lands held and used solely for agricultural or horticultural purposes to such amount as may seem just and equitable, notwithstanding that the same may be fixed thereby at an amount equal to its actual value for agricultural purposes. This section shall not apply to any lands the area of which is less than three acres."

In the year 1919 the provisions of the Municipal Act relating to assessment and taxation were consolidated and extensively revised. This Act makes very important modifications; and sec. 223a now appears as sec. 219 ss. 3 (c).

Section 219 is the first of a group of sections ending with sec. 222 which is introduced by the heading 'jurisdiction and proceedings' and ss. 3 of that section is unquestionably, primarily a provision dealing with jurisdiction. The words, it will be noted are, 'the powers of such Court shall be' those which are set forth in the enumerated clauses. *Primâ facie* this is not the language of legislation designed to confer or create substantive rights and when these clauses (other than clause (c)) are examined it will be found that save in respect of one particular, the power given is a power to give effect to rights or to perform duties elsewhere provided for. Clause (a) for-

example, confers authority to try all complaints lodged in accordance with the provisions of the Act and that authority is an authority to effectuate the rights given and to perform the duty imposed by sec. 216 ss. 1, 2 and 3; the right to prefer the complaint on the one hand and on the other the duty to hear and decide upon the complaint. Sub-section (b) is an authority to examine the roll and to see that the same shall be equitable and fairly represent the actual value of the land and improvements, in other words, to see that the assessments have been made in conformity with the provisions of sec. 207 and to perform the duties imposed upon the Court by sec. 219, ss. I., which requires that each assessment roll shall be considered and dealt with by a Court of Revision. Section (d) which gives authority to direct alterations in the assessment roll in order to give effect to the decisions of the Court merely confers jurisdiction to carry out the duties imposed by sec. 216 ss. 1, 2 and 3. Clause (e) gives authority to confirm the roll either with or without amendment and that is an authority to carry out the duties imposed by sec. 222 ss. I. and by sec. 216 ss. 1, 2 and 3 where the Court decides that the roll is unobjectionable.

Thus with the exception of clause (b) it can be affirmed in respect of all clauses just referred to that the true office of them is that which is their *primâ facie* office, namely, to confer jurisdiction and to give effect to rights or to perform duties elsewhere provided for. As regards sub-clause (b) authority is given to revise and to correct the roll in pursuance of a complaint which authority, as already mentioned, is an authority to do no more than to give effect to the rights and perform the duties provided for by sec. 216; but there is a further authority and that is to investigate assessments even in the absence of complaint and as regards the value of lands and improvements, to bring the assessed value in to accord with the value as determined by the standard laid down in sec. 207.

Now it seems to be abundantly clear that this last mentioned authority is a discretionary authority. In the first place it is incredible that the burden of examining every valuation, collecting evidence in relation to it and passing upon it should have been placed upon the Board of Revision. Again if such were the duty of the Court of Revision, the imperative duty of the Court of Revision, it is not easy to see the necessity for the enactments of sec. 216 requiring the Board in terms to reconsider an assessment in respect of which complaint is made. In the second place the contrast between the language of sec. 216 which, in case of complaint, requires the Board to proceed, and

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the language of sub-clause (b) which is facultative only, appears to be conclusive upon the point.

Coming now to clause (c): in relation to the matter dealt with in this clause, the sub-section, here as in relation to the other enumerated matters, professes simply to give jurisdiction. The words, as they stand, (to quote Lord Cairns, *Julius'* case (1880), 5 App. Cas. 214 at p. 222, 49 L.J. (Q.B.) 577, 28 W.R. 726), "are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power and they do not of themselves do more than confer a faculty or power."

Nevertheless, as Lord Cairns points out, although such is the effect of the words in themselves, there may be somthing in the nature of the thing empowered to be done, something in the object for which it is to be done making it a duty of the body in whom the authority is reposed to exercise that authority. But Lord Cairns proceeds: "It lies upon those .. .. who contend that an obligation exists to exercise this power, to shew in the circumstances of the case something which .. .. creates this obligation." And the question as Lord Selborne lays down in the same case at p. 235, "in general .. .. is to be solved from the context from the particular provisions or from the general scope and objects of the enactment conferring the power."

The clauses of ss. 3 other than clause (c) afford admirable examples of a power or faculty conferred by language in itself enabling only, which upon definite conditions it becomes by reason of provisions enacted aliunde the duty of the authority possessing it to exercise. For example clause (b) insofar as it gives jurisdiction to hear and decide complaints in respect of the valuation of property is a jurisdiction which the person assessed or the municipal council itself is entitled to invoke and which it is a duty of the Court of Revision to exercise where the party invoking it had complied with the conditions laid down in sec. 216 ss. 1, 2 and 3.

The question upon which we have to pass is whether such a duty—with the correlative right—arises by virtue of clause (c), a duty which requires the Court to exercise the authority thereby given when it is shewn that a piece of property falls within the description supplied by the clause; and for this purpose we must examine the pertinent provisions of the statute relating to this subject of assessment and assessment appeals to ascertain whether there is adequate evidence of an intention

on the part of the Legislature to establish the right and the duty contended for.

There is nothing in the provisions of the Act in express terms conferring such a right or creating such a duty. On the contrary there is much in the Act to indicate that the Legislature had no intention of doing so. In the first place what I have already said sufficiently indicates that where imperative duty was to be laid upon the Court of Revision, the Legislature has imposed the duty in explicit terms. In the next place, the system of assessment, as I have already mentioned, contemplates a valuation in the first instance by an assessor, according to standards of valuation laid down in obligatory fashion by the statute. These obligatory standards of valuation are standards which are dealt with in elaborate terms in a part of the Act exclusively devoted to that purpose and grouped under the heading "valuation." There is not a syllable in its provisions giving countenance to the idea that any such obligatory standard as is now contended to be applicable to this case was contemplated. The function of the Court of Revision is in general that which is implied in its title; and perhaps still more clearly implied in the terms of the oath prescribed for the members of the Court by sec. 219 ss. 2. It is a Court appointed for the purpose of revising the assessment roll, correcting the work of the assessor and causing the assessment roll as made up by the assessor to conform to the requirements of the statute where such requirements are of an obligatory character. According to the interpretation now proposed, an exception would be introduced and a departure from this rule for which there appears to be no satisfactory reason. I cannot conceive any reason why (if in the case of lands meeting the description of clause (c) the standard of valuation is that which is now suggested) the statute has not made it the duty of the assessor in the first instance to deal with the subject. The assessor has responsible duties; it is his duty as already pointed out, to value lands and to classify lands, and I have heard no reason why, if the provision in question is to have the effect contended for, there should have been this departure from the ordinary procedure. The amendment of 1917 clearly gave to the Court of Revision an authority which was discretionary; and having regard to the considerations mentioned the doubtful language (conceding for the moment that it is doubtful) of clause (c) does not, I think, afford sufficient evidence that the Legislature contemplated a change of the law in this respect.

It is not necessary for the purpose of this appeal to decide

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whether or not the discretion vested in the Court of Revision is one which may be exercised in relation to individual cases; or, on the other hand, whether the clause is not intended to confer upon the Court of Revision an administrative authority to establish, in its discretion, a rule governing the valuation of all lands in the municipality answering the description contained in the clause. It is quite plain on either view that it is not competent to a Court of Appeal to set aside a decision of the Court of Revision in exercise of its discretion on the ground that it has erred in exercising it.

The appeal should be allowed.

ANGLIN, J. (dissenting):—I concur with DUFF, J.

BRODEUR, J.:—The question in this case is whether agricultural or horticultural lands in the municipality of Point Grey should be assessed as such or should be assessed at their actual value.

The Court of Revision that has been established for the purpose of "confirming and authenticating" the assessment roll is composed of the members of the council or of 5 members thereof. The members of the Court, before acting, take an oath that they will honestly decide the complaints presented to the Court. The powers of the Court are to be found in sec. 219 ss. 3 of the Municipal Act of British Columbia. It has the power to investigate the roll, whether complained of or not, and to adjudicate that the same shall be fair and equitable. One of those powers is "to fix the assessment upon such land as is held in blocks of three or more acres and used solely for agricultural or horticultural purposes, and during such use only at the value which the same has for such purposes without regard to its value for any other purposes."

The Court of Revision in the present case refused to assess Shannon's property as agricultural lands. An appeal from that decision having been brought before Macdonald, J., the Court of Revision's decision was reversed and it was held that, the lands in question being used solely for agricultural or horticultural purposes, it was the duty of the Court of Revision to assess them as such and that the power which was given the Court was not discretionary but mandatory.

Some previous legislation dealing with the same subject for the first time in that province might have been properly construed as giving a discretionary power to the Court of Revision. But the law was amended, and the evident purpose was to impose a duty which formerly was of a discretionary nature.

There is no doubt that the land in question has been for 30

years or more a true agricultural land and has been exploited as such. Its value has been increased by the fact that the surrounding properties have become a residential part. If it were converted into town lots, it would give a larger income but their owners are satisfied to continue its exploitation as a farming land.

The Legislature, with the evident intention of encouraging agriculture, has enacted the legislation under review.

In *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214, Lord Selborne said, p. 235, respecting the construction of the words: "'It shall be lawful,' and the like, when used in public statutes. . . . I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context from the particular provisions, or from the general scope and objects, of the enactment conferring the power."

All the powers which are vested in the Court of Revision in the different subsections of sec. 219 of the Municipal Act are of a mandatory character with the exception of the investigating power; why should the power given as to agricultural lands not be put on the same footing?

I have come to the conclusion that the words in question are "significant of an obligation" to use the expression of Lord Selborne, and that it was then the duty of the Court of Revision to use its powers for the benefit of the farmers and horticulturists of good faith whose farms are in the territory of Point Grey.

The appeal should be dismissed with costs.

MIGNAULT, J.:—This is an appeal from the judgment of the Court of Appeal of British Columbia, dismissing on an equal division an appeal from the judgment of Macdonald, J. The latter decided, in favour of the respondents, an appeal from the decision of the Court of Revision of the Corporation of Point Grey, a suburb of the City of Vancouver, and his judgment is attacked by the appellant.

The question to be decided, briefly stated, is whether, in the case of the assessment of lands coming within the contemplation of para. (c) of sub-sec. 3 of sec. 219 of the Municipal Act

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Amendment Act of 1919, ch. 63, the Court of Revision has any discretion to refuse to fix the assessment of the lands at the value they have for agricultural or horticultural purposes without regard to their value for any other purposes.

Macdonald, J., found all the facts in favour of the respondents, holding that their land was acquired in 1890, and has ever since been used by them solely for agricultural purposes, and that there was no suggestion that they were simply utilizing their property in this manner for the purpose of coming within the provisions of the statute. The only question that now arises is, therefore, the proper construction of the statute.

Referring very briefly to the system of municipal assessment and taxation in British Columbia, I may add that properties are assessed at their actual value by a municipal officer known as the assessor. From his valuation an appeal lies by a complaint lodged with him to a body called the Court of Revision consisting of the members of the municipal council or five members thereof appointed for that purpose by resolution of the council. This Court, the statute shews, is the real assessing body.

The duties of the Court of Revision are laid down in detail by sec. 219 of the statute, sub-sec. 3, which is in the following terms:—(See judgment of Duff, J. ante p. 164.)

The assessment in question is for the year 1921, so the proviso of para. (b) is without application.

The construction of para. (c) is in issue between the parties. This provision before 1919, and as enacted by the Municipal Act of 1917, ch. 45, sec. 46, read as follows:—

"The Court of Revision shall have power to reduce the assessed value of lands held and used solely for agricultural or horticultural purposes to such amount as may seem just and equitable, notwithstanding that the same may be fixed thereby at an amount equal to its actual value for agricultural purposes. The section shall not apply to any lands the area of which is less than three acres."

It is important to note that the earlier enactment probably conferred a discretionary power on the Court of Revision, which, in the case of land held and used solely for agricultural or horticultural purposes, could reduce the assessed value of the land to such an amount as might seem just and equitable, so that the valuation might be placed anywhere between the actual value and the value for agricultural purposes.

The change in the language of this enactment is an important factor in arriving at its proper construction. There is no ques-

tion now of reducing the assessed value of the land to such an amount as may seem just and equitable, but the power of the Court of Revision is to fix the assessment upon the land in question at the value which it has for agricultural or horticultural purposes without regard to its value for any other purposes.

The appellant contends that the Court of Revision may refuse to so fix the assessment although the land comes within the description of para. (c); that it can have regard to the value of the land for other than agricultural or horticultural purposes; and that it can discriminate between different agricultural or horticultural lands, and in some cases fix the assessment at the agricultural or horticultural value, and in other cases refuse to do so.

This appears to me so contrary to the plain language of the statute that I cannot accept the appellant's contention.

An effort no doubt should be made to give to permissive words in the statute their natural meaning, but it is equally clear that where a jurisdiction or a power is conferred to be exercised for the benefit of certain persons who are within the intendment of the statute, permissive words such as "may" or "shall have power" are to be construed as imposing a duty coupled with a power and are, therefore, imperative. In *Macdougall* v. *Patterson* (1851), 11 C.B. 755, 21 L.J. (C.P.) 27, it was held that where a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application. See also *Howell* v. *London Dock Co.* (1857), 8 El. and Bl. 212, 120 E.R. 79, 27 L.J. (M.C.) 177, 5 W.R. 753.

I have not overlooked the rule of construction contained in the B.C. Interpretation Act, R.S.B.C. 1911, ch. 1, sec. 25, as to the meaning of words such as "may" or "shall," but these rules apply only where there is nothing in the context or in other provisions pointing to a different meaning, and here I find in the context and accompanying provisions a clear indication that the power conferred by paragraph (c) must be exercised.

Sub-section 3 opens with the words: "the powers of such Court shall be." Paragraph (a) concerns the meeting of the Court at the time or times appointed. This is surely imperative. Paragraph (b) requiring the Court to investigate the roll and the various assessments, whether complained against or not, and

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to so adjudicate that the same shall be fair and equitable, is also imperative. Paragraph (d) "to direct such alterations to be made in the assessment roll as may be necessary to give effect to their decision," and para. (e) "to confirm the roll either with or without amendment" are certainly mandatory. The only paragraph which possibly allows the Court to deal with a matter of policy is para. (g) which refers to increases in the amount of assessment and to changes in classification from improved to wild land; the other paragraphs I have mentioned impose a duty on the Court.

Under these circumstances, in the absence of apt words conferring a discretion, such perhaps as those contained in the 1917 enactment, it seems difficult to conclude that para. (c) is not as imperative as paras. (a), (b), (d) and (e) undoubtedly are.

It is said that in the case of the suburbs of a large city like Vancouver, it is unreasonable to value lands solely used for agricultural or horticultural purposes on a different scale from the neighbouring lands not utilized for such purposes, and that the Court of Revision should have the discretion to discriminate between lands so situated and lands in an entirely rural district. It suffices to answer that para. (c) makes no such distinction. To refuse to fix the value for agricultural or horticultural purposes would be to refuse to exercise the power conferred by this paragraph and, in my opinion, that cannot be done. The Court is called upon to determine whether the conditions contemplated exist, and if they do exist it has no choice but to fix the lower value. This determination is the only thing the Court is empowered to adjudicate upon, and when this is done it must apply the legal consequences. Otherwise it would give effect to the will of the Legislature in one case and in a similar case, in so far as the contemplated conditions are concerned, it would refuse to carry it out. I cannot place this construction on para. (c).

The authorities cited by Macdonald, J., in the first Court and by Martin and McPhillips, JJ.A., in the Court of Appeal certainly support the conclusion they have adopted, and looking at sub-sec. 3 as a whole, this construction appears to me to give full effect to the scheme of assessment and taxation which the Legislature has placed on the statute book.

I would dismiss the appeal with costs.

Appeal dismissed.

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Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Dennistoun and Metcalfe, JJ.A. February 20, 1922.

NEW TRIAL (§II—8)—INDECENT ASSAULT—DEFENCE OF ALIBI—FAIR PRESENTATION OF DEFENCE TO BE MADE IN JUDGE'S CHARGE.

Where the accused adduces evidence to support an alibi, it is the duty of the trial Judge to put that defence fairly before the jury so that they may appreciate what it is and determine the weight to be given to the evidence in support of it. A new trial may be ordered if the Judge's charge did not sufficiently present the evidence for the defence.

WITNESSES (§IA—6)—COMPETENCY—TESTIMONY OF YOUNG CHILDREN—INSTRUCTION AS TO EXTREME CARE IN FOUNDING CONVICTION UPON THAT ALONE—CHARGE OF INDECENT ASSAULT.

Where the only evidence for the prosecution is that of young children, the jury should be instructed that they are to act on the evidence with extreme care, whether the children are accomplices or not. It is not enough that the jury were charged that they should acquit if they had a reasonable doubt about the truth of the children's testimony.

[*R.* v. *Cratchley* (1913), 9 Cr. App. R. 232, and *R.* v. *Dossi* (1918), 13 Cr. App. R. 158, 87 L.J. K.B. 1024, applied.]

EVIDENCE (§XIIL—993)—SIMILAR ACTS TO THAT CHARGED—PROVING INTENT—INSTRUCTION TO JURY.

Where evidence of similar acts is admitted, the jury should be warned that it is not evidence of the commission of the act charged and can be received only for the purpose of determining what was in the mind of the accused when he committed the act charged.

INDICTMENT, INFORMATION AND COMPLAINT (§IIE—25)—COUNT—RESTRICTING EACH COUNT TO ONE OFFENCE—CR. CODE SEC. 853 (3).

The practice of confining a count to one offence is one that, in fairness to the accused, ought to be followed unless there are strong reasons for departing from it (Per Cameron, J.A.).

EVIDENCE (§XIT—885)—REPLY BY PROSECUTION—DISCRETION OF COURT—COLLATERAL RELEVANT FACT — IMPEACHING TESTIMONY OF ACCUSED VOLUNTEERED ON A COLLATERAL FACT.

It is within the discretionary powers of the trial Judge in a criminal case to permit the prosecution to give evidence in reply to a statement made by the accused which raised an issue which while collateral was still relevant.

CRIMINAL LAW (§IIA—30)—ALLOWING JURY TO TAKE ORIGINAL INDICTMENT WITH THEM ON RETIRING—SEPARATE TRIAL ON SOME COUNTS ALREADY HAD BEFORE ANOTHER JURY—VERDICT OF GUILTY ON ONE COUNT ALREADY ENDORSED—QUESTION OF PREJUDICE ON TRIAL OF OTHER COUNTS ON SIMILAR CHARGE.

The practice of allowing the jury to take the indictment with them when they retire to consider their verdict is a common one. It is not error requiring a new trial that this practice was followed with respect to an indictment charging several offences of a similar character as to some of which a separate trial had already been had at the same sittings before another jury and that the verdict of guilty on one of these had been endorsed on the indictment, if the fact of that conviction would almost of necessity have been known apart from the endorsement by all of the jurymen whose

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names were on the panel for the court sittings, and there could therefore have been no prejudice to the accused.

Per Perdue, C.J.M.:—The better practice would have been to have supplied the jury in the second case with a copy of the indictment exclusive of the endorsements of verdicts on counts previously tried.

Per Dennistoun, J.A.:—The accused had put his character in issue by his defence and it was open to the Crown to prove the previous conviction as tending to shew bad character.

APPEALS by way of reserved case, from convictions of accused by Macdonald, J.

REX v. PARKIN (No. 1), (Lillian Wilson, prosecutrix).

The following are questions and answers as certified by the Court:—

"(1) Was I wrong in refusing to quash the indictment—(a) the indictment as a whole; (b) In count No. 3? A. No, to both (a) and (b). (2) The Crown offered evidence of similar acts of the accused which was objected to by counsel for the accused. I allowed this evidence, the particulars of which will be shewn in the record. Was I wrong in admitting this evidence? A. No. (3) In view of the state of the public mind in Brandon, and the facts disclosed by the material filed on behalf of the accused, was I wrong in not warning the jury in my charge that they should not allow themselves to be prejudiced by any previous knowledge they might have had of the case, nor by the state of public opinion, which the counsel for the accused claimed to amount even to intimidation? A. No. (4) Having admitted evidence of similar acts, was I wrong in not warning the jury that these acts were not proof of the charge laid, and that they must be careful not to convict the accused because they might be convinced that some other act had been proved? A. This Court is of opinion it would have been advisable that some such statement should have been made to the jury. (5) Was I wrong in not cautioning the jury against accepting the uncorroborated evidence of the girl Lillian Wilson and girl Winnie Reid, both being very young children? A. Yes. (6) Did I sufficiently draw the attention of the jury to the points brought out in the evidence, in favour of the accused? A. The Court is of opinion that the evidence for the defence, particularly that relating to the alibi, was not sufficiently clearly presented to the jury. (7) Did I sufficiently point out to the jury that the onus of proving the case against the accused was upon the Crown? A. The Court is of opinion this was done in substance. (8) Was I wrong in telling the jury in view of the evidence given by the Crown that the date of August 8 was immaterial and that if they were satisfied an

offence had been committed during the holidays, that they should convict? A. It is not necessary to answer this question in view of the fact that the Court is granting a new trial. (9) Was I wrong in not stating to the jury that if they believed the witnesses for the defence established an alibi they should acquit? A. Answered in the answer to the 6th question. (10) Was I wrong in view of my remarks to the jury—'all the privacy possible will be invited by a guilty person before he would dare to commit such an offence. He would invite privacy of the greatest kind in order that there would be the least possible opportunity of being found out, so that you can see the difficulty that arises in a case of this kind of securing evidence, other than the evidence of the person that is assaulted'—in not drawing the attention of the jury to the fact that in this case there was no evidence of any attempt at privacy? A. The Court is of opinion that this was not material. (11) In view of the statement referred to in the last question, was I wrong in not commenting upon the absence of privacy, as being some evidence in the accused's favour? A. Same answer as to No. 10. (12) Was I wrong in not telling the jury that the fact that no charge had been made for a year after the alleged occurrence was in itself somewhat discrediting to the evidence? A. No. (13) I having called attention to the difficulty of the Crown on account of the charge not having been laid for over a year after the occurrence, should I also have drawn the attention of the jury to the fact that the accused was also at a similar disadvantage? A. No. (14) In view of the evidence, was I wrong in not stating to the jury that the Crown had attempted to establish that the offence took place on August 8, and that unless they proved the offence on that day, there must be an acquittal? A. No. (15) In view of the evidence, was I wrong in making this statement to the jury—'Now, I tell you, you are not restricted to August 8, and any evidence that has been given as to the movements of the accused on that day is not material, if you are convinced that the offence took place about that time. You are not committed to August 8. The child does not swear to that date'? A. Answered as in No. 8. (17) Was I wrong in stating to the jury that—'it would be idle to try and limit it to August 8, as you see there is a considerable uncertainty as to when this silk dress was delivered'? A. This question already was dealt with in answer to No. 8. (18) When the jury had retired for some hours they returned to ask for advice. Did I fairly instruct them at that time as to the importance of the alibi of the accused, particularly with

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reference to the necessity of the accused calling the choirmaster to give evidence and also the production of the register at Qu'Appelle? A. This question, save so far as already answered, is not material. (19) On the whole, was my charge so unfair to the accused as to prejudicially affect the jury? A. We think the charge insufficient for reasons given. (20) Was I wrong, and was counsel for the Crown wrong, in drawing attention of the jury when considering their verdict, to the right of the accused to appeal, if the contention of the accused was right, and I was wrong in my rulings? A. This question is not material. (21) The complete indictment in this case, which accompanies this reserved case, was handed to the jury and was with them during their deliberations. Was this wrong? A. No. (22) If it is the opinion of the Court that I was wrong in any of the above matters, was there such a substantial wrong or miscarriage as to entitle the accused to acquittal, or a new trial? A. The Court is of opinion that there should be a new trial. The order and direction of the Court of Appeal is, therefore, that there should be a new trial."

A. J. Andrews, K.C., and *F. M. Burbidge*, K.C., for the accused, appellant.

W. R. Cottingham, for the Crown, respondent.

PERDUE, C.J.M., concurred in granting a new trial.

CAMERON, J.A.:—This is a reserved case stated by Macdonald, J., arising out of a trial at the last Brandon assizes. The accused was indicted on several counts, two of which were in respect of Lillian Wilson, a girl under the age of 14 years, one for carnal knowledge and the other for indecent assault. These offences are alleged to have been committed "on or about" August 8, 1920. The jury found the accused not guilty on the count for carnal knowledge, but guilty on that for indecent assault.

After the perusal of the evidence and proceedings and noting the course taken at the trial, I am satisfied that the real issue presented to the jury was that of the guilt or innocence of the accused in respect of the offences alleged to have been committed by him on Lillian Wilson in the garage on the Sunday when the new dress was worn by her for the first time. It is quite possible this may not have occurred on August 8, though that is the date indicated in the evidence for the Crown. As to the commission of the act in the garage there was the evidence of the prosecutrix, corroborated by that of Winnie Reid. Whatever the exact day, the jury evidently accepted the story of the two girl witnesses of what took place in the garage as

true in substance, whatever conflict there might be in the testimony as to minor details.

The Crown examined Lillian Wilson as to another occasion said by her to be subsequent to that in the garage, when she says she went into the accused's house with Winnie Reid and then into the bedroom, where he put the comforter over the two of them and committed the act on her. Further she said this happened more than once, and that he used to commit acts of indecency on her in the bedroom, in the garage and in the front room. There is some confusion about the times of these happenings, but it seems clear that they were subsequent to that which took place in the garage.

There are obvious objections to admitting evidence of offences similar to that charged in the indictment, but in certain circumstances it can be done. In some instances its admission can be justified on the ground that the similar facts "have occurred in such close connection in point of time, place or other conditions, as virtually to form but one entire or continuous transaction." Phipson on Evidence, p. 57.

In *Reg.* v. *Rearden* (1864), 4 F. & F. 76, Willes, J., on an indictment for rape on a child under ten years of age, admitted evidence of subsequent perpetrations of the offence against the same infant, on different dates previous to complaint to the mother, a complaint which had been delayed by threats of violence. Willes, J., said at p. 80: "This seems to me to give a continuity to the transaction, which makes such evidence properly admissible." This decision is cited in the valuable article on "Evidence of Similar Acts" to be found in The Justice of the Peace, September 24, 1921. It is also cited in Archbold's Criminal Pleading, p. 366, in Phipson on Evidence, p. 67, and elsewhere, and has not been questioned so far as I can discover. It was followed by Scrutton, J., in *R.* v. *Ball*, [1911] A.C. 47, 80 L.J. (K.B.) 689, where on an indictment for incest committed in 1910, evidence was given of previous acts in 1907 showing a relation akin to that of husband and wife. This view was upheld in the House of Lords, where the evidence was held admissible to establish the guilty relations between the parties and the existence of sexual passion between them as elements in proving that they had illicit connection on or between the dates charged (p. 71).

In *R.* v. *Stone* (1910), 6 Cr. App. R. 89, evidence of acts of incest subsequent to the date charged was held admissible at the trial. The Lord Chief Justice says (pp. 93, 94):

"When you are dealing with the relation of a man and a

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woman, a relation which involves passion as well as the act, evidence of other acts is admissible to shew acts on the specified date. I cannot see why acts after that date should be any less admissible than those before."

The law is thus summarised in Phipson, p. 160:

"To prove the occurrence of sexual intercourse on a given occasion, prior or subsequent acts between the same parties are admissible."

In *R.* v. *Boyle*, [1914] 3 K.B. 339, at 347, 83 L.J. (K.B.) 1801, Lord Reading says:—

"There must be a nexus or connection between the act charged and the facts relating to previous or subsequent transactions which it is sought to give in evidence to make such evidence admissible."

In *R.* v. *Shellaker*, [1914] 1 K.B. 414, 83 L.J. (K.B.) 413, the Court of Criminal Appeal, on an indictment for carnally knowing a girl under the age of sixteen, where evidence was given of previous acts, held the evidence admissible on the principles laid down by the House of Lords in *Director of Public Prosecutions* v. *Ball*, *supra*.

In *R.* v. *Bond*, [1906] 2 K.B. 389, 75 L.J. (K.B.) 693, where the indictment was for abortion, the subject under discussion is exhaustively dealt with in the judgments. Kennedy, J., refers to *Reg.* v. *Rearden*, *supra*, and says at p. 400: "Such . . . acts formed, in point of historical and circumstantial connection, inseparable parts of the transaction which the jury had to investigate."

Lawrence, J., says, p. 424. "In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstance there must be a *nexus* between the two sets of facts, otherwise no inference can be safely deduced therefrom."

I refer to *R.* v. *Thompson*, [1917] 2 K.B. 630, 86 L.J. (K.B.) 1321, where Lord Reading says that if such evidence tends to prove that the accused committed the crime charged against him it is relevant and admissible notwithstanding its prejudicial effect on the defence.

In *Brunet* v. *The King* (1918), 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16, the authorities are fully discussed. In the report of this case in 30 Can. Cr. Cas. 16, there is a note reviewing the decisions, in which special reference is made to *Perkins* v. *Jeffery*, [1915] 2 K.B. 702, 84 L.J. (K.B.) 1554.

Roscoe's Criminal Evidence (14th ed.) at page 101 says:—"The view that it is in itself an objection to the admission of evidence that it discloses other *similar* offences . . . has long been exploded," citing in support the *Rearden* case amongst other cases. The *Rearden* case is also adopted in Russell on Crimes, 7th ed., p. 2102, and in Taylor on Evidence, 11th ed., para. 327.

In my opinion, under the authorities, the evidence of similar acts given in this case was properly admissible as shewing circumstances constituting a continuous course of action of which the particular offence charged was one link in the chain. There is a close connection in time, place and method between the offence charged in the indictment and the additional acts given in evidence. From the very nature of the offence charged, that of carnal knowledge of a girl under 14 years of age, the reasons for the decision in *Reg.* v. *Rearden, supra,* and other like cases are peculiarly applicable.

I think the trial Judge was right in receiving the evidence.

It was contended that the Judge should have told the jury plainly that such evidence of other acts was to be considered by them as limited and not as proof of the guilt of the accused in respect of the offence charged because they might be convinced other offences had been proved against him. The only reference to this matter in the Judge's charge is where he says: "This little girl said he did it on different occasions on his bed in his room." He confined his other remarks to the offence charged as of or about August 8 in the garage.

In *R.* v. *Horsenail* (1919), 14 Cr. App. R. 57, on the trial of an indictment for receiving stolen goods with guilty knowledge where evidence had been given that a pair of stolen pearl earrings were found on the accused, the Commissioner in his summing up failed to differentiate between the pearl earrings and the property, the subject of the indictment. Lord Reading said:—"The learned Commissioner failed to direct the minds of the jury to the difference between the stolen property, the subject of the indictment, and the pearl earrings, but directed them in such language that they might reasonably think that the pearl earrings were equally the subject of the charge as the stolen property specified in the indictment," and quashed the conviction. That case can hardly be applicable here except to the extent that it indicates a distinction should have been drawn between the offence charged and the similar acts and to point out that the former and not the latter was that alone upon which the jury were to find. "Where they are admissible,

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the direction must be express that they are alleged solely as proof of a specific intent."

Roscoe, p. 299, referring to *R.* v. *Baird* (1915), 11 Cr. App. R. 186, 84 L.J. (K.B.) 1785, where it was held, on a charge of obtaining by false pretences or fraud, evidence of similar conduct by the defendant to that charged is only admissible in so far as it tends to prove the specific intent to defraud as alleged, and when such evidence has been given there ought to be an express direction to that effect. The similar acts there given in evidence were with other parties than the prosecutor, and both it and the *Horsenail* case, *supra*, in which there was no *nexus* or connection between the offence charged and the similar acts, are clearly distinguishable from this case where the similar acts alleged are of a sexual character between the same parties. Neither of those cases can, therefore, be taken as authority in such a case as the present, where the facts are wholly different from those in either of them. The reference to similar acts in the charge, which I have quoted, is almost casual in its nature. The whole emphasis in the charge is upon the offence charged in the indictment, that is to say, the act in the garage. It was the evidence of the girls with reference to that that was presented to the jury for their consideration, and the incidental passage quoted is most unlikely to have influenced the jury. It would have been advisable that the Judge should have differentiated between the evidence in support of the charge and that shewing similar acts and have indicated the object with which the latter was introduced. But in the facts and circumstances of this case as shewn by the record I think the jury were made clearly to understand the true issue and were in no way misled by the omission of the trial Judge specifically to indicate that they were not to infer the guilt of the accused if they were convinced he was guilty of those other similar acts. It cannot be possible that they drew any such conclusion from any other evidence than that bearing directly on the offence charged. I am of the opinion that this objection of itself would not vitiate the trial.

As was pointed out by the Judge at the trial, there was really no evidence against the accused except that of the two young girls who were at the time of the alleged offence the one (Lillian) aged under 13 years, and the other (Winnie) under 11. In such a case as this no corroboration is necessary, but the objection is taken that the trial Judge did not warn the jury that they should be careful in accepting the evidence in such cases, especially that of children of tender years.

In *R.* v. *Graham* (1910), 4 Cr. App. R. 218, where the evidence on an indictment for having carnal knowledge of a girl under sixteen, was practically that of the girl alone, it was held that the Judge should explain that the burden of proof was on the prosecution and that it is dangerous to act on the evidence of one person, but that as corroboration was not necessary the jury could act on the girl's evidence alone if they believed it. However, the Court found there was in fact some corroboration of parts of the girl's story, and the appeal was dismissed on that ground.

In *R.* v. *Brown* (1910), 6 Cr. App. R. 24, on an indictment charging the accused with having carnal knowledge of his daughter, there was no evidence of corroboration. The Judge gave no specific warning, but throughout the trial urged the jury to exercise great care. The Court held that, if it be alleged the girl is a consenting party, as was indicated by the lack of complaint, the jury ought to have been cautioned. It was also held that the jury should have been cautioned against accepting the uncorroborated evidence of the girl whether an accomplice or not.

"In this class of case it has been, for years, an invariable practice to caution juries as to accepting the evidence of such a witness against the testimony of the prisoner.

In the absence of any complaint by a girl of fifteen ravished by her father, where no caution was given to the jury, in our opinion the trial was not satisfactory.

But the jury ought to have been warned that there was no corroboration of the girl's story, and the fact that she made no complaint ought to have been called to their attention." Ibid, p. 26.

R. v. *Pitts* (1912), 8 Cr. App. R. 126, was a case of having carnal knowledge of a girl of ten years of age. It was held that though the child was of very tender years and the jury might act on her uncorroborated evidence, "it is always wise for the Judge to address some caution to the jury as to the possibility of such a young child having a mistaken recollection of what happened."

However, it was held there was some corroboration, and while the appeal was not allowed, the conviction was varied.

In *R.* v. *Cratchley* (1913), 9 Cr. App. R. 232, Lord Reading says, at p. 235, after holding that one of the boys concerned was not an accomplice:—

"Nevertheless, in our view, there ought in such cases to be a warning by the Judge, and it ought to be brought home to the

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minds of the jury that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not, that a warning should be given to the jury as to acting on the evidence of boys of this age—twelve and under ten—who are concerned in such an offence. It is not necessary that the Judge should use the actual words 'warn' or 'caution', if from his conduct of the case this Court is of opinion that the jury were in fact warned or cautioned, it would not interfere."

It was, however, pointed out that the jury had been told they must be very careful in considering the evidence and must not find the accused guilty unless they were quite satisfied they could accept the boys' evidence and in view of that and other circumstances the appeal failed.

In *R.* v. *Dossi* (1918), 13 Cr. App. R. 158, 87 L.J. (K.B.) 1024, it was held, at p. 160:—"There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care." Citing the *Graham, Pitts* and *Cratchley* cases. The charge objected to said (see p. 160):—"What the law does require is that it must be carefully pointed out to a jury that they ought to act with great caution and with the greatest deliberation, if there is no corroboration of the story in such a case as this," . . . but there were added some remarks about children's evidence and its superior value, which were objected to.

In the *Cratchley* case the evidence of a boy directly implicated was corroborated by another boy and it was held a case where the warning should be given. In such a case, just as where there is the evidence of one only, the warning must be given.

Now can it be said that the charge in this case complies with what was held sufficient by Lord Reading? The trial Judge points out the conflict in the evidence of the children, but says that if the jury believe them it is their duty to convict. He further points out that there is the evidence of the children only, and if the jury have any doubt, any reasonable doubt, the accused is entitled to the benefit of it. He concludes: "If you cannot reconcile the evidence to a moral certainty then there is a reasonable doubt and the verdict should be not guilty." Were the jury in fact thereby warned or cautioned by the Judge that in acting on the evidence of these children they must do so with extreme care? There is reference in the charge to the

evidence of the children as being all the evidence there was and as to the necessity of giving the accused the benefit of the doubt, but nowhere in it can I find any statement of the rule that the jury are not to act on the evidence of children except after weighing it with utmost care. It is as if the Judge said: You have the evidence of these two children and that only. You are at liberty to believe that evidence without corroboration and if you do you must find this man guilty. On the other hand, if you have a reasonable doubt about the truth of the children's story, your verdict should be not guilty.

The charge falls short of stating the general definite rule for the guidance of jurors in such cases and its propriety and the authority for it cannot be questioned.

Objection is made that the Judge did not fairly place the evidence for the accused before the jury and that the defence of *alibi* was not properly submitted to them. What he says is:

"The evidence of the defence is simply in the nature of an *alibi* by shewing that he was not here on the 8th and 15th or 1st of August. The fact that he was not here on these dates does not make much difference if you are satisfied the offence was committed on or about these dates. You are not restricted as to dates. If you believe the evidence of these children that is the main thing—are they telling the truth?"

This statement was repeated in substance when the jury were recalled.

In *R.* v. *Rufino* (1911), 7 Cr. App. R. 47, it was held that the defence of an *alibi* must be left to the jury; it is misdirection if the Judge rules it out. See also *R.* v. *Curtis* (1913), 9 Cr. App. R. 9, where it was held erroneous to state to the jury that an alibi was unsatisfactory when that was not proved. See also *R.* v. *Finch* (1916), 12 Cr. App. R. 77, where no reference what- ... made in the summing up to the evidence of alibi or other facts.

In this case the trial Judge in effect told the jury they need not consider the alibi evidence if satisfied the offence was committed some date some time in the summer or holidays of 1920. Either the jury disbelieved the alibi evidence or they considered the date as other than August 8, and that was probably the case.

In *R.* v. *Dossi*, *supra*, the indictment charged the accused with indecently assaulting a child, aged eleven, "on March 19th, 1918." The girl gave evidence of no particular date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness for the defence swore he was with the accused on March 19 at the material

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time and that no indecency took place. The jury retired and on their return said they found the accused, "With regard to the date March 19th, not guilty. If the indictment covers the other dates, guilty." The indictment was then amended by substituting the words "on some day in March" for the words "on March 19th, 1918," and the jury found the accused guilty on the amended indictment. It was submitted, as it was in this case, that if a man is put on his trial on an indictment charging him with committing an offence on a specific date and no amendment is made before or during the trial and the jury find he has not committed the offence on that day, it is a verdict of "Not guilty" and must be allowed to stand. The Court of Appeal held, as to that submission, that that is not a correct contention in law.

From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

For this some old authorities are cited and the judgment goes on to say at p. 160:—

"Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment, but we must not be taken to express any doubt that the wide words in s. 5 (1) of the Indictment Act, 1915, which give the Court power to amend an indictment 'at any stage of a trial' might, in a proper case, permit of an amendment in circumstances similar to those which exist here."

This case seems much in point. In it the defence was substantially an alibi. A specific date was mentioned in the indictment (not "on or about" as in this case, let it be noted) yet the holding is the jury could have found the accused guilty of the offence charged and it was not necessary to amend the indictment. The authority of this decision seems to answer to a large extent the objections lastly referred to as well as those based on the instructions given to the jury in respect of the date of August 8 being immaterial.

Nevertheless, after perusing the Judge's charge and giving it my best consideration, the impression is left on my mind that

he placed a greater stress than was advisable, in cases of this kind, particularly, on the evidence for the prosecution, and that notwithstanding the statement of the general principle in the concluding part of his charge that the accused is entitled to the benefit of the doubt. It is the well-established rule that the onus is on the Crown to prove its case and where the only evidence is that of children it must be considered with the greatest care.

As for the defence, while it is held that "it is no misdirection not to tell the jury everything which might have been told them," as was said by Brett, M.R., in *Abrath* v. *N.E. Ry.* (1883), 11 Q.B.D. 440, at p. 453, 52 L.J. (Q.B.) 620, it seems to me the trial Judge in this case might well have presented it rather more fully for the consideration of the jury. But I would not be inclined to give effect to this ground of objection if it stood alone.

The questions raised with reference to the objections to count 3 of the indictment have been considered by Dennistoun, J., and I agree with his remarks on the subject. The inclusion of offences on other dates prior to August 8 seems to have been without object as no evidence of them was offered. The practice of confining a count to one offence is one that, in fairness to the accused, ought to be followed unless there are strong reasons for departing from it.

My conclusion on the whole matter, arrived at after my best consideration, and, I must say, not without some degree of hesitation, is that the trial in this case was not satisfactory and that there should be a new trial. There are frequently grave difficulties in the trial of a case such as this, particularly when depending on the evidence of children. But it is essential, nevertheless, that the accused should have the benefit of the usual and well-established safeguards given him by the law.

I would answer the questions stated, so far as they need be answered, in accordance with the foregoing.

DENNISTOUN, J.A.:—There are two reserved cases to be dealt with. The first relates to the trial of the charges contained in the second and third counts of the indictment. The second relates to the trial on the fourth and seventh counts of that indictment. There were separate trials before different juries.

The first trial resulted in a verdict of not guilty on the second count which charged carnal knowledge on or about August 8, and of guilty of indecent assault on the third count on or about the same date.

I will deal first with the questions reserved by the trial Judge

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upon the trial which concerned the girl Lillian Wilson as set forth in the second and third counts and will abbreviate the questions to avoid repetition.

Q. 1. Was the Judge wrong in refusing to quash the indictment? A.: No.

The third count charged an offence "on or about the 8th day of August, 1920, and on and at divers other days and times before that date."

This count is clearly objectionable for it charges the commission of more than one offence.

Section 853 (3) of the Criminal Code says: "Every count shall in general apply only to a single transaction."

The practice is well established in England that several offences should not be charged in the same count, although opinions have been expressed which indicate that this is more a matter of uniformity of practice than the strict law. Tremeear's Annotated Criminal Code, p. 1165.

Notwithstanding this, the irregularities in this indictment occasioned no substantial wrong or miscarriage to the accused for no evidence of other offences before August 8 was offered, and under the provisions of sec. 1019 of the Criminal Code action is not called for by this Court.

Q. 2. Was the Judge wrong in admitting evidence of similar acts of the accused?

I proceed to the answer of this question with a good deal of hesitation and some doubt for there is much scope for the exercise of judicial discretion by a trial Judge which should not be lightly interfered with by an Appellate Court.

There is authority that in some cases where sexual offences have been charged evidence of the commission of other similar acts in a series of transactions through which runs a link of continuity is properly admitted: *Reg* v. *Rearden*, 4 F. & F. 76; *R.* v. *Shellaker*, [1914] 1 K.B. 414; *R.* v. *Stone*, 6 Cr. App. R. 89; *R.* v. *Bond*, [1906] 2 K.B. 389.

I am not prepared to say that the admission of evidence of other acts in this case was clearly wrong, but am of opinion that its admission without special directions to the jury as to the effect which should be given to it did prejudice the accused as will be more evident when questions 8 and 9 are dealt with.

The evidence given in respect to the charge of indecent assault was of an equivocal character. If believed there was no room for question as to the intent of the accused. What he did was grossly indecent and could not possibly be anything else. The prosecution should not have introduced evidence of like offences

for the purpose of anticipating a defence of innocence, or an absence of *mens rea*, as may be done in case of uttering counterfeit money, abortion, incest, baby farming and like: *Brunet* v. *The King*, 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16; *R.* v. *Boyle*, [1914] 3 K.B. 339; *Reg.* v. *Balls* (1871), L.R. 1 C.C.R. 328, 40 L.J. (M.C.) 148; *R.* v. *Bond, supra; Makin* v. *Att'y-Gen'l for New South Wales*, [1894] A.C. 57, 63 L.J. (P.C.) 41.

The evidence given with the fullest detail that the accused on a subsequent occasion committed an indecent assault on this child may have influenced the jury as specific evidence of bad character on the part of the accused, and as shewing a propensity to commit such crimes, which is improper. The harmful effect of the admision of such evidence may at times be mitigated by the trial Judge's charge to the jury, which should place such evidence in its proper light and contain a warning against giving it improper weight. In this case no such warning was given.

I answer, No, to this question.

Q. 3. This is not material in view of answers given to other questions.

Q. 4. Was the trial Judge wrong in not warning the jury in respect to evidence of similar acts? A. I think so, for reasons given in answer to question No. 2. In all cases where such evidence is admissible the jury should be warned that it is not evidence of the commission of the act charged and can be received only for the purpose of determining what was in the mind of the accused when he committed the act charged.

Q. 5. Was the trial Judge wrong in not cautioning the jury against accepting the uncorroborated evidence of young children? A.: This was not a case in which corroboration was required either by statute or common law. The children by reason of their tender age were not accomplices, but the trial Judge should have warned the jury, and should have brought it home to their minds that they ought not to convict on evidence of this character without extreme care. It is not necessary to use the actual words "warn" or "caution." The Judge in charging the jury put their evidence forward as worthy of acceptance, and was content to restrict his warning to the usual directions as to reasonable doubt. I think he should have gone further, and urged a careful scrutiny of the evidence, for the reason that it was given by young children, who are "possibly more under the influence of third persons . . . than are adults, and they are apt to allow their imaginations to run

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away with them, and to invent untrue stories." *R.* v. *Dossi*, 13 Cr. App. R. 158; *R.* v. *Cratchley*, 9 Cr. App. R. 232. A. Yes.

Q. 7. Was the onus which is upon the Crown sufficiently pointed out to the jury? A.: It was not directly referred to in the charge but occasioned no miscarriage.

Q. 7. Was the onus which is upon the Crown sufficiently pointed out to the jury? A.: It was not directly referred to in the charge but occasioned no miscarriage.

Q. 8. Was I wrong in telling the jury in view of the evidence given by the Crown that the date of August 8 was immaterial and that if they were satisfied an offence had been committed during the holidays, that they could convict?

I have set this question forth *in extenso* for, in my judgment, it is the crux of this reserved case and upon the answer to be given will depend the disposition of the trial which has taken place.

The third count charged an indecent assault on or about August 8.

Under ordinary circumstances this would permit a variation of the actual date of the offence within reasonable limits—fair to the accused. *R.* v. *Dossi*, *supra*.

In this case the Judge charged the jury that they might find the accused guilty "if you find this offence was committed around about the time the girl had this silk dress or during the holidays, if it happened in the school holidays—if you find that the offence was committed, you are not confined to the date of August 8 as to the commission of the offence."

This was in my view depriving the accused of the defences which he may have possessed and which he may have abandoned, relying on the case put forward by the Crown.

Counsel for the Crown in opening said to the jury:

"Lillian Wilson is a girl about 14 years of age. Her mother will be called to say how old this girl is, and you will locate the date August 8, named in the indictment, by the fact that on that date the girl was wearing a new dress that had been bought for her, and that dress was worn the first (second?) Sunday in August, and the dress was made by Mrs. Wynne, who will testify of the making and delivery of the dress. That has nothing to do with the case except fixing the date, the approximate date on which the offence occurred. The specific offence which occurred on August 8 was this . . ."

Counsel then described the offence which took place on a Sunday in a garage. The mother of the child was called to testify that Lillian wore her new dress on August 8, 1920, a

Sunday, that the dress was delivered by the dressmaker "so that she wore it on August 8, on the Sunday." The dressmaker swore that she delivered the dress in the first week of August.

The girl Lillian Wilson says she got the new dress "the night before that Sunday" and that she first wore the dress on Sunday but cannot fix the date except that it was in the summer holidays.

She then described the meeting with the accused on that Sunday and gives evidence of the commission of the offence charged.

Counsel for the Crown then asked for details of what it believed was the commission of a subsequent offence at some later date, not definitely fixed, in a bedroom in accused's house. The admission of this evidence was strongly objected to by counsel for the accused. The offence described was of a similar character to that described in the garage. The Judge must have thought it had some connection with the previous offence, and that there was a "nexus" such as is referred to in the cases above referred to, otherwise it was inadmissible. He might in the exercise of his wide discretion admit it. But this evidence having got into the case, the jury should have been warned as to the effect which should be given to it, and no such warning was given.

When the accused came to making his defence he relied upon an alibi. A number of witnesses were called upon to prove that from August 7 to the 22nd he was out of the province staying with relations in Regina.

In view of the opening statement of counsel for the Crown as to August 8 being the date of the offence, and of the evidence given to establish that date, I think counsel for the accused were justified in putting forward that alibi and relying upon it. It should have been put fairly to the jury as a defence which, if believed, might acquit the accused.

The only reference to the defence upon the main charge to the jury was in the following words:

"The evidence of the defence is simply in the nature of an alibi by shewing that he was not here on the 8th and 15th or 1st of August. The fact that he was not here on these dates does not make much difference if you are satisfied the offence was committed on or about these dates. You are not restricted to dates."

When the jury retired, they remained in consultation for 4 hours, and then returned to the Court room to ask if there was an opportunity of getting any of the evidence.

"The Court: Whose evidence do you want?

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Foreman: It is with respect to the date of August 8th. The different things in conection with that.

The Court: My instructions to you are, you are not confined to the 8th August if you find this offence was committed around about the time the girl had this silk dress, or during the holidays, if it happened in the school holidays—if you find the offence was committed, you are not confined to the date of the 8th August. . . . The point you are to investigate is to try and discover was there a crime committed about that time; you are not restricted to the date."

The jury then asked certain other questions, as to the evidence in support of the alibi. In about half an hour they returned with a verdict of "not guilty, on the second count, carnal knowledge; guilty on the third count of indecent assault."

It may well be that the Judge having brushed aside the defence of alibi as presenting no difficulty in the way of a conviction, the jury accepted his view, and found a verdict without further hesitation, though it is obvious that if they believed the alibi to be proved, they found the accused guilty of an offence "in the summer holidays" which may have been the offence committed in the house, which was not included in any count of the indictment. On the other hand they may have thought the offence in the garage took place on some Sunday previous to August 8 or after the 22nd, when the accused is said to have returned to Brandon.

I am unable to infer from their verdict, or their questions, or the Judge's directions, what they intended to find, and am of opinion that the importance of August 8 to the defence was not clearly put to them, nor was the defence of alibi, or the necessity for passing upon it brought before their minds, on the contrary the only suggestion was that they should ignore it.

My answer is Yes, as qualified and explained by reasons given.

Q. 9 Was the trial Judge wrong in not stating to the jury that if they believed the witnesses for the defence established an alibi they should acquit?

It is the duty of a trial Judge to put the defence fairly before the jury so that they may appreciate what it is and determine the weight to be given to the evidence in support of it.

In *R.* v. *Finch*, 12 Cr. App. R. 77, at p. 79, Avory, J., said:

"There was a strong case of alibi made out by the defence, but the Assistant-Recorder in his summing up did not tell the jury that they must be satisfied that this defence was unsound before they convicted the appellant. . . . The Court is of

opinion that the jury were entitled to have the assistance of the presiding Judge in directing them, and that, in the words of Pickford, J., the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence. In these circumstances a miscarriage of justice may well have occurred, and the Court have therefore come to the conclusion that this appeal must be allowed and the conviction quashed."

Here the trial Judge brushed aside the only defence put forward and instead of directing the jury to weigh and consider it, he was content to point out how they might avoid giving it any consideration whatsoever.

R. v. *Davis*, [1917] 2 K.B. 855, 13 Cr. App. R. 10, 87 L.J. (K.B.) 119; *R. v. Kurasch*, [1915] 2 K.B. 749, 13 Cr. App. R. 13, 84 L.J. (K.B.) 1497; *R.* v. *Badash* (1917), 13 Cr. App. R. 17, 87 L.J. (K.B.) 732; *R.* v. *Richards* (1910), 4 Cr. App. R. 161, at p. 163.

My answer is Yes, as qualified and explained by reasons given.

Questions 10 and 20 inclusive in my judgment do not require specific answers. Most of them have been touched upon in the remarks already made and further consideration of them would have no effect upon the disposition to be made of the case and might hamper the Judge who presides at the new trial.

Q. 21. Was it wrong to hand the complete indictment to the jury during their deliberations? A.: No.

Q. 22. If it is the opinion of the Court that I was wrong in any of the above matters was there such a substantial wrong or miscarriage as to entitle the accused to acquittal or a new trial? A.: There should be a new trial.

METCALFE, J.A., concurred in granting a new trial.

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The accused was also convicted of indecent assault on Winnie Reid, a girl under the age of 14 years, and Macdonald, J., reserved certain question of law for the Court of Appeal. The following are the questions and answers as certified by the Court:—

"(1) Was I wrong in refusing to quash the indictment—(a) The indictment as a whole; (b) In counts 4 and 7? A.: No, to both (a) and (b). (2) Was I wrong in allowing the amendments to the indictment as made? A.: No. (3) The Crown offered evidence of similar acts of the accused which was objected to by counsel for the accused. I allowed this evidence, the particulars of which will be shewn in the record. Was I wrong in admitting this evidence? A.: No. (4) In view of the

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state of the public mind in Brandon, and the facts disclosed by the material filed on behalf of the accused, was I wrong in not warning the jury, in my charge, that they should not allow themselves to be prejudiced by any previous knowledge they might have had of the case, nor by the state of public opinion, which the counsel for the accused claimed to amount even to intimidation? A.: No. (5) Having admitted evidence of similar acts, was I wrong in not warning the jury that these acts were not proof of the charge laid, and that they must be careful not to convict the accused because they might be convinced that some other act had been proved? A.: The Court thinks that there was no substantial error in this respect in this case. (6) Did I sufficiently warn the jury against accepting the uncorroborated testimony of children of tender age? A.: Yes. (7) Was I wrong in the comments which I made to the jury respecting the reliability of the evidence of young children, to the extent of prejudicing the accused? A.: No. (8) Did I sufficiently draw the attention of the jury to the points brought out in the evidence, in favour of the accused? A.: Yes. (9) Did I sufficiently point to the jury that the onus of proving the case against the accused was upon the Crown? A.: Reviewing the charge as a whole, yes. (10) When charging the jury my recollection was that on July 22 the accused had taken the girl into the bedroom and certain things had happened. Counsel for the accused has pointed out that there was no evidence of anything of the kind on this occasion. The jury having heard the evidence, was it a substantial wrong to the accused that I stated to the jury that on this occasion—'she said that she put her legs around the shoulders of the accused'—also—'there is nothing to shew what became of Mildred Ferguson after she stated the accused took her into the bedroom. Now, is it possible that the girl has concocted it or is there some occasion she is confusing with another occasion'? A.: The Court is of opinion there was no substantial error in these matters. (11) Should I have drawn the attention of the jury to the fact that Mildred Ferguson and the other girl witnesses were not called for the defence, but by the Crown and that where they contradicted the evidence of Winnie Reid they threw discredit upon her testimony? A.: The Court is of opinion there was no substantial error in these matters. (12) In view of the evidence of Winnie Reid that she ran into the house, had found the accused sitting there and that she had locked the door, were my remarks as to the conduct of the accused, among which was the following —'surely a grown-up man could protect a child against three

little girls'—unfair to the accused? A.: The Court is of opinion that this matter was not material. (13) Were my comments on the evidence of the defence unfair to the accused? A.: No. (14) The Crown called Mrs. Steeden in rebuttal. Her evidence was objected to by counsel for the accused. Was I right in admitting her evidence? A.: Yes. (15) Was I right in especially referring to her evidence in the way I did, when charging the jury? A.: Yes. (16) In view of the evidence, was I wrong in drawing the attention of the jury to the fact that the descriptions given by Winnie Reid of the contents of the house were strong corroboration of her story? A. The Court is of opinion that there was no substantial error in this respect. (17) On the whole was my charge so unfair to the accused as to prejudicially affect the jury? A.: No. (18) The indictment was handed to the jury containing all its counts and endorsed with the verdict of 'guilty' on count No. 3, during their deliberations. Was this wrong? A.: No. (19) If it is the opinion of the Court that I was wrong in any of the above matters, was there such a substantial wrong or miscarriage as to entitle the accused to acquittal, or a new trial? A.: The Court is of opinion the verdict must stand.

The order and direction of the Court of Appeal is, therefore, that the verdict shall stand and that the rulings appealed from shall be confirmed."

PERDUE, C.J.M.:—My brothers Cameron and Dennistoun have dealt with the questions reserved by the trial Judge in trial No. 1 and I agree with the conclusion at which they have arrived. I will confine myself to the main questions raised in the trial on the fourth and seventh counts. An application was made by counsel for the accused to postpone the trial or for a change of venue on the ground of local prejudices against the accused and the inflammatory condition of the minds of the people of the district which, it was contended, would prevent a fair trial at that time. This motion was refused. An application on behalf of the accused was then made to quash the indictment on the ground that all of the offences charged in the various counts could not form part of one indictment, and that several of the counts, amongst them counts 4 and 7, upon which this trial took place, were double, multifarious and embarrassing. The motion to quash was refused, but upon a motion for severance separate trials were allowed in respect of the offences alleged to have been committed on each child. Trial No. 2 dealt with counts 4 and 7. These counts as they stood in the indictment found by the grand jury were as follows:—

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The jurors aforesaid do further present:—

"4. That J. I. Parkin on or about the twenty-ninth day of May in the year of our Lord one thousand nine hundred and twenty-one and on and at divers other days and times before and since that date at Brandon in the Western Judicial District in the Province of Manitoba unlawfully and carnally knew Winnie Reid a girl under the age of fourteen years not being his wife."

The jurors aforesaid do further present:—

"7. That J. I. Parkin on or about the twenty-second day of July in the year of our Lord one thousand nine hundred and twenty-one and on and at divers other days and times before that date at Brandon in the Western Judicial District in the Province of Manitoba unlawfully and indecently assaulted Winnie Reid a female."

At the opening of the trial, counsel for the accused objected to the form of the counts claiming that the words "and on and at divers other days and times before and since that date" might cover a number of charges and were multifarious. Counsel for the Crown applied for leave to amend by striking out the words to which objection was taken. The application was allowed and the counts were amended accordingly. This amendment was made in the interests of the accused and in response to his objection to the form of the counts. The Court has power to amend the indictment under sec. 892 of the Criminal Code at any stage of the trial. See *R.* v. *Dossi*, 13 Cr. App. R. 158, at p. 160.

I would therefore answer No to Q. 1, (a) and (b). I would also answer Q. 2 in the negative.

Question 3 relates to the admissibility of evidence relating to similar acts of the accused upon the girl prior to May 29, 1921, being the date of the offence charged in count 4. The evidence was, I think, rightly admitted on the authority of *R.* v. *Shellaker*, [1914] 1 K.B. 414, 83 L.J. (K.B.) 413. In that case the charge was one of unlawful carnal knowledge of a girl under sixteen. Evidence of other acts of misconduct towards the girl on the part of the accused was offered and received in evidence. It was held by the Court of Criminal Appeal that this evidence was admissible. The principle is thus stated in Phipson on Evidence, 6th ed. p. 160:—"To prove the occurrence of sexual intercourse on a given occasion, prior or subsequent acts between the same parties are admissible."

In support of this statement the author cites the *Shellaker* case; *R.* v. *Ball*, [1911] A.C. 47; *R.* v. *Stone*, 6 Cr. App. R. 89.

In the *Shellaker* case, Isaacs, C.J., gives the rule under which such evidence is admissible. He refers to *R.* v. *Ball, supra*, and *Reg.* v. *Ollis*, [1900] 2 Q.B. 758, at p. 781, and proceeds at p. 417, "The rule was well stated by Channell, J. in the latter case, where he said: 'In such cases evidence of other transactions is admitted, not for the purpose of showing that the prisoner committed other offences, but for the purpose of showing that the transaction the subject of the indictment was done with the intent to defraud or with guilty knowledge, as the case may be. Such evidence is admitted, not because it tends to show that other offences have been committed, but notwithstanding that, in the particular case, it may happen to do so.'"

In *Reg.* v. *Rearden*, 4 F. & F. 76, the accused was charged with rape on a child. Evidence was given of repeated similar acts two and four days later, and prior to the child's complaint to its mother, it appearing that the accused threatened to beat the child if she told. The evidence was held admissible by Willes, J. as one continuous offence.

The cases dealing with the rule as to the reception of evidence of similar acts of the accused are very fully dealt with in *Brunet* v. *The King*, 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16. In that case such evidence was given in rebuttal, the accused having put forward a defence of innocent and lawful purpose.

In the present case the accused in giving evidence on his own behalf positively stated that the prosecutrix, Winnie Reid, was never with him alone at any time, either in the house, or in the garage, or between the two. This leads up to the important point covered by question No. 14. The Crown called Mrs. Steeden in rebuttal to contradict these statements of the accused. This witness lives just across the street from the house of the accused. From her dining room window she could see his house, his garage and the passage leading from the house to the garage. She was asked the question: "Have you seen Winnie Reid about that house within the last year alone with Mr. Parkin? This question was objected by the counsel for the accused on the ground that it was not in rebuttal and should have been given, if at all, as evidence in chief. The trial Judge ruled that the evidence was admissible. The witness then said that she had seen Winnie Reid go to the house of the accused and come out with him, "his arm around her shoulders, and going into the garage, and they would go in there a little while and then come out again." She said she saw him in the month of April take the girl into the garage and shut the door

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and she saw the little girl coming out first and the accused afterwards when he closed the door and went home. The witness also stated that on a subsequent occasion, "I saw the child coming out from the garage and she was drying herself." Witness places the time of this other occasion as about the third week in April. The witness stated that on another occasion on a Sunday afternoon she saw Winnie Reid go into the house of the accused at two o'clock and come out at five. All of this evidence was objected to by counsel for the accused.

In Russell on Crimes, 7th ed., para. 2,327, the rule as to rebutting evidence is thus stated:

"The general rule is, that the evidence in reply must bear directly or indirectly upon the subject matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. This rule is made for the purpose of preventing confusion, embarrassment, and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted as he may think best for the discovery of the truth and the administration of justice."

See also Wigmore on Evidence, para. 1873.

The question was considered by the Court of Criminal Appeal in *R.* v. *Crippen*, [1911] 1 K.B. 149, at pp. 156, 157. Darling, J., in giving the judgment of the Court said:

"There is no doubt that the rule is that the judge at the trial in considering whether he should allow rebutting evidence to be given should consider whether the rebutting evidence could have been given in chief and ought to have been adduced by the prosecution as part of their case before they closed it. We do not feel inclined to lay down the rule as strictly as Tindal, C.J., did in *Reg.* v. *Frost*, (4 St. Tr. (N.S.) at col. 386). We do not propose to adopt the language of Tindal, C.J. . . . We prefer to express the rule by saying that the rebutting evidence must in the first place be evidence, which is admissible in law. Assuming it to be admissible evidence, it then becomes a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in chief, ought to be given as rebutting evidence.

In arriving at a decision upon the question the judge ought, no doubt, to have regard to the rule which has been established by the authorities. But the matter is one which is within the discretion of the judge who presides at the trial, who is in a much better position than any Court before which an appeal

comes to determine whether it is really fair to allow the rebutting evidence to be given or not and whether it does or does not expose the defence to a disadvantage to which it ought not to be exposed. It does not appear to have been laid down in any of the authorities that if the judge at the trial exercises his discretion in a manner different from that in which the Court of Appeal would have exercised it, that is of itself a sufficient ground for granting a new trial or quashing the conviction."

In *R.* v. *Froggatt* (1910), 4 Cr. App. R. 115, the defence had set up an alibi. The Court upheld the ruling of the trial Judge admitting rebutting evidence to contradict evidence for the defence even as to an immaterial date.

The accused in the present case set up what was in effect an alibi. The Crown could not foresee that he would swear that he had never been alone with the girl in his house or his garage. If the evidence of Mrs. Steeden had been offered in chief it would, no doubt, have been objected to on the ground that it was not connected with the particular acts charged in the indictment, but related to other occasions. The importance of the evidence is to disprove the alibi. It might also, by contradicting the accused on a material point, cast a doubt upon his credibility.

It is urged on behalf of the defence that the statement of Mrs. Steeden as to what the child was doing when she came out of the garage was most damaging to the accused and should not have been received. The answer was given to the question. "Do you remember an occasion when your attention was drawn to Winnie Reid coming out of the garage with the accused? "The question was objected to and was repeated at the request of the Court. What then followed I extract from the evidence:

"The Court: Is that the occasion she has already mentioned that she saw her go in. A. That is another thing (time).

The Court: Another time? A. Afterwards; I saw the child come out and she was drying herself."

If the question as put by the counsel for the Crown was admissible, and it is clear that the trial Judge allowed it, the witness was entitled to answer it by telling exactly what she saw.

When the jury retired to consider their verdict the original indictment was handed to them with the indorsement upon it of the verdict in the first trial showing "guilty" on count No. 3. The propriety of so doing is raised by question No. 18. The practice of allowing the jury to take the indictment with them when they retire to consider their verdict is a common

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one. It would have been better in the present case to have furnished them with a copy. I cannot, however, believe that any injustice was done to the accused by permitting the jury in this case to see the entry of the verdict found by the jury in the first trial. I think that every juryman on the panel would by that time have been aware of the result of that trial. It would have been a topic of conversation and a matter of general news. Seeing the entry on the indictment would convey to them no information that was not already known by them. A somewhat similar thing took place on the trial of the *Froggatt* case, above referred to. There were three indictments against Froggatt. When he was arraigned in the presence of the jury he pleaded guilty to the third indictment and not guilty to the first and second before the first was tried. Thus, when given in charge to the jury to take his trial on the first indictment, to which he pleaded not guilty, the jury were seized of the fact, on his own confession, that he was a criminal. On this objection being presented to the Court of Criminal Appeal, Darling, J. asked "How can that be avoided?" The Court overruled the objection summarily. The same course should be adopted in the present case. To rule otherwise would necessitate the segregation of the jury not only from the general public but from other members of the panel.

The other questions are discussed by my brothers Cameron and Dennistoun, JJ.A. with those conclusions I agree.

The Court answers the questions in these cases in the manner set out respectively in the certificates given.

In trial No. 1, the *Lillian Wilson* case, a new trial is ordered. In trial No. 2, the *Winnie Reid* case, the verdict will stand.

CAMERON, J.A.:—This is another reserved case in a case tried by Macdonald, J., at the last Brandon assizes. The accused, who is the same person as is involved in the other case of *Rex* v. *Parkin*, was indicted for having carnal knowledge of Winnie Reid, a girl under the age of 14 years, on or about May 29, 1920, and for indecently assaulting Winnie Reid on or about July 22, 1920. The jury returned a verdict of guilty of indecent assault on both counts.

Some 19 questions are asked in the case. Several of the most important of these I have already discussed in the case against the same accused in which Lillian Wilson is prosecutrix. In this case I think the warning given by the Judge to the jury against accepting the uncorroborated testimony of children of tender age was sufficiently given, and no reasonable exception

can be taken to his general reference to the character of the evidence of children and the necessity of considering it with care.

There were some misstatements of fact in the charge to which our attention was drawn. These were merely slips and it is hard to imagine that the jury could have been misled by them or that there was any miscarriage of justice occasioned thereby in a case so strongly contested as this was. The girl Mildred Ferguson was called for the Crown and gave evidence that contradicts that of the prosecutrix. The objection is made that the trial Judge should have pointed this out to the jury as discrediting the testimony of Winnie Reid. But the fact of Mildred Ferguson being called as a Crown witness was apparent, the witnesses were before the jury and the weighing of their evidence was for the jury alone. The only reference in the charge that I can find to evidence of similar acts is that the prosecutrix says "that something of the same kind had happened before this." I think the remarks I made on this subject in the *Lillian Wilson* case are applicable here also and I would not regard this reference to the evidence or the omission to deal more specifically with it as sufficient to constitute a mistrial.

The most serious objection is that taken to the evidence of Mrs. Steeden given in rebuttal. I must say that I was at first of the impression that the admission of this evidence was unwarranted. Examination of the authorities has convinced me that the action of the Judge in ruling it admissable must be upheld.

"Whenever evidence has been given by the defence introducing new matter which the Crown could not foresee, counsel for the prosecution may be allowed to give evidence in reply to contradict it. The matter is within the discretion of the Judge at the trial. Archbold's Criminal Pleading, 25th ed., p. 199, citing *R.* v. *Crippen*, [1911] 1 K.B. 149, where the Court of Criminal Appeal refused to hold itself bound by the rule laid down by Tindal, C.J. in *Reg.* v. *Frost*, 4 St. Tr. (N.S.) 85, 386, set out in Roscoe's Criminal Evidence, 14th ed., p. 109.

This discretion is not confined to cases where evidence has been given by the defence on matters which the Crown could not foresee. Archbold, p. 199, referring to *R.* v. *Crippen*, *supra*."

The reception of the evidence can be justified as being in reply to the statement made of a collateral fact by the accused. He said he was never alone with Winnie Reid in his house or

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garage or between them or anywhere else at any time. This was a wide and inclusive contradiction of the specific instances given by Winnie Reid and raises an issue that, while collateral, was still relevant. On this point I refer to Phipson, p. 40. The accused's statement is equivalent to a defence of alibi which can be rebutted. Phipson, ibid; *R.* v. *Froggatt*, 4 Cr. App. R. 115; Archbold, 200. Moreover the statement made by the prisoner is one that the Crown could not be expected to anticipate.

The final consideration remains that the admission or rejection of evidence for the prosecution in rebuttal is peculiarly a matter within the discretion of the Judge at the trial as was said by the Court of Criminal Appeal in the *Crippen* case, Roscoe, p. 109, makes this quotation from Phillimore on Evidence.

"After the close of the case for the defendant, the general rule is that the evidence in reply must bear directly or indirectly upon the subject matter of the defence and not tending to controvert or disprove it . . . . but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted."

I hold, therefore, that the objection to this witness's evidence fails. I agree with the observations of the Chief Justice and Dennistoun, J. on this objection and the admissibility of the evidence.

The objection is taken that the handing of the indictment to the jury with the verdict of guilty on count No. 3 necessarily prejudiced the defence. This objection appears to me to be met by the case of *R.* v. *Froggatt, supra*, and is dealt with by the Chief Justice and Dennistoun, J. I can see nothing in this objection to which this Court should give effect.

There are objections taken which I have not specifically discussed and the answers to them will appear on the certified record so far as it is necessary they should be answered.

I am of the opinion it is clear that this Court should not interfere with the verdict of the jury which must stand.

DENNISTOUN, J.A.:—Trial of the charges in the fourth and seventh counts was then proceeded with before a new jury, which found a verdict of guilty of indecent assault on both of them.

Q. 1: Was I wrong in refusing to quash the indictment? (a) As a whole—A. No. (b) In counts 4 and 7—A. No. Q. 2: Was I wrong in allowing the amendments to the indictment made? A. No. Counts 2 and 3 have been dealt with in the reserved case first above considered.

Counts 4 and 7 were objectionable when first presented to the trial Judge for they alleged the commission of offences on or about specified dates and included the words "and on divers other days and times before and since," which quoted words the trial Judge struck out. I think he was right in so doing. Sec. 853 (3) of the Criminal Code, quoted above, with the comments taken from Tremeear's Annotated Criminal Code, show that it is a matter of uniform practice to limit the charges in a count to a single transaction. The amendments which the trial Judge made were upon the application of the accused and were solely in his interest and he was in no way prejudiced thereby. In my view, they were properly made under the provisions of sec. 892.

Q. 3:—The Crown offered evidence of similar acts of the accused which was objected to by counsel for the accused. I allowed this evidence, the particulars of which will be shewn in the record. Was I wrong in admitting this evidence?

The record shews that the only evidence of this character was as follows:

Q. Where did these things happen? A. Sometimes in the house and sometimes in the garage..... ....

Q. Did anything of the kind happen between you and Mr. Parkin before the 21st of May? A. Yes.

For the reasons given in answer to the like question in the former case, I cannot say this evidence was improperly admitted and I adopt the reasoning of Cameron, J. on the point as set forth in that case.

I think the trial Judge should have charged the jury as to the value of this evidence but do not think any miscarriage resulted from his failure to do so. This case differs from the former one in that the accused in this case made a full defence, going into the witness box and giving evidence on his own behalf, with a complete and full denial of the evidence of the girl. In the former case he rested upon his alibi in respect to August 8 and may have been prejudiced by a recital of specific offences at other times in the absence of clear directions to the jury in respect thereto. In this case the evidence of other acts was of the most general character and was fully met by the evidence of the accused. A. No.

Q. 4:—This refers to the state of public opinion at the place of trial and the lack of reference to it in the charge.

The accused was defended by able counsel. It was unnecessary for the trial Judge to deal with this point.

Q. 5:—Lack of warning to jury in respect to general evi-

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dence of similar acts. This has been dealt with. The trial Judge should have commented upon this point but in view of the evidence given by the defence and the cautions contained in the charge as a whole there was no miscarriage of justice by reason of this omission.

Q. 6 and 7:—Were sufficient warnings given the jury against accepting the uncorroborated testimony of children of tender age, and respecting the reliability of the evidence of young children?

The charge was satisfactory on these points and supplied all the omissions referred to in the previous case.

Q. 8:—In this case the trial Judge did put the defence fairly and fully before the jury.

Q. 9:—Onus of proof. A perusal of the whole charge shews that the jury were sufficiently instructed as to their duty. As previously stated the accused had able counsel who dealt at length with this question. It was not essential that the Judge should reiterate counsel's words. It was clearly before the minds of the jury that the Crown must prove its case before the accused was called upon to make an answer.

Q. 10.—This question relates to an error which the trial Judge made when dealing with the seventh count. He stated that on July 22, after certain indecent acts in the sitting room, the accused took the girl into his bedroom where certain things happened. As a matter of fact it was on May 29 as charged in the fourth count that the bedroom incident occurred. The jury had heard the evidence and there is no ground for thinking that this misstatement in any way prejudiced the accused. There was no substantial wrong or miscarriage of justice and under the powers given by sec. 1019 of the Code I so find.

Q. 11, 12, 13:—I answer in favour of the Crown.

Q. 14 and 15:—The rebuttal evidence of Mrs. Steeden. I agree with the remarks of Cameron, J. upon this question and add the following:—When the accused by evidence called for the defence gives collateral facts for the purpose of impeaching the credit of a witness on the other side, rebutting evidence may in the discretion of the trial Judge be allowed. Roscoe's Criminal Evidence, 14th ed., p. 109:

Wigmore on Evidence at para. 1873, puts it this way: "a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because, on any issue whatever, facts discrediting the proponent's witnesses have been offered."

If the accused had rested his case on a denial of the girl's evidence that they were ever alone in the house it would have been an end of the matter; but when he said he was never alone with her in the house, or in the garage or in any other place, he went out of his way to set up an alibi not only to meet the charge which was restricted to the house but to impeach her general credibility, and the evidence of Mrs. Steeden that she had seen them alone in the garage was admissible, under the wide discretion referred to which must not be lightly interfered with by an Appellate Court.

I think the trial Judge's comments on this evidence were quite fair and proper.

Q. 16 and 17: I answer in favour of the Crown.

Q. 18: The indictment was handed to the jury containing all its counts and endorsed with the verdict of "guilty" on count No. 3, during their deliberations. Was this wrong?

I had no hesitation in finding in the first of these cases that it was not improper to hand the whole of the indictment to the jury for it is usually done and is in many cases necessary to do so, to enable them to deal with different counts. It may be considered settled practice, though individual Judges prefer not to follow it.

In this case the endorsement of "'guilty' on the third count" had been placed upon the back of the indictment at the conclusion of the trial on that count and when the new jury came to try the fourth and seventh counts they no doubt saw this entry upon the indictment.

These cases were tried at the same assizes at Brandon by members chosen from the same jury panel. It must have been common knowledge among them that the accused had been found guilty by the first jury, and it would be impossible to say that any prejudice was created by allowing the official record of the fact to appear. Moreover, the accused had put his character in issue by his defence and it was open to the Crown to prove bad character and to prove previous convictions. If this endorsement on the record had been put before the jury as evidence of character I would hesitate to say that it was improperly tendered.

In *R.* v. *Froggatt*, 4 Cr. App. R. 115, at pp. 116-119, it appears that there were three indictments against the prisoner and when arraigned in presence of the jury he pleaded guilty of the third indictment. Thus when given in charge to the jury to take his trial upon the first indictment to which he had pleaded not guilty, the jury were seized of the fact, on his own

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confession, that he was a criminal. Bucknill, J. at p. 119, says: "But the procedure of which he complains has been in existence a number of years. It is the custom of the Court and we think that there is no substance in the prisoner's complaint."

I am content to take that ground as sufficient in this case.

Q. 19: I am of opinion upon the whole case that there was no substantial wrong or miscarriage in the second trial of this case. The conviction must stand, in so far as counts 4 and 7 are concerned.

METCALFE, J.A. (dissenting):—While I agree that there should be a new trial on the first case, I have the misfortune in the second case to disagree with the majority of the Court. I think there should be a new trial in the second case also.

New trial ordered in the Wilson case; verdict affirmed in the Reid case.

McINTYRE v. TEMISKAMING MINING Co.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. May 13, 1921.

COMPANIES (§IVB—50)—PURCHASE OF SHARES IN OTHER COMPANIES—AUTHORITY NECESSARY—COMPANIES ACT, R.S.O. 1914, CH. 178, SEC. 94 (1) AND 23 (E)—CONSTRUCTION.

The intention of the Legislature in passing sec. 94 (1) of the Ontario Companies Act, R.S.O. 1914, ch. 178, was that no company should purchase the shares of any other company until the shareholders had expressly authorised it, but once the authority was conferred, the entering into and carrying out the purchase of any particular shares became part of the corporate business, which rested rightly with the directors and not with the shareholders, and each particular transaction did not have to be authorised by them, but where the by-law passed by the directors and authorised by the shareholders is wider in its terms than sec. 23 (e) authorises, the company, unless it undertakes not to do so, will be restrained from exercising the powers purporting to be conferred except with respect to objects mentioned in clause (e).

APPEAL by plaintiff from the judgment of Middleton, J. (1921), 58 D.L.R. 597, 49 O.L.R. 90, on an application to continue an injunction which was turned into a motion for judgment. Affirmed with a variation.

W. R. Smyth, K.C., for appellant.

Strachan Johnston, K.C., for respondent.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff, who sues on behalf of herself and all other shareholders of the respondent company, from an order of Middleton, J., dated the 15th January, 1921, dismissing her action.

On the 19th October, 1920, the appellants obtained an interim injunction restraining the respondents "from in any way acting on a certain by-law passed by the directors prior to the 23rd September, 1920, purporting to authorise the directors, at any time they may see fit, to purchase, on behalf of the company,

shares in any other corporation or company and to use the funds of the company therefor, and from in any way acting on an attempted confirmation of the said by-law, by resolution of the shareholders said to have been passed at a special meeting of the company held on the 7th December, 1920."

An application to continue this injunction came on to be heard before my brother Middleton, and the motion was turned into a motion for judgment, and the result of it was the dismissal of the action. The by-law is as follows:—

"Be it enacted as a by-law of the Temiskaming Mining Company Limited that the directors be and they are hereby expressly authorised from time to time to purchase shares in any other corporation and to use the funds of the company for such purpose."

The by-law was confirmed by the shareholders at a special meeting called for the purpose, at which shareholders representing 1,350,000 of the 2,500,000 shares into which the capital is divided were present or represented by proxy, and the resolution was passed by a unanimous vote.

The company is incorporated under the Ontario Companies Act, sec. 23 of which provides that a company incorporated under the Act "shall possess as incidental and ancillary to the powers set out in the letters patent," among other powers, the "power to . . .

"(*e*) subject to section 94, take, or otherwise acquire and hold, shares in any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as directly or indirectly to benefit the company.

Section 94 provides:—

"94.—(1) The company, although authorised by the special Act, letters patent or supplementary letters patent, or by this Act, to purchase shares in any other corporation, shall not do so or use any of its funds for such purpose until the directors have been expressly authorised by a by-law passed by them for the purpose, and confirmed by a vote of the shareholders present or represented by proxy at a general meeting duly called for that purpose and holding not less than two-thirds of the issued capital represented at such meeting.

"(2) This section shall not apply to a company incorporated for the purpose of carrying on the business of buying and selling or dealing in shares."

I agree with the reasoning of my brother Middleton, and have but little to add to what he has said.

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I apprehend that the object of enacting sec. 23 was to make it unnecessary, in order to extend the powers of a company, to obtain supplementary letters authorising it to extend its powers to the objects mentioned in the section.

Without the aid of sec. 23, the company could have applied under sec. 16 for supplementary letters patent, but such an application could not be made by the directors until their by-law had been confirmed by the shareholders as a by-law for the exercise of the powers conferred by sec. 23, i.e., required by sec. 94 to be conferred.

There can be no doubt as to the powers of a company authorised by supplementary letters patent to do what sec. 23 authorises to be done, to do anything so authorised without submitting the particular transaction which it is proposed to enter into to the shareholders and having it authorised by them; and, if that be the case, I see no reason why the same result should not follow where the shareholders' assent to the exercise of the powers conferred by sec. 23 has been obtained.

The by-law which has been passed and confirmed by the shareholders is wider in its terms than clause (*e*) of sec. 23 authorises, and, unless the respondents undertake not to exercise the powers which the by-law purports to confer except with respect to objects mentioned in clause (*e*), they should be restrained from exercising them except in respect of those objects.

As the appellant has partly succeeded, though the main ground of the attack on the by-law has failed, there should be no costs of the appeal to either party.

MACLAREN, MAGEE, and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—I adhere to the view that the objects of the statutory requirement applicable to this case necessitate submission to the shareholders in each case where the power to purchase stock in other companies is to be exercised. This can be easily done by effecting an agreement to buy the shares subject to the ratification of the shareholders.

But, as this view finds no support among the other members of the Court, I agree in the dismissal of the appeal and to the disposition of the costs, though my opinion would be that no injunction should be granted or undertaking exacted where the resolution giving the power follows the statutory enactment. As to costs, while in words wider powers are expressed than can legally be exercised, the Court will not interfere unless a case arises where an *ultra vires* act is actually threatened. No such case arises here. *Judgment varied.*

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Supreme Court of Canada, Duff, J., Cassels, J. (ad hoc), Anglin, Brodeur, and Mignault, JJ., May 2, 1922.

CONTRACTS (§IID—145)—SALE OF SET OF LAW BOOKS—FIXED PRICE FOR VOLUME—SET TO BE COMPLETED IN 150 VOLUMES MORE OR LESS—1500 PAGES IN A VOLUME — CONSTRUCTION OF CONTRACT — ADMISSIBILITY OF EVIDENCE TO SHEW FACTS TO WHICH CONTRACT RELATES.

By the terms of a contract the appellant company agreed to purchase 150 copies of each volume of a set of a reprint of English law reports at a fixed price per volume, the set to be completed in 150 volumes "more or less." The Court held that in construing the contract, extrinsic evidence was admissible to shew what the facts were to which the contract related and as shewing circumstances which the parties must have had in view when entering into it. This evidence shewed that the contract was based on a circular giving a list of the reports to be included in the series, and stating that the reports could be re-published in about 150 volumes of about 1500 pages each, and this being an estimate by experts of the reproduction of reports the exact number of words of which were known, and the evidence further shewing that if the respondent had made each volume of 1500 pages, the whole of the reports could have been reproduced in the 150 volumes estimated. The appellant was entitled to rely on this estimate in contracting for the sale of the books to its customers, and that the words "more or less" must be considered to contemplate only such a departure from the estimate as should be regarded as reasonably arising from exigencies of publication which might naturally be unforeseen or overlooked, and that the appellant was entitled to damages for loss sustained, by reason of the number of volumes being over the estimated number. The appellant's right of action for breach of the contract arose when it became clear that the deficiency could not be remedied by increasing the size of the subsequent volumes, and could be set up by way of counterclaim in an action on the contract.

APPEAL by defendant from the judgment of the Supreme Court of Ontario, Appellate Division, (1920), 55 D.L.R. 435, in an action on a contract to purchase a number of copies of a law publication, the reprint of the English reports. Reversed.

E. Lafleur, K.C. for appellant.

Bain, Bicknell & Co. for respondent.

DUFF J.:—The decisive point in the controversy is that raised by the question, what was the subject-matter of the contract—or rather that branch of the contract which in effect is a contract of sale? The respondents advance the view that they agreed to supply the appellants with sets of reports as they were published and only as they were published by Green & Sons. The appellants on the other hand, rest their case upon the proposition that the contract contemplated the delivery of sets, each set consisting of a number of volumes fixed within very narrow

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limits and each volume containing an approximately determined number of pages and each set being a complete reprint of certain specified law reports.

The document of June 5, 1900, is one which can only be fully understood by one who is informed of the circumstances in which it was executed. The phrase "English Reports Reprint to be published by Wm. Green & Sons, of Edinburgh, Scotland, first volume to appear about September 1st" "points to something which was known to and in the contemplation of both parties to the contract and with reference to which they contracted; and in order to construe and apply the contract you must ascertain what" this was. Lord Davey, whose words I have been quoting, (*Bank of New Zealand* v. *Simpson*, [1900] A.C. 182 at p. 187, 69 L.J. (P.C.) 22, 48 W.R. 591) proceeds to say "extrinsic evidence is always admissible not to contradict or vary the contract but to apply it to the facts which the parties had in their minds and were negotiating about." It will be very useful to bear in mind the words of Lord Haldane in *Charrington & Co.* v. *Wooder*, [1914] A.C. 71 at p. 77, 83 L.J. (K.B.) 220. "But if" says Lord Haldane, "the description of the subject-matter is susceptible of more than one interpretation, evidence is admissible to shew what were the facts to which the contract relates. If there are circumstances which the parties must be taken to have had in view when entering into the contract it is necessary that the Court which construes the contract should have these circumstances before it."

There are certain circumstances which the parties must be taken to have had in view. Soule had in his possession a copy of the circular of Green & Sons; and this circular gave a list of the reports which were to be re-published. It stated explicitly that all the reports mentioned could be re-published in about 150 volumes of about 1,500 pages each.

It is indisputable that this estimate was one which could be subjected to rigorous tests; the precise words which were to be reproduced were known and the number of volumes required into which the whole series would run could be determined subject to a very narrow margin of error.

The appellants moreover, as well as the respondents, were publishers and booksellers and were, of course, known to be purchasing with a view to reselling to their customers, the legal profession in Canada. It was quite well understood that they would follow the usual procedure in such a case. That is to say they would issue an advertisement or prospectus inviting subscriptions; and inviting these subscriptions upon the faith of the essential terms, at all events, of the prospectus of Green &

Sons—that a set of the Reprint would contain the reports specified and that it would consist of about 1500 pages each. These were essential trems of the prospectus of Green & Sons beause on the basis of this prospectus subscriptions were being invited by them at the rate of a named price per volume and the total cost of the work to the subscriber would necessarily depend upon the number of volumes he was agreeing to buy; and, as this was a matter easily ascertainable by the publishers within, as I have said, very narrow limits the publishers' estimate, so called, would naturally be treated by the publisher and subscriber alike as within such limits, determining the number of volumes which the subscriber would ultimately be called to pay for. Precisely the same considerations would govern the relations between the Canada Law Book Co., and its customers. A proposed subscriber's first question would be concerning the number of volumes and it was necessary that the appellants should be in a position to give such assurance upon this point as subscribers would naturally exact. The Boston Book Co., dealing with Green & Sons would expect from Green & Sons just as the individual subscribers would expect from Green & Sons a contractual stipulation upon this point and that such a contractual stipulation had been or would be procured by the Boston Book Co., from Green & Sons must, I think, be taken to have been one of the assumptions upon which Cromarty and Soule proceeded in concluding their arrangements.

All these things, the character of the publication which Green & Sons were offering to the public as the English Reports Reprint; the fact that the exact identity of the publications to be reproduced was known and the precise number of pages of a given size required to reproduce them could be ascertained; the fact that the appellants and the respondents were themselves publishers and dealers in books and fully understood this; the fact that the publication was being offered at a fixed price per volume, and consequently that the ascertainment of the number of volumes in each set as one of the conditions of the subscribers' contract within such limits as aforesaid was a point on which the appellants must be prepared for the purpose of securing subscriptions to enter into explicit engagements; these facts not only may but must be considered in construing the document signed by Soule and Cromarty for the purpose of ascertaining what was the subject matter of the sale.

Reading the document in light of the facts mentioned, two things appear to me to be almost manifest, 1st, that the English Reports Reprint means a reprint of all reports mentioned in Green & Sons circular, and 2nd, a reprint embodied in about

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150 volumes of about 1500 pages each. In other words, that the parenthetical language "150 volumes more or less" is part of the description of the thing sold.

The phrase "more or less" has of course no fixed quantitative significance. Its precise import and bearing upon the meaning and effects of any instrument in which it occurs must depend upon the subject-matter and circumstances of the transaction. It is questionable perhaps whether decided cases ascribing to it a precise effect in particular circumstances can safely be taken as a guide in other cases. It has sometimes been treated as manifesting simply an intention that the figure given should be regarded as an estimate only, e. g. in *Cockerell* v. *Aucompte* (1857), 2 C.B. (N.S.) 440, 140 E.R. 489, 26 L.J. (C.P.) 194, 5 W.R. 633, and in other cases it has been considered to denote that the quantitative expression which it qualifies though not mathematically exact is accepted as expressing an approximation to the number or other magnitude in relation to which the parties are contracting as close as the particular business in a practical way admits of ,e. g., in *Finch* v. *Zenith* (1909), 146 Ill. App. 257 at p. 277. Here this phrase is to be construed in light of the considerations already mentioned and those considerations seem to give the key to its meaning. In a sense the number given—150—is an estimate but it is an estimate given by experts in possession of all the data required for the purpose of arriving at a judgment almost exact as to the number of volumes required. This number must necessarily, in some degree, be matter of uncertainty because it was thought, no doubt for very good reasons, desirable that in every case a volume of the Reprint should contain only completed volumes of the republished reports, a condition necessarily resulting, no doubt, in some disparity in the size of different volumes of the Reprint; and other circumstances also may have contributed to the uncertainty on this point. Some latitude therefore must be allowed as to the number of volumes which each set was to contain, but to that latitude strictly ascertainable limits might be set; and bearing in mind the fact that the appellants had no contractual relations with Green & Sons while it was quite understood that the figure given (150) must be the basis of contractual stipulations by the appellants in the agreements with their customers. I think these words "more or less" must be considered to contemplate only such departure from the estimate (of 150) as should be regarded as reasonably arising from exigencies of publication which in the circumstances might naturally be unforeseen or overlooked; and that the figure given (subject to such reasonable degree of inexactitude as would not

be incompatible with the skill and care to be expected in such circumstances) was accepted as part of the description of the thing they were dealing with.

The law applicable in such circumstances is settled. Where goods are sold by description there is an implied condition that they shall correspond with the description, (*Bowes* v. *Shand*, (1877), 2 App. Cas. 455, 46 L.J. (Q.B.) 561, 25 W.R. 730) and such implied conditions go to the root of the contract and if the appellants when delivery of the first volume was tendered had been informed that the work was to be in sets of 200 instead of 150 volumes they could have declined to accept the book and would also have had a right of action for breach of an implied contract that the designated reports would be contained in a set of about 150 volumes, *Bowes* v. *Shand*, *supra*.

Having accepted the volumes delivered the right to reject is lost, but they have a cause of action as upon a warranty that the work as delivered would comply with the description in the contract—This right the appellants are entitled to assert in an independent action; and they are entitled also in the action brought by the respondents to set up in diminution of, or as a complete answer to the respondents' claim, the loss they have suffered by reason of the difference in value between the thing agreed to be sold and that delivered. *Mondel* v. *Steel* (1841), 8 M. & W. 858, 151 E.R. 1288, 10 L.J. (Ex.) 426. This reduction or extinction of price is not by way of set off, and is regarded as satisfaction only *pro tanto* (per Parke B. 8 M. & W. 870, 871): and consequently damages in excess of the amount so allowed can be recovered in another action or by counter claim. In this case if this exceed the amount sued for, the action should be dismissed with costs. There should be a reference to ascertain the damages and further consideration and costs (except costs of the appeals which the appellants should have) should be reserved.

ANGLIN J.:—I agree with the view which prevailed in the provincial Courts that what we have to deal with in this case is not an agreement for an agency, but a contract for the sale and purchase of goods. The parties put that contract in writing, in June 1900, in the following terms:—

"The Canada Law Book Company agree to take two hundred copies of each volume of the set (one hundred and fifty volumes more or less) at a price of ten shillings and sixpence (10s.6d.) per volume, bound in half roan, f. o. b. Edinburgh; payment to be made by the Canada Law Book Company on each volume three months after shipment of the volume from Edinburgh."

The "two hundred copies" was a few months later changed

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by mutual consent to 150 copies and was eventually fixed at 175 copies.

The "set" had reached 160 volumes at the time of the trial; 164 volumes have now been delivered; and it seems reasonable to expect that when complete the "set" will comprise from 187 to 195 volumes. The vendor sues for the price of volumes Nos. 151, 152, 153, 154. The purchaser contests this demand and counterclaims for $20,000 as damages for breach of contract, and for specific performance.

The question presented is whether the words "one hundred and fifty volumes more or less" were introduced into the contract as mere words of estimate so that the purchaser bound itself to take and pay for the entire "set" at the price of 10s. 6d. per volume, however great the number of volumes it should be made to comprise, or whether these words constituted a part of the description of the subject-matter of the contract, non-fulfillment of which, as a "condition" would entitle the purchaser to reject the goods and repudiate all liability, or, in the alternative, taking the goods, to recover damages *as* for breach of a warranty. The law on this subject is fully discussed in the judgment of the late Lord Justice Fletcher-Moulton in *Wallis, Son & Wells* v. *Pratt & Haynes*, [1910] 2 K.B. 1003, 79 L.J. (K.B.) 1013, unanimously and wholly approved by the House of Lords, [1911] A.C. 394, 80 L.J. (K.B.) 1058.

I say not "for a breach of warranty", but "as for a breach of warranty," because, after a careful study of the evidence I agree with the Judges who have held that intention on the part of the vendor to enter into an undertaking (as to the number of volumes to be comprised in the set) *collateral* to the express object of the contract (*Chanter* v. *Hopkins* (1838), 4 M. & W. 399, 150 E.R. 1484, 8 L.J. (Ex.) 14), has not been shewn. *Heilbut, Symons* v. *Buckleton*, [1913] A.C. 30, 82 L.J. (K.B.) 245. With very great respect, the effort to make of this case one of warranty collateral to the sale from the outset, if I may so put it, seems to have introduced confusion of thought and led to misconception of the true issue. If the statement of the number of volumes imports contractual obligation on the part of the vendor it is because it forms a part of the description of the goods sold. Was that the purpose of its insertion in the contract? The words in themselves are susceptible of being so regarded or of being treated merely as an estimate. In which sense they were in fact used must be determined by the context, if it affords the necessary cue, and, if not, by consideration of "the circumstances and the grounds upon which the contract was entered into" (Beal on Legal Interpretation, 2nd ed. p.

123) and the object with which the words in question were inserted. *Hart* v. *Standard Marine Ins. Co.* (1889), 22 Q.B.D. 499, 58 L.J. (Q.B.) 284, 37 W.R. 366.

While the "set" is described in the earlier clause of the contract as "the English Reports Reprint," to be published by William Green & Sons of Edinburgh, it is common ground that in order to have an adequate description of the subject-matter of the sale recourse must be had to a prospectus issued by the Edinburgh firm which the vendor (The Boston Book Co.) placed in the hands of the purchaser, (The Canada Law Book Co.) before the contract was made. In its statement of claim the vendor says that its contract with the defendant, "was entered into with reference to this prospectus, which is made a part of the said contract, and to which the plaintiff craves leave to refer at the trial of this action." Although the truth of this allegation, because not admitted in the statement of defence, was in issue under the Ontario practice, the evidence fully warrants the conclusion that the subject-matter of the contract sued upon was the set of books described in the Edinburgh prospectus. The trial Judge, Middleton, J. (1918), 44 O.L.R. 529 at p. 530, found that:—

"This circular was before the parties to this action as the foundation of the contract made, and may, I think, be referred to as showing what was meant by the English Reprint referred to in the agreement."

Extraneous evidence is admissible (even in the case of a memorandum required to satisfy the Statutes of Frauds) "of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument," or, in other words, to understand the subject-matter of the contract. *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182, 69 L.J. (P.C.) 22, 48 W.R. 591.

The description of the subject-matter given in the heading of the prospectus is

"A complete re-issue of all the decisions of all the English Courts from the earliest times to 1865, in one uniform set of 150 volumes, forming "The English Reports," 1300 to 1865."

In the body of the prospectus was the following paragraph:

"With the object of Proving whether it were possible to print such an enormous mass of material in a good readable type and in a series of volumes which could be accommodated in an ordinary small book-case, careful calculations and experiments in paper and printing have been made, it has been found as the result of these that a complete set of all the decisions, from the earliest times to 1865, can be given to the profession in about

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150 volumes of 1500 pages each. *The set when complete will occupy actually less room than a set of the official Law Reports from 1865 to date.* How this desirable result will be attained is shown on the specimen pages enclosed."

The accompanying specimen pages, printed as part of the prospectus, exhibited a copy of the original of p. 127 of volume IX. of Clark & Finnelly's House of Lords Reports and, opposite to it, a proposed page of the reprint containing all of pages 127 and 128 and most of page 129 of the Clark & Finnelly volume. In a note, printed between these two specimen pages, it is stated that:—

"The re-issue will be printed in volumes of about 1500 pages each. By these means from 6 to 8 volumes of the Reports will be condensed into one volume of the 'English Reports,' of the handy size shown on the other side."

On another page of the prospectus occurs the following:—

"The number of volumes in each series will be approximately as follows:—

House of Lords	11	volumes.
Privy Council	6	"
Chancery	23	"
King's and Queen's Bench	32	"
Rolls Court	7	"
Vice Chancellor's Court	13	"
Common Pleas	19	"
Exchequer	12	"
Ecclesiastical, Admiralty, and Probate and Divorce	8	"
Bankruptcy and Mercantile Cases	5	"
Crown Cases	3	"
Nisi Prius	6	"
Bail Courts	5	"

It requires little argument to prove that a series containing all these reports in a moderate number of well printed volumes at one-eighth of their present cost and occupying only about one-tenth of their shelf-room, must certainly become for all time coming the accepted edition for general use and reference."

The subject-matter of the contract in my opinion was not a set of "the English Reports" to comprise an indefinite number of volumes—merely estimated at 150—but a set of the English Reports to consist of "one hundred and fifty volumes more or less"; and the vendor represented that its undertaking would be carried out by making each volume contain about 1500 pages printed as indicated in the specimen page submitted.

The plaintiffs thus state the purview of the contract in their reply:—

"According to the said contract the defendant agreed to purchase from the plaintiff company, one hundred and fifty copies of each volume of the set of English Reports reprinted, each set to contain one hundred and fifty volumes more or less, and each volume to contain fifteen hundred pages, more or less, for the price mentioned, and the plaintiff denies that there was any agreement that each volume of said sets was to contain at least fifteen hundred pages."

Except, perhaps, that the statement of the paginal content of each volume was rather a representation as to the intended method of carrying out the stipulation as to the number of volumes than itself a term of the actual agreement, this is, in my opinion, a correct statement of the contract between the parties; and upon it the defendant is, I think, entitled to maintain its counterclaim.

Much was made in argument of the fact that the price stipulated for in the contract is not a lump sum, but so much per volume. But the volume for which the fixed price was agreed to be paid was a volume not of indefinite size but to contain "about", or "approximately." 1500 pages, or, at least, a number of pages sufficient to permit of the whole "set" being completed in about 150 volumes, the size of the pages, the number of lines in each and the style of type being specified. If the very different view of the contract now contended for on behalf of the vendor were correct the defendant would have been bound to accept as a fulfillment of it volumes of say 200 pages each and to pay for a set comprising not 150 volumes or thereabouts, but upwards of 1000 volumes, should the publishers see fit to extend the series to that extent. The suggestion that the parties intended any such contract is simply preposterous.

The evidence leaves no room for doubt that had the set been published in uniform volumes of about 1500 pages each, with pages of the size and printed with the type shewn in the specimen exhibited in the prospectus, the entire set would have been completed in "150 volumes more or less" contracted for. What the defendant bought and had a right to expect to receive was uniform sets of "150 volumes more or less" of "about 1500 pages each." The number of volumes was in my opinion an essential part of the description of the goods bought.

I extract the following from the judgment of Riddell, J., (1920), 55 D.L.R. 435 at pp. 448, 449, 48 O.L.R. 238.

"The first matter calling for comment is that in 1902 the publishers, whose prospectus was for the publication of the Privy Council Reports in 6 volumes, after publishing volumes

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12-17 of the series, and thereby completing the Privy Council Reports ordinarily referred to, added three volumes, 18-20, of Indian Appeals, not, it is said, contemplated in the original proposition. This, the plaintiffs say, was due to Stevens & Sons, whose name appears with Green & Sons as publishers, owning the copyright, and that they 'were unwisely grasping in extending these additional volumes to three reprint books, when they could easily have been put into two at most, or even by maintaining the size of the early volumes consistently these additions could have been so combined as to make only one extra volume beyond announcement' (letter May 21st, 1902). When we see that volumes 12-17 have an average of 820 pages only, 4,960 pages in all, and volumes 18, 19 and 20 have 999, 1099, and 926 respectively, an average of 1,008 pages, 3,024 pages in all, the truth of the statement just referred to is manifest. The total paging of the Privy Council Reports is 7,984, less than 6 volumes of 1,500 each."

Six volumes containing an average of 820 pages each certainly did not evidence a genuine effort to produce a set of uniform volumes containing about 1,500 pages each. Volume 16 contains 837 pages; vol. 17, 596 pages, and two volumes together making 1,333 pages, or less than the proposed 1,500 of a single volume. It is difficult to conceive of any honest explanation for not including these two books, which contain Moore's (N.S.) Privy Council Reports, Vols. 3-6 and 7-9 respectively, in one volume. In the absence of the publisher I withhold further comment.

Had the complete set as actually published been all tendered for delivery at once, the defendant, in my opinion, would have been entitled to reject it as not corresponding to the particular description under which it was sold. But the books had, as was contemplated by the parties, been resold by the defendant to its subscribers before, or immediately upon, the contract being made with the plaintiff. The volumes were delivered not in a complete set, but as each came from the press. The first six volumes contained, respectively, 1606, 1335, 1491, 1403, 1439, and 1619 pages—or an average of 1482 pages apiece. There was no substantial ground for complaint up to this point. The six volumes averaged "approximately" or "about" the 1500 pages each mentioned in the prospectus. By the delivery of these six volumes to the subscribers the defendant was fully committed to the enterprise and its opportunity for rescission was gone forever. It retained, however, its right to recover damages for non-fulfillment of the contract in the subsequent deliveries. That right it preserved, so far as may have been necessary, by fre-

quent letters of protest. It is perhaps worthy of note in passing that one of those letters elicited from the plaintiff, on November 13, 1902, the statement:—

"I think Green (the Scotch publisher) said that he had found that volumes of the average of 1200 pages would bring the whole series of the reprint into 150 volumes."

It is argued, however, by the plaintiff that the words "more or less," appended to the words "one hundred and fifty volumes" in the contract, must be read in the broadest sense and provide a margin wide enough to cover the extra 37-45 volumes which it now seems reasonable to anticipate will be required to complete the set. Indeed, as Riddell, J., observes, the attitude of the plaintiff throughout, as indicated in the correspondence and the pleadings, has been that "the number of volumes is not stated absolutely but qualifiedly." It has not treated the "one hundred and fifty volumes more or less" as the mere estimate for which it now seeks to have it taken, but rather as importing merely the right to exceed 150 volumes by such margin as the words "more or less" might afford.

Regard being had to all the circumstances, and more especially to the terms of the prospectus, I find in the addition of the words "more or less" an indication not that a mere estimate was imported by the statement in the contract of the projected number of volumes, but rather that the plaintiff always recognised in the words "one hundred and fifty volumes" an essential part of the description of the subject-matter of the sale and accordingly qualified what would otherwise have been an absolute undertaking that the number of volumes should not exceed 150. The facts in evidence shew that the governing words of the description are those specifying the number of volumes. Benjamin on Sales (6 ed.) 803, 813.

I am, with great respect, unable to accept the view that the defendant's counterclaim should be rejected as premature There may not have been a breach of the plaintiff's contract when it delivered the first volumes containing substantially less than "about 1500 pages". For some time it was possible that the deficiency might be remedied by making subsequent volumes larger. That possibility, however, is long since past, and the breach was complete when it ceased to exist. There is no reason why, applying the principle of *Mondel* v. *Steel* (8 M. & W. 858, 151 E.R. 1288) the damages for such breach already sustained should not be applied so far as the value of the "set" is thereby diminished, *pro tanto* in diminution or extinction of the contract price, so far an unpaid . . . no reason why the defend-

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ant should be compelled to pay for the volumes already delivered in excess of "150 volumes more or less," and for those yet to be delivered, and be obliged to take the chance of subsequent recoupment on its counterclaim. *Government of Newfoundland* v. *Newfoundland Railway* (1888), 13 App. Cas. 199, 57 L.J. (P.C.) 35.

The defendant has asserted that counterclaim for the whole of the damages it has sustained and will sustain by reason of the plaintiff's breach of contract. It can probably now be ascertained with at least approximate exactness how many additional volumes will be required to complete the "set." In arriving at this figure care must of course be taken that it is not put higher than will be entirely fair to the plaintiff. I agree with Riddell, J.'s, view, 55 D.L.R. at p. 452, however, that the damages should now be assessed once for all and that the proper course to adopt for this purpose is the reference which he suggests. A new trial seems to me to be unnecessary under the Ontario practice. (Ont. Judicature Act, R.S.O. (1914) ch. 56, secs. 64, 65).

What number of volumes in excess of 150 the plaintiff may claim it was within the contemplation of the parties might be comprised in the "set" without breach of contract, by virtue of the margin provided for by the words "more or less," must still be determined. No doubt these words sometimes have the effect of rendering the statement of quantity in the contract nothing more than an estimate, as was held in *McLay* v. *Perry* (1881), 44 L.T., 152; but see *McConnel* v. *Murphy* (1873), L.R. 5 P.C., 203, 21 W.R. 609. Here, having regard to the circumstance under which, and especially to the terms of the prospectus "with reference to which, the contract was entered into," consideration of which is vital to its construction (*Morris* v. *Levison* (1876), 1 C.P.D. 155, 45 L.J. (C.P.) 409, 24 W.R. 517) it is possible to give them any such effect. The materiality of the number of volumes is too apparent. The number of volumes requisite to furnish a complete reprint, (the size of the pages, number of lines to each page, and type being specified) was susceptible of precise mathematical determination; and the prospectus stated that it had been so determined. The case then was not one for an estimate at all. The only element of uncertainty was due to the desirability that the whole of each of the original volumes, should be found in a single volume of the reprint—that an original volume should not be split, or divided, so that part of it would appear in one volume and the rest in the succeeding volume of the reprint. This might necessitate

some of the volumes of the latter falling slightly short of, and others slightly exceeding the average of 1500 pages projected. Hence the statement in the prospectus that the volumes would each contain "*approximately*" or "*about*" 1500 pages and the contractual provision that the set would number "150 volumes *more or less.*" The words "more or less"—equivalent to "about"—are introduced in such a case, "for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight." *Brawley* v. *United States* (1877), 96 U.S.R. 168; *British Whig Publishing Co.* v. *Eddy* (1921), 59 D.L.R. 77, 62 Can. S.C.R. 576. "More or less" are words of general import and the excess or deficiency, as the case may be, which they cover bears a very small proportion to the amount named. *Cross* v. *Elgin* (1831), 2 B. & Ad. 106, 109 E.R. 1083. They provide "a margin for a moderate excess or diminution of the quantity." *Reuter* v. *Sala* (1879), 4 C.P.D. 239, 48 L.J. (C.P.) 492, 27 W.R. 631.

In *Morris* v. *Levison*, 3% either way was under the circumstances, held to be a fair allowance under the word "about." In "*The Resolven*" (1892), 9 Times L.R. 75, 5% margin was allowed under the word "thereabouts." No doubt any margin fixed must be "more or less" arbitrary. Having regard to the terms of the prospectus, however, as affording some indication of what the parties must have had in mind to provide for, and to the precision with which the number of volumes requisite to complete the set could have been, and was in fact, stated to have been ascertained. I think an allowance affording "a reasonable latitude" must be confined to such excess as suitable arrangement of the matter in volumes and trifling error in calculation, practically unavoidable, might entail.

I would allow the appeal with costs here and in the Appellate Division. There should be a reference to the Master to ascertain any balance of purchase money due the plaintiff and the amount of the defendants' damages and the balance due either party, after making set-off.

Other costs and further directions should be referred to the Supreme Court of Ontario.

BRODEUR, J.:—I concur with my brother Sir Walter Cassels.

MIGNAULT, J.:—I concur with my brother Anglin, J.

CASSELS, J.:—I have given the best consideration that I am capable of to the appeal argued before this Court, March 9, 1922. With all due respect to the opinion of a majority of the Judges who heard the case at the trial and on the appeal, I am

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unable to arrive at the conclusions they have come to. With some exceptions of a minor character, which I will subsequently deal with, I am of opinion that the view pronounced by Riddell, J., is the correct one, that there was a warranty on the part of the Boston Book Co., and that the Canada Law Book Co., Ltd., were entitled to have damages for a breach of such warranty.

The facts are so fully dealt with in the various judgments under review that it is unnecessary for me to repeat them.

I agree with the view arrived at by Riddell, J., that the contract between the Boston Book Co. and the Canada Law Book Co. is a contract of sale and purchase.

In the plaintiff's statement of claim, after referring to the two contracts of June 5, 1900, and November 19, 1900, the plaintiff states as follows:—

"At the time the said agreements were entered into the defendant had in its possession a prospectus issued by William Green & Sons stating in general terms their plans for the issue of the English Reports Reprint and the contract between the plaintiff and the defendant was entered into with reference to this prospectus which was made a part of the said contract and to which the plaintiff craves leave to refer at the trial of this action."

There is no privity between the Canada Law Book Co. Ltd. and William Green & Sons.

In his reasons for judgment, Middleton, J., 44 O.L.R. at p. 531, is reported as stating as follows:—

"In other words, the estimate of 123 vols. for the work so far as it has gone has been exceeded to the extent of 37 vols., the publication having actually yielded 160 vols., and if the same proportion holds good for the 27 remaining estimated vols. the actual result will be 192 or 193 vols., an excess of result over estimate of about one-third."

It is stated in the same judgment at p. 531:—"As contemplated by the parties, the defendants have sold to individual customers."

It was known to the Boston Book Co. that the object of the purchase by the Canada Law Book Co. Ltd. was to resell them to their customers.

Mr. Justice Middleton states, 44 O.L.R. 529, at pp. 531-3:—

"Unfortunately I have before me only the parties to this action, and cannot deal in any way with those really at fault—the publishers. Mr. Tilley presented various theories which might account for some discrepancy between the number estimated and the number produced, but slight investigation has

made it plain that this will not account for more than a small fraction of the excess; and so far, I am convinced that there has been on the part of the publishers a deliberate design to increase the number of vols. over the estimate."

He states further:—

"I can only regret that the parties did not join in an attack upon the publishers, against whom, unless more appears than was developed, in the evidence, in this case, a remedy ought to be found."

It seems to me that if the trial Judge's views are correct, and that the Boston Book Co. would have a remedy over against the Edinburgh publishers, it would follow that the contract between the Boston Book Co. and the Canada Law Book Co. Ltd. based upon the same representations as were made by the Edinburgh company to the Boston Book Co. would entitle the Canada Law Book Co., Ltd., to a remedy against the Boston Book Co. for breach of their representation which practically amounts to a warranty. The Boston Book Co. would have their remedy against the Edinburgh company.

In addition to the authorities referred to by Riddell, J., I would quote from the case of *Lloyd, Ltd.*, v. *Sturgeon Falls Pulp Co., Ltd.* (1901), 85 L.T. 162. It is a case decided by two Judges of eminence, and was very fully argued by very eminent counsel on both sides. The case arose out of a contract of sale, the facts of which are set out in the letters marked S.T. and U at the foot of p. 164 of the report. There had been a reference under the English statute to arbitration,—the arbitrator named being the present Sir Charles Fitzpatrick. A reference was directed by the arbitrator for the decision of the English Court upon a question among others of very great importance. On p. 163 of the report in the Law Times, it is stated that the claimant sought to give evidence that the contract between the parties was not confined to the documents above referred to, S.T. and U.; but, that amongst the terms of the contract which they claimed was partly in writing and partly verbal, upon which they purchased the properties in question, or in the alternative amongst the matters verbally warranted to them by the defendants in consideration of which they agreed to and did enter into the contract of purchase were the following; the important one is contained on p. 163 (b):—

"That there was an inexhaustible supply of pulp wood upon the area comprised in the Government concession and more than the claimants operating upon the scale contemplated by the

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parties or any other possible extension of such scale could exhaust within twenty-one years."

Bruce, J., states at p. 165:—"A warranty in a sale is not one of the essential elements of a contra for the sale is none the less complete in the absence of a warranty. But it is a collateral undertaking forming part of the contract by the agreement." etc.

On p. 166 on the top of the second column, the Judge states—"We must decide that the verbal warranty alleged in par. 8 (b) must be regarded as a term so far collateral to the contract set out in the letters S.T.U. that oral evidence is admissible to establish the warranty."

There is no suggestion that the respondents, the Canada Law Book Co., Ltd., are not sufficiently responsible for the amount awarded by the judgment of the trial Judge, and in my view the proper order that should be made is to allow the appeal with costs in this Court, and in the Appellate Court, with a direction that if the parties fail to agree there should be a retrial enabling the present appellants to set up their claim for damages, and if they succeed then to the amount to which they may be held entitled, there should be a set-off as against the amount awarded by the judgment. See *Government of Newfoundland* v. *Newfoundland Railway Co.*, 13 App. Cas. 199. The costs of the former trial and of the second trial to be in the disposition of the trial Judge.

Appeal allowed and judgment of trial Judge, 44 O.L.R. 529, and Appellate Division, 55 D.L.R. 435, 48 O.L.R. 238, set aside with costs of both appeals to the appellant.

Declare that the phrase "150 volumes more or less" was intended to express a number which should be greater or less than 150 only by an excess or deficiency fairly capable of explanation as the result of reasonable errors of calculation by Green & Co. concerning the number of volumes of about 1,500 pages each required for the publication of the series, regard being had to the facts that the matter to be reprinted was precisely known and that Green & Co. as publishers were experts in such calculations.

Declare further that the appellants are entitled to damages as for breach of warranty that each set should consist of "150 volumes more or less" in this sense.

Reference to the Master to ascertain the amount due the plaintiff—the amount of the defendant's damages—and making the necessary set-off, to adjust the balance due to either party.

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Further directions and other costs reserved to the Supreme Court of Ontario.

Appeal allowed.

REX v. SILLERS.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 2, 1922.

GAMING (§I—1A)—KEEPING COMMON GAMING HOUSE—SEARCH ORDER—SIGNAL TO HOTEL ROOM ON OFFICER'S DEMAND OF ENTRY—INSTRUMENTS OF GAMING—PRESUMPTIONS—CR. CODE SECS. 226, 228, 641, 987.

On a search pursuant to an order made for search and seizure on suspicion of keeping a common gaming house, the finding of six persons playing a card game called "Rummy" with money staked thereon, in a hotel basement room reached by the officers only after the hotel clerk had unlocked the basement door after first signalling by an electric push button to the basement room to which the officers had demanded admission, raises a *prima facie* case which will support a conviction of the keeper of the room for keeping a common gaming house, if he offers no satisfactory testimony in rebuttal. It was not enough that, without testifying on his own behalf, he called as a witness one of the players to show that in the game in which he participated the chances between the players were equal.

[Cr. Code, secs. 226, 228, 641, 985, considered; and see Annotation at end of this case.]

APPEAL by the defendant from the order of Ives, J. quashing a conviction whereby the defendant was convicted on January 3, 1922, under sec. 228 of the Criminal Code, "For that he the said John Sillers on the 23rd., day of December A.D. 1921 at Medicine Hat, in the said Province did keep and maintain a disorderly house, to wit, a common gaming house by keeping and maintaining for gain a certain room, the basement of the Royal Hotel, South Railway Street, Medicine Hat."

C. H. S. Blanchard, for accused.

N. A. McLarty, for the Crown.

SCOTT, C.J.:—The evidence for the prosecution is to the effect that on December 23, 1921, Chief Constable Rae of the City Police, reported in writing to the Police Magistrate of the city that there were good grounds for believing and that he did believe that certain rooms, to wit, the premises of the Royal Hotel on South Railway St. were kept as a common gaming house, that on the same day the Police Magistrate by writing authorised him to enter and search these premises, that on the same day he, accompanied by two other city constables entered the premises in question about 11.30 p.m. and there saw the night clerk, and demanded admission to the basement, that the clerk

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then went behind the counter, pressed a button, the effect of which was to ring a bell in the basement and took a key and unlocked the door leading to the basement, that the constables entered a room there in which was a round table around which 6 persons were sitting and playing a game of cards, that the defendant who was one of those playing was sitting at the head of the table where a part of it had been cut out and that the constables found in the drawer of the table 22 packs of playing cards and one which was being used in the game. It was admitted by counsel for the defendant that the latter was in charge.

For the defence, one Hunter stated that he was in the room when the constables appeared and had been there only a few minutes but he had been there earlier in the evening, his two visits comprising only about 15 minutes, that he was not playing cards there and that he saw a game of cards being played there but that he did not know what it was.

One Foster stated that he was one of those playing at the table when the constables arrived, that they were playing a game called "rummy" which the evidence shews was not a gambling game, that he had been there about 20 or 25 minutes before the constables arrived, that the defendant was sitting in the dealer's seat and was playing but that he had no more interest or profit from the game than any of the others and that there were no more chances for him than any other player.

Section 985 of the Criminal Code provided that, when any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game [note (a)] are found in any house, room or place suspected to be used as a common gaming house and entered under a warrant or order issued under the Act, it shall be *prima facie* evidence on the trial of a prosecution under sec. 228 that such house, room or place is used as a common gaming house.

In my view the defendant has failed to rebut the *prima facie* case established by the prosecution. At most the defendant has only shewn that for a period of about 20 or 25 minutes before the constables entered the room at 11.30 p.m. it was not used as a common gaming house within the meaning of sec. 226. For anything that appears to the contrary it may have been so used and carried on up to 11 o'clock p.m. on that day. I entertain some doubt whether the presumption that the premises was a

(a) For the words "any unlawful game" there was substituted by the Code Amendment of 1917, ch. 16, sec. 4, the words "any game of chance or any mixed game of chance and skill."

common gaming house would have been sufficiently rebutted by shewing that they were not so used at any time on that day. The defendant is charged that he was on a certain day the keeper of such a house. It is not merely a charge that it was so kept or used only on that day.

What occurred when the constables entered the premises would reasonably lead to the suspicion that the room was being used for an improper purpose. The ringing by the night clerk of the bell in the basement points to the conclusion that it was intended to give warning to the occupants of the room. The chief constable states that the delay occasioned by the ringing of the bell and unlocking the door was sufficient to allow them to conceal what they were doing.

The defendant having failed to establish that the room in his charge was not a common gaming house, the conviction must be sustained. If it were quashed it would be practically impossible to convict its keeper although it may have been and it may continue to be kept as such.

I would, therefore, allow the appeal with costs, and give the appellant the costs of the application in the Court below.

STUART, J.A.:—I have had doubt, particularly upon two points, in this case. First I notice that the evidence did not disclose the exact nature of the cards which were discovered. There are many kinds of cards. And with respect to some of these kinds the Court might need to be informed by evidence as to whether they were commonly used in playing a game in which the element of chance entered. Where a statute creates a *prima facie* case of guilt in certain circumstances I think the prosecution ought to be careful to prove the existence of the exact circumstances required without leaving too much to the Court to which to apply its general knowledge; But I have concluded that the expression "packs of cards" was treated at the hearing as an expression having a well known meaning and I think the Magistrate was entitled to assume that common playing cards were being referred to and to use his general and the common knowledge that those are used in playing games wherein the element of chance enters.

Then I had some doubt as to the extent of the meaning of the admission that the defendant was "in charge." Section 228 (2) speaks of the person who appears, acts or behaves as master or mistress or as the person having the care, government or management of any disorderly house &c." Whether the admission meant that the accused had the care, government or management of the room in question as distinct from his being

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merely in charge or general direction of what was going on that evening in the room, that is the mere game itself, which, I think, is a real distinction, I had upon argument some curiosity. However, I mentioned the matter to counsel for the defendant and I gathered that he intended the admission to be taken in the wider sense.

Having resolved these doubts I concur in the views expressed by Scott, C.J. I do not think Foster's evidence, even if all taken to be true, was sufficient to rebut the statutory presumption. Foster was not the accused. I do not think that anything he said was enough to rebut the presumption of the statute that the place was being used on that day or even on that evening as a common gaming house. His evidence as to what went on there during the comparatively short period during which he, a mere visitor, was there, cannot, in my opinion, take the place of evidence, which should have been given by the person admitted to have had the care, management or government of the place, as to what the place had been used for on that evening.

BECK, J.A (dissenting):—The defendant was convicted on January 3, 1922 for that he did "on the 23rd., December 1921 at Medicine Hat keep and maintain a disorderly house, to wit, a common gaming house by keeping and maintaining for gain a certain room situated and being the basement at the Royal Hotel, South Railway Street, Medicine Hat."

On proceedings by way of *certiorari*, Ives J. quashed the conviction and the matter is before us by way of appeal.

When the matter was before the Magistrate it was agreed that if any one connected with the hotel should on the evidence turn out to be liable to conviction for the offence charged, no question of the proper person would be raised and that the defendant might be convicted.

The charge was evidently laid under sec. 228 of the Criminal Code, which reads:

"Everyone is guilty of an indictable offence. . . . who keeps any disorderly house, that is to say any. . . . . common gaming house . . . . . as hereinbefore defined." Section 226 defines a common gaming house: The section contains two clauses (a) and (b).

A common gaming house is: "(a) a house, room or place *kept by any person for gain*, to which persons resort for the purpose of playing at any game of chance or at any mixed game of chance and skill."

The essentials under this clause are, therefore, that it be

proved (1) that the keeper keeps *for gain*, (2) that the game is one of chance or of chance and skill.

Then follows the alternative clause: "(b) a house, room or place kept or used for playing therein any game of chance or any mixed game of chance and skill in which—(i) A bank is kept by one or more of the players exclusively of the others; or (*ia*) the whole or any portion of the stakes or bets or other proceeds at or from such games is either directly or indirectly paid to the person keeping such house, room or place or (ii) any game is played the chances of which are not alike favourable to all the players, including among the players the *banker* or other person by whom the game is managed, or against whom the game is managed or against whom the other players stake, pay or bet."

Subclause (*ia*) is clearly only an elucidation of the words "for gain" in clause (a). The rest of clause (b) relates solely to the case of a game in which there is a banker or in which the chances are not alike favorable to all the players.

There is no question under (bi) and (bii) of grain in the capacity of *keeper* but only in the capacity of *player*.

The prosecution was rested upon the presumption created by sec. 985.

It was also rested upon the presumption created by sec. 986. So far as there is any difference between the two, I think it is sufficient to say, with reference to sec. 986, that it seems to me that the evidence does not shew that there was any act by the accused, or even by the clerk of the hotel, which caused any appreciable delay to the police in entering the room in question.

Section 985 reads as follows:— "when any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming house and entered under a warrant or order issued under this Act or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under sec. 228 or sec. 229 that such house, room or place is used as a common gaming house and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order or in the presence of the persons by whom he is accompanied."

On a report of the chief constable of Medicine Hat, dated December 23, to the Police Magistrate a search warrant was

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issued on the same day under sec. 641 to the chief constable Taylor.

Before considering the evidence I wish to consider the force of the section raising a *prima facie* case for the prosecution. I have no doubt that a search warrant under sec. 641 ought to be executed, as was said by Drake, J., (*Reg.* v. *Ah Sing* (1892), 2 B.C.R. 167) within a reasonable time," yet, I suppose, that, according to varying circumstances, a week, a month or even more, might be a reasonable time. Then, if that is so, to what moment or space of time does the *prima facie* evidence, arising from finding instruments of gaming, attach? Is it from the date of the constable's report, the date of the information, the date of the issue of the search warrant—all of which may be different and at least a considerable time previous to the actual search, or is it from the first moment of the day of the search or from the time of the actual search?

The fact of finding being constituted *prima facie* evidence, there is cast upon the defendant, the onus of proving that he is not guilty of the charge. Must he, in order to avoid conviction, prove that the house was not used as a common gaming house at any time since the constable's report, the date of the information for the search warrant, the date of the search warrant, the first moment of the day of the actual search or, on the other hand, does he not meet the statutory presumption by proving that at the time of the actual search the house &c. was not used as a common gaming house?

The words are "is used." No doubt these words give the idea of continuity. Doubtless they were intended to give the idea of continuity inasmuch as proof merely of an isolated instance would be insufficient to prove "use"(*Reg.* v. *Davis* [1897] 2 Q.B. 199, 66 L.J. (Q.B.) 513; Archbold's Crim. Pleading, ed. 25, p. 1270; *Jayes* v. *Harris* (1908), 72 J.P. 364; *R.* v. *Nat Bell Liquor Ltd.* *(1921), 56 D.L.R. 523, 35 Can. Cr. Cas. 44. 16 Alta. L.R. 149, at p. 557, per Stuart, J.). But the presumption, artificially raised by the statutory provision, leaves the evidence quite indefinite as to the length of time during which the use has continued or in other words is no evidence whatever of any particular acts of use. Undoubtedly, if nothing appears but the finding under search warrant of instruments of gaming, the case for the prosecution is sufficiently proved; but when we get, either from the evidence for the prosecution or from evidence of the defence, which the tribunal applying the evidence accepts, or from both sources, oral evidence as to the

*Reversed by the Privy Council, 65 D.L.R. 1.

facts, embracing a reiteration of the facts on which the statutory presumption is raised and also a development and explanation of those facts then, in my opinion, the necessity for the statutory presumption having gone, the presumption itself is spent, and the case must be decided upon the whole evidence without regard to the statutory presumption. The situation then becomes parallel to the case where the maxim *res ipsa loquitur* or the statutory presumption raised by the Motor Vehicles Act 1911-12, (Alta.) ch.6, applies. This Court in *Carnat* v. *Matthews* (1921), 59 D.L.R. 505, 16 Alta. L.R. 275, said at p. 507:—"When once the defendant has made out a *prima facie* case of absence of negligence, by evidence, which of course the Court or jury accepts as reliable, the rule *res ipsa loquitur* or, in this case, the rule of the statute, has no further application."

It seems to me then that once the oral evidence is entered upon and a particular instance of use is established directly or by natural inference, then the accused has thrown upon him the onus of disproving only that particular instance and cannot be called upon to prove the negative of an indefinite number of wholly unparticularised instances.

Then to come to the evidence, Chief Constable Taylor having proceeded to the hotel accompanied by sergeant McQueen and Constable Gilbert, they arrived there about 11.30 p.m. They went into the hallway on the ground floor. Taylor said as follows: Meeting the night clerk, told him he had a warrant and demanded of him that he should be let go into the basement. The clerk went to the counter, pressed a button which was found to operate a bell in the basement, took the keys for the basement door off the cash register and opened the basement door. The constables went down. They found 9 men, 6 sitting round a table, the others standing around. The accused was sitting at the head of a round table, over which there was an electric light and in which there was a part of the top cut out. There was another small square table in the corner of the room and some chairs. Two boxes containing 23 packs of playing cards were found in the room. "There was a pack of cards being used, but I do not know what they were playing." "The playing cards are the same as would be used for playing rummy." "I was delayed somewhat in getting into the basement by the ringing of the bell, perhaps the fraction of a second—but sufficient time to allow them to conceal what they were doing in the basement."

McQueen said, "I do not know what game they were playing. If they were playing rummy at 25ct. per game, it would not

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be very extravagant. I saw no poker chips. I never understood rummy to be a gambling game."

This was the whole of the evidence for the prosecution. For the defence, a witness, Foster, was examined. He said to epitomize his evidence:—Am a rancher, living in Medicine Hat; have lived in the district for 25 years; have a family; was in the Royal Hotel basement on night of December 23, was one of the players. We were playing rummy for 25cts. a game, know the accused, he was playing, but had no more interest or profit from the game than any of us; there were no more chances for him than any other player. On cross-examination he said: We were not playing anything that night only rummy. We were just starting *to deal the cards*—he does not say starting *to play cards*—when the bell rang; there was no banker in the game; we were playing 6 card rummy; I had been down about 20 minutes; takes about 5 minutes to play a game; I am not exactly sure what time I went down. I would be there 15 or 20 minutes or perhaps 25 minutes when the chief came down. I did not know there was anything wrong. I am no gambler.

The Police Magistrate gave written reasons for convicting the accused. He held that the accused had failed to discharge "the onus put upon him by sec. 985 of the Code." He says of Foster's evidence:—

"The witness Foster did not impress me very favorably. He said he did not know what time he went down to the basement and at first said he had only been down about 20 minutes and a little later said he would be there 15 to 20 or 25 minutes when the chief came down."

A difference of 5 minutes on either side of 20 minutes, under circumstances when there was no reason to attend to the exact time, a reason for disbelieving the testimony of, or imputing deliberate perjury to, a man who, from the rest of his evidence and the absence of suggestion to the contrary, one would judge, was a man long and well known in the community of good repute and with a "stake" in the country!

The Magistrate appears to find some inconsistency in his evidence as follows:—

"He also said they were playing rummy for 25cts. a game." A little later he said, "we were not playing anything but rummy that night." Then a little later he said, "we were just starting to deal the cards when the bell rang."

The explanation is obvious. They had been playing rummy. They were just in the act of dealing a new hand.

I refuse to accept such preposterous grounds as these for dis-

believing the witness. I have the authority of the Appellate Division of this Court for doing so. *R.* v. *Covert* (1916), 34 D. L.R. 662, 28 Can. Cr. Cas. 25, 10 Alta. L.R. 349 and the Ontario Cases of *R.* v. *McKay* (1919), 32 Can. Cr. Cas. 9 at p. 13, 46 O.L.R. 125; *R.* v. *Lemaire* (1920), 57 D.L.R. 631, 34 Can. Cr. Cas. 254, 48 O.L.R. 475, *R.* v. *Fields* (1921), 58 D.L.R. 507, 49 O.L.R. 266, are to the same effect.

Accepting as I do, the evidence of Foster, we have in conjunction with the evidence for the prosecution, the whole story of the card playing of the persons found to be present when the police arrived, either expressly or by inference, and the case had become so developed that, in my opinion, the effect of the statutory presumption was spent and the case became one to be dealt with upon a consideration of the oral evidence only.

For these reasons I would affirm the order of Ives, J. quashing the conviction and dismiss the appeal with costs.

HYNDMAN, J.A. (dissenting):—The material facts are set forth in the judgment of Beck, J.A., and there is no necessity for my repeating them.

I have some doubt as to the sufficiency of the evidence establishing *prima facie* that the place in question was a gaming house there having been found therein only a table, light and certain packs of cards. A common gaming house is rather likely to possess more than just those instruments. It is admitted that a search of the premises failed to reveal anything more than cards where one would expect to find poker chips, dice, etc. But granting a *prima facie* case was made out, there is the evidence of the witnesses for the defence that what they were doing was not in any way unlawful. The magistrate refused to believe them but a perusal of the testimony leads me to the conclusion that their evidence was not unreasonable and at the very least sets up a reasonable doubt which cannot properly be overlooked in a criminal charge.

In the decision of *Rex* v. *McKay* (1919), 32 Can. Cr. Cas. 9, 46 O.L.R. 125, being a prosecution under the Ont. Temperance Act 1916, ch. 50, based upon a presumptive case, Meredith, C.J.C.P. at p. 10 said. "The one question raised in this case is whether there is evidence to support the conviction complained of: a question which may be more definitely put thus: Was there any evidence upon which reasonable men could find that there was reasonable doubt of the applicant's guilt?" And again at p. 13, "Magistrates should bear in mind that guilt must be proved just as much under this enactment as under any other; and that, although the legislation in question aids the

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accuser much in some respects in his proof it has not taken away from the accused and given to the accuser that which is commonly called 'the benefit of the doubt,' and that no Court, nor judicial officer, has any power to do."

The whole of the evidence in the case must be considered and not only a portion of it. That being so even if the Magistrate could not feel satisfied of the explanations in the defence, nevertheless where, as here, a reasonable account of the proceedings is given, there must in my opinion spring up a doubt of the defendant's guilt, which he must be given the benefit of. That right cannot be taken away. As I see the case I feel satisfied that reasonable men must find that there was reasonable doubt of the applicant's guilt: Of course it is argued that the accused did not himself offer any evidence or explanation. That would have been more desirable. But the two men who were called I think would know of what was going on quite as well as the accused and his evidence might have been a mere repetition of theirs. Under the Code he is not bound to go into the box and no comment can be made to a jury of such fact. It is not for us to use that as a ground against him, but to take the evidence as we find it. I would therefore dismiss the appeal.

CLARKE, J.A. concurred with Scott, C.J.

Order of Ives, J., reversed, and conviction restored.

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COMMON GAMING HOUSES AT COMMON LAW AND UNDER THE CRIMINAL CODE

By the common law the playing at cards, dice etc. when practised innocently and as a recreation 'the better to fit a person for business' was not unlawful. 4 Bac. Abr. 450; 1860, American edition, 2 Vent. 175; 5 Mod. Rep. 13; Salk 100. But all common gaming houses were nuisances at common law, "not only because they are great temptations to idleness but also because they are apt to draw together great numbers of disorderly persons which cannot but be very inconvenient to the neighborhood." Bac. Abridg. 451; Hawk. P.C. ch. 75 sec. 6, 7th ed. Gambling in some of its manifestations has always been an offence at common law. Article (1919), 83 J.P. 297, 298. In *R.* v. *Rogier* (1823), 1 B. & C. 272, 107 E.R. 102, it was held that "any practice which has a tendency to injure the public morals is a common law offence. In England, Parliament has from time to time given expression to the current view of public policy by making certain games and certain

forms of gaming lawful and unlawful. 83 J.P. 298. The result was stated in *Jenks* v. *Turpin* (1884), 53 L.J. (M.C.) 161, 15 Cox C.C. 486, 13 Q.B.D. 505, to be that the following are unlawful games—ace of hearts, pharaoh, basset, hazard, passage, roulet, every game of dice except backgammon, and every game of cards which cannot be classed as a game of skill. The degree of skill necessary to take a game out of the category of unlawful games has been the subject of decisions difficult to reconcile, 83 J.P. 298. In *Pessers* v. *Catt* (1913), 77 J.P. 429, the Court of Appeal thought that something more than a scintilla of skill would make a game cease to be one of chance; while in *Peers* v. *Caldwell*, [1916] 1 K.B. 371, 85 L.J. (K.B.) 754, 80 J.P. 181 the High Court thought that some degree of skill was not enough. 83 J.P. 298. The latter case was prosecuted under the Betting Act 1853 (Imp.) ch. 119, in respect of an automatic machine and it was held that the fact of the game not amounting to what, in ordinary parlance would be called a betting transaction did not prevent the use of the premises for the purposes of the game from being an offence within sec. 1 of the Betting Act. That section made it an offence, *inter alia*, for any person to use a shop for the purpose of any money being received by such person for any promise, etc., to give thereafter any money or valuable thing on any event or contingency of or relating to any game, etc. Reference was made with approval to the case of *Fielding* v. *Turner*, [1903] 1 K.B. 867, 72 L.J. (K.B.) 542, 51 W.R. 543, 67 J.P. 252, decided under the Gaming Act, 1845, ch. 109. That case also dealt with an automatic machine in which the keeper or owner of the machine backed his chance against the person who used it. In *Peers* v. *Caldwell supra*, the transaction was held to be in the nature of a wager, and it was said that the fact of there being a possibility of exhibiting some degree of skill in playing with the machine did not affect the question of the liability of the proprietor under the Betting Act 1853. Lush, J. dissenting as to the application of the Betting Act, intimated that if the prosecution had been taken under the Gaming Act there would have been materials on which the Magistrate could have convicted, because he was not bound to hold as matter of law that the operation of the automatic machine was a game of skill, and if he had come to the conclusion that it was a *game of chance*, a conviction under the Gaming Act would have been a proper conviction. *Peers* v. *Caldwell*, [1916] 1 K.B. 371 at 380.

In *Morris* v. *Godfrey* (1912), 76 J.P. 297, 23 Cox C.C. 40 it

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was held that whist is a mixed game of chance and skill so that the playing of it for money in a public place was not necessarily unlawful in England, but that progressive whist as commonly played in public assemblies and places of entertainment by persons who contribute the prizemoney in the shape of entrance-fees is so devoid of the element of skill as to become a pure game of chance.

The older English statutes for the restraining of gaming were: 12 Rich. 2, ch. 6, 1624, 2 Jac. 1 ch. 28; 33 Hen. 8, ch. 9; 2 & 3 Ph. & M. ch. 9; 16 Car. 2, ch. 7; 9 Anne ch. 14; 12 Geo. 2, ch. 28; 13 Geo. 2, ch. 19; 18 Geo. 2 ch. 34; 30 Geo. 2, ch. 24; 3 Geo. 4, ch. 114.

The statute 33 Hen. 8, ch. 9, imposed a penalty subject to licensed exceptions, for the maintenance by any person of a house for unlawful games kept by such person for his "gain, lucre or living." It did not in itself define what were unlawful games although it repealed former statutes dealing with such games. These prior statutes as well as future enactments declaring a game unlawful were to be looked at in ascertaining whether or not a game was unlawful. The Act of 33 Hen. 8, ch. 9 was only partially repealed by the Gaming Act of 1845, (Imp.) ch. 109. The latter statute provided that so much of the Act of Hen. 8 whereby "any game of mere skill, such as bowling, tennis or the like, ... is declared an unlawful game, or which enacts any penalty for playing at any such game of skill as aforesaid" should be repealed.

Sir James Fitzjames Stephen in his Digest of English Criminal Law (note to article 183) said:

"There is a good deal of difficulty in bringing into a clear and systematic form the provisions of the various statutes relating to the suppression of disorderly houses, and especially gaming-houses . . .

"The matter stands thus. The earliest Act upon the subject now in force is 33 Hen. 8, c. 9, 'An Act for Maintenance of *Archery* and Debarring of Unlawful Games.' This Act was intended to compel people to practise *archery* by making all other amusements unlawful, and it accordingly forbids by name bowls, quoits, tennis, and various other games, cards and dice, and all other unlawful games prohibited by any of the statutes which it repealed, as well as all other unlawful games to be subsequently invented. The expression 'unlawful games' is nowhere defined, unless it means every amusement except archery.

"By the 10 Will, 3, c. 23, lotteries were forbidden. By the

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12 Geo. 2, c. 28, 'the games of ace of hearts, pharaoh, basset and hazard,' were declared to be lotteries, and, as well as what we now call raffles, were forbidden under penalties. By the 13 Geo. 2, c. 19, the same course was taken as to a game called passage, 'and all other games invented or to be invented with one or more die or dice,' backgammon only excepted. By 18 Geo. 2, c. 34, these enactments were extended to a certain pernicious game called roulet or roly poly,' and that game and 'any game at cards or dice, already prohibited by law,' were prohibited afresh.''

The 8 & 9 Vict. 1845 Imp. c. 109, repeals so much of the Act of Henry VIII. as relates to games of mere skill, and provides that upon any information or indictment for keeping a common gaming-house ''it shall be sufficient to prove'' the matter stated in sec. 8 of 8 & 9 Vict.

This enactment was passed in order to dispose of doubts that apart from its provisions it would have been necessary to prove that the parties played at one of the games specifically prohibited by the Acts of Geo. II. or at one of the games of chance prohibited by the Act of Henry VIII. Burbidge, Digest of Criminal Law, Can. 1890 p. 509.

The essence of gaming consists not in the character of the game, *i.e.* its lawfulness or unlawfulness, but in the fact that the game is played for money or moneys worth *staked by the players.* (1911), 75 J.P. 554. To compete for a prize provided by strangers is not to ''game''; there must be the possibility that the player may lose as well as gain. *Lockwood* v. *Cooper,* [1903] 2 K.B. 428, 72 L.J. (K.B.) 690, 52 W.R. 48 (under the Licensing Act 1872 Imp. ch. 94). To amount to ''gaming,'' the game played must involve the element of wagering. *Lockwood* v. *Cooper, suprà,* per Alverstone L.C.J. If however there was a colorable arrangement between the members of a club organising a ''whist drive'' that they should take it in turns to abstain from playing and to give the prizes so that in substance the players would really be contributing to the prizes that they played for, it would appear that such would constitute ''gaming.'' *Lockwood* v. *Cooper, supra...* Sec. 5 of the Gaming Act 1845 Imp. enacted that ''it shall not be necessary, in support of any information for . . . . keeping or using or being concerned in the management or conduct of a common gaming-house to prove that any person found playing at any game was playing for any money, wager or stake.''

Where ''any cards, dice, balls, counters, tables or other *instruments of gaming* used in playing any unlawful game'' were

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Under the English Gaming Houses Act of 1854 the keeper of a house, room or place for the purpose of unlawful gaming being carried on therein was subject to a fine. But an isolated instance of an unlawful game of cards being played among friends at the house of one of them did not render the owner of the house liable as a keeper "for the purpose of unlawful gaming." *Reg.* v. *Davies,* [1897] 2 Q.B. 199, 66 L.J. Q.B. 513. Participation in a game did not alone make the participant liable as "assisting in *conducting* the business" which under the Act of 1854 was the equivalent of "keeping." *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505. But to act as banker in playing the game of "pharaoh" (faro) is assisting in conducting the business of unlawful gaming. *Derby* v. *Bloomfield* (1904), 68 J.P. 391, 20 Cox C.C. 674. Where a statute declared it an offence to "open, keep or use" a house, room or place for the purpose of gaming being carried on there, one isolated instance of unpremeditated gaming is not sufficient to prove the offence. *Reg.* v. *Davies,* [1897] 2 Q.B. 199; nor is it a case where from proof of one act a regular or secret practice or "uses" may be inferred, (apart from any statutory presumption). 75 J.P. 554; *R.* v. *Mortimer,* [1911] 1 K.B. 70, 80 L.J. (K.B.) 76, 22 Cox C.C. 359. An editorial article in (1911), 75 J.P. 553 in

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referring to the English Gaming Houses Act of 1854 says: "An occasional whist drive is a comparatively 'innocuous amusement'—certainly not such as was contemplated by the powers of the Act of 1854—and the Court may well think that, in the absence of more or less regular 'using or keeping' there is no necessity for construing the statute too strictly."

To constitute an "instrument of gaming" there must be something more than the coins used in playing "pitch and toss." *Watson* v. *Martin* (1864), 10 Cox C.C. 56, 34 L.J. (M. C.) 50, 13 W.R. 144. So a person on the highway playing at 'pitch and toss' with halfpence was held not liable to be convicted under a clause of the Vagrancy Act 1824, (Imp.) ch. 83, subjecting to penalty every person playing or betting in any highway or other public place at or with any table or *instrument of gaming* at any game or any pretended game of chance. *Watson* v. *Martin, supra.*

It is an indictable offence for a person, with intent to defraud, to cheat in the playing of *any* game or in holding the stakes or in betting on any event. Cr. Code 1906, (Can.) sec. 442; Cr. Code 1892, (Can.) sec. 395. And winning by fraud at tossing with coins is an indictable offence. *Reg.* v. *O'Connor* (1881), 15 Cox C.C. 3, 46 J.P. 214.

"Poker" is not in itself an unlawful game. *Reg.* v. *Shaw* (1887), 4 Man. L.R. 404; *Rose* v. *Collison* (1910), 16 Can Cr. Cas. 359.

As to 'three card monte,' see *R.* v. *Rosen and Lavoie* (1920), 61 D.L.R. 500, 27 Rev. de. Jur. 32, and the later legislation, 1921 Can. ch. 25, sec. 71 adding a new section 442A to the Criminal Code, whereby the playing of three-card monte "or any similar game" in any public place is forbidden.

The English statutory law was the foundation of the various Canadian statutes dealing with common gaming houses. See 1875, (Can.) ch. 41; 1877 (Can.) ch. 33; R.S.C. 1886, ch. 158 secs. 4-9; Cr. Code 1892 (Can.) sec. 196, 198, 200, 575. Cr. Code Can. R.S.C. 1906, secs. 226, 228, 230, 641, 642. There are also special enactments dealing with gaming in particular places, *ex. gr.*, on railway trains; See Cr. Code, R.S.C. 1906, ch. 146, sec. 234, 442A (amendment of 1921). And it is made a vagrancy offence under Code sec. 238 for a person having no peaceable profession or calling to maintain himself by, to support himself for the most part by gaming.

Various extensions of the former law have been introduced from time to time into the Criminal Code. A prosecution for keeping a common gaming house is no longer limited to cases

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in which the place is kept or used for the purpose of unlawful gaming therein by any considerable number of persons, (see Stephen's Digest of Criminal Law, art. 181). If there is a *resorting* thereto for the purpose of playing "at any game of chance or at any mixed game of chance and skill," and the place is kept by any person *for gain*, it is a common gaming house under the Cr. Code 1906, sec. 226 as amended 1918, ch. 16, sec. 2. So also if the "place be kept *or used* for playing therein at any game of chance, or any mixed game of chance and skill in which (i) a bank is kept by one or more of the players exclusively of the others; or, (*ia*) the whole or any portion of the stakes or bets or other proceeds at or from such games is either directly or indirectly paid to the person keeping such house, room or place, or, (ii) any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet." Cr. Code sec. 226, as amended 1918, ch. 16, sec. 2.

Before the Code amendment of 1918, when any cards, dice, balls, counters, tables or other instruments of gaming used in playing any *unlawful game* were found in any house, room, or place suspected to be used as a common gaming house, and entered under a warrant or order issued under the Code, or about the person of any of these who are found therein, it was *prima facie* evidence, on the trial of a prosecution under section 228 or sec. 229, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied. R.S.C. 1906, ch. 146, sec. 985; 1900-1901 (Can.) ch. 46, sec. 3. But the amendment of that year substituted for the words "unlawful game," the words "game of chance or any mixed game of chance or skill." 1918 Can. ch. 16, sec. 4. The rebuttable presumption is directed to the *use* as a common gaming house and that the persons found were playing therein. It has, therefore, particular application to that part of the statutory definition contained in sub-sec. (b) of Code sec. 226 dealing with places kept or *used* for playing any game of chance and skill in which a bank is kept by a player exclusively of the others, or part of the stakes goes to the person keeping the place, or the game is of kind in which the chances are not alike favorable to all the players including the banker or manager

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of the game. Without one of these *indicia*, declared by clauses (i), (*ia*) and (ii) of Code sec. 226 (b), the mere user, as distinguished from the keeping for gain and resorting, dealt with in sec. 226 (*a*) would not constitute the place a common gaming house. The presumption of use as a common gaming house may possibly apply also in aid of the proof that persons resort to the place for the purpose of playing, etc., under sec. 226 (*a*), leaving this to be supplemented by other proof of the keeping for gain. The presumption under Code sec. 985 arises on the finding, in search and seizure proceedings, of instruments of gaming used in playing and game of chance or any mixed game of chance and skill. While cards, dice etc., are specifically mentioned, the words "*other*" *instruments of gaming* used in playing any game of chance or any mixed game of chance and skill" appear to qualify or limit the specific articles named to cards, dice, balls, counters and tables which are in fact, instruments of gaming. The section was evidently intended to create a statutory but rebuttable presumption from the finding of gaming paraphernalia and appliances, and the suggestion is offered that there should be testimony adduced for the prosecution to shew at least what is the ordinary or customary, use of the articles found unless it appears that they were actually used for gaming. The Magistrate trying the case has to find upon this question of fact. It does not appear to be sufficient to raise the statutory presumption that the articles are such as may be used for gaming, if they might be used for other lawful objects; and it may be doubted whether, in the present century, the finding of nothing more than 'playing cards' would be effective, as they are so commonly used for games in which there is no stake or bet. In *R.* v. *Gow Bill* (1920), 33 Can. Cr. Cas., 401 (Alta.) the finding of certain instruments or paraphernalia which might be used for gaming but which might also be used for other lawful objects was held insufficient under Code sec. 985 when there was no evidence to establish that games of any kind were being played.. When gaming instruments are found in the search and seizure proceedings, it may be open to the Magistrate trying the case to apply the presumption of use to such one or more of the various sets of circumstances which constitute the statutory definition of a common gaming house under sec. 226 as he considers appropriate, but it is to be noted that the presumption under sec. 986 is of a much wider character. Section 986 makes it *prima facie* evidence that a place is a common gaming house if, in search and seizure proceedings, the place is found fitted or

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provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, or with any device for concealing, removing or destroying such means or contrivance. So also under sec. 986, the wilful obstructions of the officer in entering is made *prima facie* evidence that the place is a disorderly house. *R.* v. *Jung Lee* (1913), 13 D.L.R. 896, 22 Can. Cr. Cas. 63. Section 986 was amended in like manner to sec. 985 by substituting "game of chance or mixed game of chance and skill" for the words "unlawful gaming." It has been held that it shifts the onus upon the proprietor to prove, in the event of means or contrivance being found for playing any game of chance or any mixed game of chance and skill, that the place did not possess the other attributes which would make it a common gaming house under Cr. Code sec. 226. *R.* v. *Ah Sing* [1920] 3 W.W.R. 629 (B.C.) Where the case for the prosecution is based solely upon the statutory presumption from the finding of instruments of gaming but there is no proof by the prosecution, of any gaming having taken place and the presumption is met in an apparently honest and frank manner by the testimony of the accused and his witnesses that there was no gaming, the Magistrate should not convict. *R.* v. *Gow Bill* (1920), 33 Can. Cr. Cas. 401, 404 (Alta.), applying the doctrine of *R.* v. *Covert* (1916), 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 10 Alta. L.R. 349. But it does not follow that the Court can correct the Magistrate's error by *certiorari* proceedings. *R.* v. *Nat Bell Liquors Ltd.* [1922] 65 D.L.R. 1 (P.C.); *Colonial Bank of Australasia* v. *Willan* L.R. 5 P.C. 417.

Re GASTON, WILLIAMS and WIGMORE Ltd. and GASTON, WILLIAMS & WIGMORE STEAMSHIP Co. v. THE KING.

Exchequer Court of Canada, Audette, J. May 31, 1922.

SHIPS (§I—1)—REQUISITION OF—WAR MEASURES ACT, 1914—ORDER IN COUNCIL, NOVEMBER 24, 1916—POWERS OF MINISTER OF MARINE AND FISHERIES THEREUNDER—COMPENSATION—RATE—"OFF-HIRE" PERIODS.

That in virtue of the Order in Council dated November 24, 1916, and passed under the War Measures Act, 1914, the Dominion Government was empowered to requisition ships in its own name and as principal and not as agent for the British Government and that the Minister of Marine and Fisheries, acting thereunder, had no power to vary the same by adding thereto or derogating therefrom.

That inasmuch as conditions prevailing in Canada are more like those in the United States than in Britain, the rate of compensation allowed in the United States affords a safer comparative guide than the English rate, in establishing a just and reasonable rate for Canada.

That for the same reasons the rule obtaining in the United States with respect to "*off-hire*" should also apply to vessels requisitioned by Canada.

Where a ship is "*off-hire*," due to a collision occurring in the war zone, when acting under instructions of the Admiralty and according to signals given by the destroyers escorting her, she is entitled to the full rate of compensation; credit, however, being given to the Crown for any expenses saved the owners during this period.

Where, on the other hand, the accident takes place out of the war zone, etc., the owners should only receive half the "*off-hire*" rate.

THIS was a reference to the Court by the Minister of Justice of Canada under the provisions of the War Measures Act, 1914, for a claim for compensation for the ship "Lord Dufferin" requisitioned during the war.

A. C. McMaster, K.C., and *N. A. Belcourt*, K.C. for claimants; *F. E. Meredith*, K.C., and *A. R. Holden*, K.C. for respondent.

AUDETTE, J.:—This is a reference, made to this Court, by the Minister of Justice for Canada, under the provisions of sec. 7 of the War Measures Act, 1914, ch. 2 of a claim for compensation in respect of the ship "Lord Dufferin" requisitioned, during the war, in the manner herinafter mentioned.

The "Lord Dufferin" is a British cargo steamship, registered on the Canadian Register of Shipping, in the Port of Montreal, P. Q. of 4,664 tons gross register and gross deadweight capacity of 7,250.

On November 24, 1916, the Government of Canada passed an Order in Council, under the special powers given the Governor in Council, under the War Measures Act, 1914, whereby it was among other things, provided that "any British ship registered in the Dominion of Canada" may be requisitioned by and on behalf of His Majesty, for the carriage of foodstuffs and of any article of commerce,—and authorizing the Minister of Marine and Fisheries to give effect to these regulations by causing Notices of Requisition to be served on the owner of any such ship and furthermore vesting in him the power to give instructions and direction accordingly.

The power and authority to so requisition any British ship registered in Canada was by this Order in Council vested in the Minister of Marine and Fisheries to be exercised entirely in conformity with and within the scope of the Order in Council, and such power and authority are to be thereby measured and ascertained. Any such specific power vested in the Minister of Marine and Fisheries by the Order in Council does not carry with it the authority to vary its terms. The Order in Council does not provide that the Canadian Government shall requisition

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vessels as agents for the British Government and there was no such authority given therefore to the Minister by the Order in Council. Cf. *The King* v. *The Vancouver Lumber Co.* (1914), 41 D.L.R. 617, 17 Can. Ex. 329; 50 D.L.R. 6; and *British American Fish Co.* v. *The King* (1918), 44 D.L.R. 750, 18 Can. Ex. 230; 52 D.L.R. 689, 59 Can. S.C.R. 651. Therefore, to ascertain what power and authority is so vested in the Minister for the requisitioning of ships, reference must be had to the Order in Council which is the only source and foundation of such power and authority.

Freed from all unnecessary details, it may be said that the "Lord Dufferin" was, under the authority of this Order in Council, requisitioned, that the owner delivered possession of the same, at Durban, Africa, on March 14, 1917, and that the vessel was released on November 25, 1918. The ship remained under requisition 621 days and a fraction, or 622 days.

By the notice of requisition it is, *inter alia*, provided that the British Admiralty is thereby "authorized to take over immediately the possession and control of the said ship for the purposes aforesaid"—that is, as provided by the Order in Council and the notice for the carriage of foodstuffs and other articles of commerce necessary to be transported for the purposes of the present war.

Now, it has been contended, on behalf of the Crown, resting such contention on both the Order in Council and the Notice of Requisition, that when the Minister was acting thereunder, he was acting on behalf of the Imperial Government as agent, and therefore the Canadian Government does not admit any liability, although it will be recouped of any condemnation by the British Government.

I am unable, on reading the Order in Council of November 24, 1916, to accede to such contention. The Minister has no power to vary the Order in Council, either by adding thereto or derogating therefrom, and there is nothing in the Order in Council suggesting that the Canadian Government, in thus acting under the provisions of the Canada War Measures Act, 1914, was acting as agent for the Imperial Government. The vessel was on both occasions requisitioned and released by and on behalf of the Canadian Government, through Canadian officials and furthermore, kept under control by them, as shown by the several cables and letters filed of record.

Moreover, that fact is fully and amply supported by other evidence and documents filed of record. The Deputy Minister of Marine and Fisheries for Canada,—through whom practically

all requisitions were effected,—testified upon this point as follows: at p. 2 of his examination on discovery, which was partly read at trial, viz:

"Q. Then, I believe, was objection taken by the Government of the Dominion of Canada to the requisitioning of steamers on the Canadian Registry by the British Government? A. The right in general was asserted by the Dominion Government that the power to requisition vessels of Canadian registry rested solely in the Canadian Government."

Then at p. 5 thereof: "Q. And the ship was taken for the purposes of the British Government? A. No. Q. The space was taken. A. No. Q. How do you put it? A. She was taken for the purposes of His Majesty by the Canadian Government. Q. That is the way you put it? A. Yes. Q. Well, then, she was for that purpose delivered by the Canadian Government to the British Government? A. To the British Government."

Then at p. 8: "Q. Did the Canadian Government requisition any steamers for its own purposes? A. They were all requisitioned for our own purposes. We regarded the purposes ours just as much. Q. Did you requisition any steamers that you did not turn over to the British Admiralty? A. No. I do not think so."

Affirming and recognising this Canadian view, we have, as ex. No. 34, the despatch of Sir Walter Long, the British Colonial Secretary to the Governor General, bearing date May 19, 1917, stating that "*requisitioning authority should be regarded as vested in and only to be exercised on behalf of the Government of that part* of the Empire in which vessel's port of registry situated. . . . . *In last resort wishes of Government* in whose country vessel registered will prevail . . ."

Moreover, the Imperial Proclamation of May 3, 1914 (Statutory Rules and Orders, vol. 1, p. 806,) in respect of requisitioning of British ships only extends to British ships within the British Isles or the waters adjacent thereto and does not apply to British ships of Canadian registry.

Moreover, the rights of the Canadian Government with respect to requisitioning British vessels of Canadian registry is fully asserted and set forth in the Order in Council of January 3, 1917, filed herein as ex. No. 33.

Having said so much, it becomes unnecessary to consider whether or not under these circumstances of national emergency and in the interest of the defence of the realm, the view set up by the Crown could be supported and, furthermore, whether the Canadian Government really contracted as principal although

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intending to contract only as agent of the Imperial Government. Bowstead, Law of Agency, ed. 5,388. *Graham* v. *Public Works*, [1901] 2 K.B. 781, 70 L.J. (K.B.) 860, 50 W.R. 122.

I find the action was properly instituted coming, as it does, within the ambit of sec. 7 of the War Measures Act, 1914; that this Court has jurisdiction to hear, determine and adjudicate upon the same and that the Crown, in the rights of the Canadian Government, is the party that requisitioned in its own name and behalf the vessel in question herein.

Coming to the question of the rates for compensation to be awarded for the use of a requisitioned vessel in Canada it may well be said as a prelude that the British Blue Books referred to in the Imperial Indemnity Act, 1920, do not apply to the present case.

A copy of these Blue Books has been filed as ex. No. 26, and at p. 7 thereof, dealing with the Requisition of Cargo Liners, such as the "Lord Dufferin" the following clause is therein enacted, viz:—

"6. The rates of hire set forth in the following schedule are not to apply to vessels taken up in the Dominion overseas where the circumstances will probably call for *higher rates.*"

It is in evidence that in normal days owing to British competition, there has been great difficulty for American owners to make profit on their ships. The operating of a British ship being in almost all respects much cheaper. (p. 205).

With regard to the relative conditions governing the operating cost of freighters such as the "Lord Dufferin", there is evidence before the Court to show that the expense of running such a ship is greater in the United States than in Canada (p. 177) owing to the larger crews carried, the greater amount of food necessary, and the higher wages paid in the former country.

Witness Grey reckoned it to be one-third more in the United States than in Canada, while witness Robinson contends the difference runs from one-third to one-half more in Canada, and other witnesses state that the cost in Canada is almost three-fourths to two-thirds of the American. However, witness Austin, on behalf of the claimants, contends that the costs of operating American or Canadian vessels are exactly equal; but more than operating a British vessel. This witness further states that during the time of the requisition of the "Lord Dufferin," their American company chartered vessels for which they paid from 35 to 55 shillings per dead weight ton. On July 25, 1917 they chartered the "Harold," 2,500 tons, dead weight, at 55 shillings (p. 53).

Witness Cowan, the Director of Operations of the Canada Steamship Co. testified that on January 11, 1917, his company chartered the steamer "Nepawaw," 2,100 tons dead weight, to the French Government at 43 shillings; on December 31, 1916, the steamer "A. R. McKinstry" 2,905 tons, dead weight at 43 shillings, as well as the "Winona," 2,440 tons, dead weight and the steamer "Acadian" 3,100 tons dead weight, at same price.

Then witness Robinson, heard on behalf of the Crown, stated that, in the middle of 1919, the rate obtainable for a charter of about a year, depending upon the class of steamers, was somewhat between $9 and $10 a ton dead weight—or between 45 to 50 shillings, assuming the pound at $4 and the shilling at 20 cents.

The English rate fixed by the British Blue Books on gross weight under special British conditions is entirely inadequate for Canada as determined by the Blue Books themselves. But conditions prevailing in Canada are more like those in the United States and it is, therefore, obvious that the United States rate affords a safer comparative guide than the English rate in establishing a just and reasonable rate for Canada. The British rate, as stated under the signature of the Deputy Minister of Marine, in ex. No. 35, is altogether inadequate to enable vessel owners to even meet operating expenses and he further adds:—

"The conditions in Canada, so far as the operation is concerned, are somewhat similar to those which obtain in the United States. The rate of wages, etc., are practically similar. The United States Government quite recently decided upon a policy to requisition steamers, and they have fixed rates to govern as from the 15th instant. These rates are as follows:—

Over 10,000	tons deadweight	$5.75 per ton per month
8,001 to 10,000	tons deadweight	$6.00 per ton per month.
6,001 to 8,000	tons deadweight	$6.25 per ton per month.
4,001 to 6,000	tons deadweight	$6.50 per ton per month.
3,001 to 4,000	tons deadweight	$6.75 per ton per month.
2,500 to 3,000	tons deadweight	$7.00 per ton per month.

It will be seen at a glance that the rates fixed by the United States Government are substantially in excess of the rates paid by His Majesty's Government. While vessels under requisition in the service of His Majesty's Government are being paid at Blue Book rates, neutral vessels doing similar service for His Majesty's Government are receiving compensation ranging from 40s. to 47s."

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Under the American rates fixed on September 27, 1917 with retroactive effect, the "Lord Dufferin" would call for a price of $6.25 per ton deadweight with more advantageous terms and conditions with respect to the insurance and off-hire.

Prior to the war period, the usual way of hiring and chartering vessels, generally throughout the world, including Canada, United States and England, was on tonnage deadweight and not gross. The British Blue Books introduced gross tonnage and this change only applied to them and the United States retained the usual basis of dead weight.

As a general proposition it may be said that where there is no agreement to the contrary, a requisitioned vessel is assumed to be always available for service and the moment she ceases to be so, she becomes off-hire and not entitled to remuneration.

However, since the Rules obtaining in England are not to prevail in Canada, under the provisions of the Blue Books, and that the conditions in Canada are somewhat similar to those in the United States, the rules obtaining in the United States with respect to off-hire should, also apply to Canadian vessels under the present circumstances, and clause 22 of the United States Requisition Charter will be followed.

The "Lord Dufferin" was off-hire
13 days, between September 14, and September 27, 1917;
42 days, between February 3, and March 17, 1918;
21 days, between March 22, and April 12, 1918;
117 days, between July 29, 1918, and November 25, 1918;

193 In all one hundred and ninety-three days.

The off-hire of the, 13, 42 and 21 days above mentioned making a total of 76 days, was the result of the accident which happened when the "Lord Dufferin" loaded with aeroplanes and shells of every kind, collided with the "Largo Law" on sailing from Malta and laying her course under Admiralty instructions, according to signals given by the Destroyers, escorting her. See *British and Foreign Steamship Co.* v. *The King*, [1917] 2 K.B. 769; [1918] 2 K.B. 879, 87 L.J. (K.B.) 910; *Atlantic Transport Co.* v. *Director of Transports* (1921), 38 Times L.R. 160; Cf. *Adelaide Steamship Co.* v. *The King* (1922), 38 Times L.R. 362.

I find that with respect to these 76 days there should be no deduction, the collision having occurred in the war zone, acting under the instructions of a war vessel and in direct guidance of military or naval authority. However a certain credit should be given to the Crown for any expenses saved to the owners

during these 76 days. There is no tangible evidence of such savings and this matter will be taken into consideration in arriving at the rate of compensation.

Then with respect to the off-hire during 117 days resulting from the collision with the "Ciudad de Buenos Aires" I find, again following the American requisition charter, that the accident took place out of the war zone etc., and the claimants are entitled to recover only one half of the hire. *Britain Steamship Co.* v. *The King*, [1919] 1 K.B. 575, 88 L.J. (K.B.) 521.

The genus of the English common law is that no property should be taken from the subject by the Sovereign power without proper compensation. *DeKeyser's Royal Hotel* v. *The King*, [1919] 2 Ch. 197, 88 L.J. (Ch.) 415; *Newcastle Breweries* v. *The King*, [1920] 1 K.B. 854, 89 L.J. (K.B.) 392, and see per Lord Atkinson in *Central Control Board* v. *Cannon Brewery Co.*, [1919] A.C. 744 at p. 752, 88 L.J. (Ch.) 464. And further, as said in "*The Aquitania*" (1920), 270 Fed. Rep. 239, the aim of the Court is to work out principles which make for justice and seek to avoid the turning away of a *bonâ fide* suitor without remedy.

Taking all the circumstances of the case into consideration, charging the claimants with all premium of insurance they saw fit to place upon the vessel, and allowing a certain amount by way of set off resulting from the obvious and necessary saving of some expenses during the repair period,—approaching this last consideration as a jury would I have come to the conclusion to allow as a fair, just and reasonable compensation to be paid the claimant the sum of $5.75 per dead weight ton, per calendar month of 30 days. Scrutton on Charterparties, 10th ed. 384. I reckon the number of days of requisition at 622, and allow 505 days at the rate of $5.75 per ton dead weight per month and 117 at half rate, namely at $2.87½ per ton dead weight.

The compensation is to be ascertained at prevailing rates at the date of the taking and is to be reckoned and paid in Canadian currency. *Atlantic Shipping etc.* v. *Dreyfus* (1922), 38 Times L.R. 534.

The statement of the amounts already paid on account, by the Crown, under British rate, and accepted under protest, as well as the evidence in respect of such payments are both unsatisfactory. This statement is somewhat clouded from the fact that the claimants have kept their books of account in United States currency, which must be transposed into Canadian currency. Moreover, counsel at Bar on behalf of the Crown, was

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not in a position to satisfactorily establish these payments without communicating with the British Government.

Under the circumstances, failing the parties, through their counsel, to agree as to such payment made on account, and to adjust the same, leave is hereby given them to apply to the Court, upon notice for further direction in respect of the same.

The compensation moneys are made payable to the owners of the vessel excluding the charterers; the owners, through their counsel at Bar, having undertaken to adjust the matter out of Court as between themselves, regarding it, so to speak, as a domestic and internal business and as set forth in the charter between themselves.

Therefore, there will be judgment adjudging and declaring that the claimants, Gaston, Williams and Wigmore of Canada, Limited, the owners of the "Lord Dufferin," are entitled to be paid by the Crown, as total compensation for the hire of their requisitioned vessel at the rate of $5.75 per ton dead weight for 505 days, and at the rate of $2.87½ per ton dead weight for 117 days, after deducting the several and large amounts already paid on account by the Crown. The whole with costs against the respondent.

Judgment accordingly.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons, Hyndman and Clarke, JJ.A. May 17, 1922.

GARNISHMENT (§III—61)—SUFFICIENCY OF AFFIDAVIT—RULE 648 ALTA. RULES—CONSTRUCTION.

The obvious purpose of Alta. Rule 648 is, while allowing a garnishee summons to issue and to have a certain legal effect as to binding a debt, and giving a plaintiff a right to it by way of attachment, at the same time to insist on the observance of certain preliminary requirements as a precaution against a free and untrammelled exercise of that right, and if these precautions are in substance fulfilled the rule is complied with. An affidavit that "the garnishee is within the jurisdiction of this honourable Court" is a sufficient compliance with Rule 648 (b) Alta. A positive statement that the defendant had done some threshing for the garnishee is a good ground for believing that he is indebted to him.

APPEAL by plaintiff from an order of a District Court Judge setting aside a garnishee summons. Reversed.

William Beattie, for appellant.

A. G. Virtue, for respondents.

The judgment of the Court was delivered by

STUART, J.A.:—This is an appeal by the plaintiff from an order of a District Judge setting aside a garnishee summons.

The plaintiff in his affidavit swore, among other things, as follows:—

"To the best of my information and belief the above named garnishee is indebted to the said defendant and is within the jurisdiction of this honourable Court. The grounds of my beliefs are: The garnishee is indebted to the defendant for certain threshing which the defendant did for the garnishee."

The garnishee upon being served with the summons paid into Court the sum of $434.66 the amount of the claim. The plaintiff signed judgment against the defendant and then obtained an *ex parte* order from the Judge for the payment of the money out of Court to him which was done. We must assume that there was a certificate produced that there were no conflicting claims upon the money.

Before this order was made and apparently even before the money was paid in the solicitor for another Westcott, a son of the defendant, wrote to the solicitor for the plaintiff claiming that the money was due not to the defendant Westcott, the father, but to the son, and asking him to release the garnishee summons "or else we shall be compelled to file our claim with the clerk of the Court." And in answer to this, plaintiff's solicitor replied "will say that the money is being paid in as there appears to be two claimants for the money."

When the claimant D. M. Westcott, the son, learned, through his solicitor, that the *ex parte* order for payment out had been made and that the money had been paid out to the plaintiff it was apparently arranged in some way that the defendant, the father, should apply to set the garnishee summons aside. A notice of motion was then served upon the plaintiff stating that such a motion would be made. This notice was signed by solicitors for the defendant, the father, and no other statement is contained in the notice as to who the party applying was. But the solicitors signing it were the same firm as had written the letter on behalf of the son.

The application was heard by the District Judge who apparently held on account of the correspondence that had passed, that the order for payment out should not have been secured *ex parte* but that notice should have been given to the claimant's solicitors. In this he was undoubtedly right. It looks a little like sharp practice by the plaintiff's solicitor. To assure the Judge by production of a certificate or otherwise, as he must have done, that there was no conflicting claim when he had been told by letter that there was such a conflicting claim was almost, if not absolutely, a fraud on the Court and should perhaps have been punished in some direct way. It is, however, desirable to

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say that the solicitors who appeared on this appeal on behalf of the plaintiff were not the solicitors guilty of this piece of apparent bad faith and also that there may be some explanation of the matter in the way of innocent oversight.

The District Judge set aside the garnishee summons on the ground of insufficiency in the affidavit on which it was issued. But he went still further. He ordered the plaintiff to pay the money direct to the claimant. This order is expressed to have been made on the application of D. M. Westcott, the son, the claimant, although, as I have said, the notice of motion purported to be served on behalf of the defendant, the father.

The plaintiff then applied to the Judge for an order varying his previous order which was done and the money was ordered to be paid back into Court, where it now is.

Then the plaintiff appealed from the order setting aside the garnishee summons.

The notice of appeal is directed, not to the defendant, but to the claimant, the son. The appellant has, therefore, apparently waived the irregularity presented by the facts that the notice of motion was served on behalf of one person and that the order was ostensibly made on the application of another person.

The respondent, the claimant, raised the preliminary objection that the plaintiff having applied to vary the order appealed from and having then acted upon it as amended was thereby precluded from prosecuting an appeal therefrom. I do not think this contention is sound in the circumstances of the present case. Practically all the plaintiff did was to ask the Judge to make his order less stringent, to allow him merely to remedy the wrong he had done in getting the money out of court *ex parte* and so put the matter *in statu quo*. In doing that I do not think he by any means assented to or acted upon the order setting aside the garnishee summons or took any benefit under it or took any further proceeding upon the assumption that it was to stand.

The first ground upon which the garnishee summons was attacked was that a statement in the affidavit that "the garnishee is within the jurisdiction of this honourable Court" is not sufficient compliance with the requirements of Rule 648 (b) which provides that the deponent must state that the proposed garnishee "is within Alberta." It was argued that the statement in the affidavit could only by a conclusion of law be said to be equivalent to a statement that the garnishee "is within Alberta," and various theoretical suggestions were made as to the jurisdiction of the District Court extending beyond Alberta. In my opinion, none of these suggestions were sound. But aside

from this it ought to be remembered that Rule 648 is partly, though perhaps not entirely, a rule of procedure, that its very obvious purpose is, while allowing a garnishee summons to issue and to have a certain legal effect as to binding a debt and giving a plaintiff a right to it by way of attachment, at the same time to insist on the observance of certain preliminary requirements as a precaution against a free and untrammelled exercise, and possibly abuse, of that right. If these precautions are really in substance fulfilled, I think the rule is complied with. Now we know that the expressions "within the jurisdiction" "and without the jurisdiction" are in every day use in Court proceedings. Every lawyer continually uses them with a well understood meaning. The Rules of Court 204 and 205 have the caption "service out of the jurisdiction" and the first rule at once begins by saying "service outside of Alberta &c.," thus treating the two expressions as synonymous. An affidavit for a garnishee summons is usually prepared by a solicitor and in these circumstances it was the most natural thing in the world for a solicitor to use the expression "within the jurisdiction of this Court" and to put it in the mouth of his client as meaning the same thing as "within Alberta." We have no right to assume that the solicitor did not explain to his client the proper meaning of the expression which perhaps, strictly speaking, it was his duty to do. And if he did explain it then the client was, in my opinion, perfectly justified in swearing to the affidavit in the sense explained to him. It is no doubt advisable to use the exact language of the rule but I see nothing in the rule itself requiring that its exact language should be copied. It is the meaning and substance which must be deposed to, not the exact form of words. I observe that the Manitoba rule actually uses the expression "within the jurisdiction."

I think, therefore, this objection to the affidavit cannot be supported.

Secondly, it was objected that the grounds of the information and belief were not sufficiently given either with respect to the existence of the debt from the proposed garnishee to the defendant or with respect to his being within Alberta. With respect to the first it is to be observed that the deponent does swear that the garnishee owed the defendant on a threshing account and that the defendant had done some threshing for him. I am inclined to the opinion that this affidavit is slightly weaker than the affidavit which this Court upheld in *Adams* v. *Adams* (1921), 62 D.L.R. 721, 17 Alta. L.R. 109. There the deponent did swear that he *was informed* (though not stating by whom) that A. A. McGregor, the garnishee had sold certain property for the

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defendant and still had in his possession the money realized. Here the deponent does not in giving the grounds of his information and belief at first sight go quite so far. But perhaps he goes farther. For he swears positively to the fact although first stating merely that to the best of his information and belief the garnishee was indebted. But after all, is not a positive statement that the defendant had done some threshing for the garnishee a fairly good ground for believing that he was indebted to him? No doubt the debt might have been already paid. On the other hand the affidavit was made on October 31, when threshing is generally going on and while the fact of the defendant's having done the threshing (which might very well be within the personal knowledge of the deponent) is no absolute proof of the continued existence of the debt and indeed may be no very satisfactory logical reason for believing that it did still continue, yet it is the reason which the deponent gives. He is not required by the rule to give a convincing reason. And while I do not say that any absurd ground of inference, not logically sensible at all, ought to be accepted as a compliance yet I cannot say that the reason given is so devoid of sense that we ought to declare that it does not fulfill the requirements of the rule. The fact of the defendants having threshed for the garnishee did, according to the deponent, induce him to believe that a debt existed. For my part, I cannot say that he was advancing an utterly foolish ground of belief. I think, therefore, the purpose of the rule was complied with, which is, that the deponent must be prepared to swear to something which will show that he is not taking a shot absolutely in the dark and on a mere chance. That is what the rule is intended to prevent. No doubt the case is near the line, perhaps as near as we should allow anyone to go, but on the whole I think there was compliance.

Then with regard to the absence of a reason for believing that the garnishee is in Alberta, it will be sufficient to say that, in my opinion, the expression "such information and belief" at the end of clause (b) of Rule 648 should be interpreted as referring only to the information and belief as to the existence of the debt. It is only in that regard that there is any real substantial reason for the requirement of grounds for the belief The requirement was intended to protect persons from what I have referred to as mere shots in the dark and from being bothered by garnishee summonses being served upon them recklessly and without any reason whatever. In any case, the summons could not be served out of Alberta. All that was intended was to prevent the process of the Court being issued in a case

where it could not be used (at least without a Judge's order, which I do not say is possible) and so to no purpose. The rules as to service of other process out of the jurisdiction do not apparently require any reasons to be given for the statement that the person to be served resides in the place stated. I think this ground of objection should also be rejected.

There is a further reason why I think the garnishee summons should not have been set aside, at least at the instance of the claimant which the order says was the case. The claimant is actually demanding and did demand on this appeal that the money should be paid out to him. He thus adopts the result of the procedure which he seeks to set aside. The order which he at first secured from the District Judge actually directed the money to be paid over to him by the plaintiff who would thus by the procedure attacked have secured the money for the claimant's benefit. In my opinion, this ought to preclude the claimant at least, whatever may be said of the defendant, from attacking the summons as irregular unless he is prepared to have the money paid back to the garnishee from whom it came. Rule 651 (2) does give a claimant the right to move to set the summons aside but it does not give him any right if the summons *is* set aside to get the money paid out of Court to him after the garnishee has once paid it in without any further notice to the garnishee.

I would, therefore, allow the appeal without costs as the point of practice was admittedly uncertain, set aside the order appealed from and make an order upon the original application directing an issue to be tried as between the plaintiff and the claimant either summarily in chambers or more formally as the District Judge may deem proper when the matter is again brought before him. And the costs of original application should be disposed of by the District Judge in the same way as he would have done had he himself made the order which we now direct, having, of course, regard also to the necessity of getting the money back into Court out of the plaintiff's hands into which it had quite improperly come.

Judgment accordingly.

ROCK v. CANADIAN NORTHERN R. Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 30, 1922.

RAILWAYS (§IIIA—46)—NEGLIGENCE—PLACING BOX CARS SO THAT THEY PROJECT ON HIGHWAY AND OBSTRUCT VIEW OF TRAINS—ACCIDENT DUE TO VIEW BEING OBSTRUCTED—LIABILITY OF COMPANY—DUE DILIGENCE OF TRAVELLER ON HIGHWAY—THE RAILWAY ACT, 1919 (CAN.), CH. 68, SEC. 311—CONSTRUCTION.

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The placing by a railway company of box cars, so that they project several feet on a highway and obstruct the view of trains crossing the highway on the company's tracks, from persons travelling on the highway, is negligence, and where an accident results from such view being obstructed the company is liable for the resultant damage notwithstanding sec. 311 of the Railway Act, 1919 (Can.), ch. 68, which permits a railway company to obstruct traffic for short periods. It is for the jury to say whether the person injured used due diligence before proceeding to cross the track.

[*Campbell* v. *C.N.R. Co.* (1913), 12 D.L.R. 272, followed; *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125, distinguished.]

APPEAL by defendant from the trial judgment in an action for damages for injuries causing the death of the respondent's son, by being struck by a train of defendant's at a railway crossing. Affirmed.

J. N. Fish, K.C., for appellant.

W. H. McEwen, for respondent.

The judgment of the Court was delivered by

McKAY, J.A.:—The deceased, Frank Hilton Rock, was the son of the respondent. At the time of his death and for approximately 5 years prior thereto he was employed by the Saskatchewan Co-operative Creameries, Ltd. In 1920 the deceased earned $1336.33, in 1919 $1314.86, and in 1918 $1009.35. Prior to 1920 he was in charge of one of his employer's retail milk wagons, delivering milk from house to house, and in 1920 he was assigned as driver of one of his employer's motor trucks, which work he was engaged in at the time of his death. All monies earned by him during the 3 years mentioned were handed by him to his mother, the respondent, which she used for the maintenance of herself and her 3 children, the deceased, James Earl Rock, and Frances Rock.

At the time of the death of the deceased, his mother, the respondent, was 36½ years old; his brother James Earl Rock was 13 years old; and his sister Frances Rock was 4½ years old. The deceased was the sole support of his mother, brother and sister. The brother started to work about the end of January, 1921, shortly after the death of the deceased. The mother has no independent means, or any means of supporting herself.

Seventh Avenue in the city of Regina is crossed at rail level over Smith St., as the right-of-way, by the main line and a spur track of the appellant railway. The spur track is on the east side of the main line.

On the evening of January 28, 1921, two box cars belonging to the appellant, loaded with wood, had been spotted by the servants of the appellant on the spur track, so that the most northerly of the said box cars projected a distance of 27 ft. 6

inches from the southerly limit of Seventh Ave. This car was still there at the time of the accident. The effect of the projection of the said box car was to obstruct the view of trains proceeding north on the appellant's main line to a person approaching the crossing from the east along Seventh Ave.

On the morning of January 29, 1921, F. H. Rock was driving a Ford truck westerly along Seventh Ave. at the rate of about 6 miles an hour, and when the motor truck reached the tracks of appellant at said crossing it was struck by the appellant's train coming north along Smith St., and Rock was killed.

The appellant's train was on the main line, and it consisted of the equipment of the morning train which had arrived and was being taken to the yards at North Regina by a yard engine. The yard engine was moving with its tender ahead (north) and the speed was about 6 miles an hour. The wreckage was so distributed, and the marks of the wheels of the Ford truck were such, that it is clear the front wheels did not get beyond the width of the space between the rails of the main line.

The respondent as administratrix of the estate of her deceased son, F. H. Rock, brought this action against the appellant for negligence occasioning the death of the said Rock, claiming damages on her own behalf as mother of the deceased and on behalf of the infant brother and sister of the deceased.

The respondent alleges that the accident was caused by the negligence of the appellant:—1. In leaving its box cars projecting across the highway Seventh Ave., so as to obstruct the view of trains proceeding north on the tracks of the appellant along Smith St., to travellers from the east along Seventh Ave. 2. In failing to give the statutory warning when the train was approaching the highway, Seventh Ave., by sounding of the whistle. 3. By failing to keep a proper lookout. 4. By failing to bring the train to a stop as soon as possible after the collision.

The appellant's defence to the claim is a denial of the different allegations therein, and, in the alternative, that the deceased came by his death through his own negligence, and in the further alternative that he was guilty of contributory negligence.

The action was tried by a judge and jury, and the latter found on questions submitted to them by the Judge that the accident was caused by the negligence of the appellant, such negligence being as above alleged by the respondent, and that deceased was not guilty of contributory negligence, and assessed the damages at $9,000, for which amount judgment was entered with costs.

From this judgment the appellant appeals on several grounds.

The appellant contends that there was no evidence of negli-

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gence which should have been submitted to the jury, and that if there was any evidence of possible negligence, there was no causal relation between such negligence and the accident; that therefore there should have been a nonsuit; but that now, a verdict having been found for the respondent in the absence of such evidence, this Court should set aside the verdict and judgment, and dismiss the action.

A finding by the jury that appellant was negligent in any one of the 4 particulars of negligence alleged as above set forth would be sufficient to support the verdict, provided there was some evidence on which such finding could be made.

In my opinion there was evidence of negligence to be submitted to the jury.

Take the allegation of obstruction of the view by the projection of the box car on to the highway Seventh Ave. It was established that the appellant had on January 28, 1920, the day before the accident, placed the two box cars on the spur track as above stated. There were buildings, etc., to the south east of these cars, which obstructed the view beyond the cars. The evidence is clear that the result of the projection of the northerly car on to the highway was to obstruct the view of trains proceeding north to persons coming from the east, until such train had cleared the cars. This being the result of appellant's act, it was for the jury to say whether or not this was something that an ordinarily prudent person would have done under the circumstances.

In *Weaver* v. *C.N.R.* (1911), 17 W.L.R. 265, Lamont, J., held projection of a box car in a similar manner constituted an unreasonable and unlawful use of the highway and was negligence.

In *Campbell* v. *C.N.R.* (1913), 12 D.L.R. 272, 15 C.R.C. 357, 23 Man. L.R. 385 the defendant railway company permitted the end of a long string of cars to project into a highway for some time, in violation of sec. 279 (now 311) of the Railway Act, 1919, (Can.) ch. 68 so as to obstruct the public view of approaching trains. It was held by the Manitoba Court of Appeal that this was negligence on the part of the defendant company. Perdue, J.A., in whose judgment Howell, C.J.M., and Richards, J.A., concurred, stated, at p. 274, as follows:—

"I think that the defendants by leaving the car partly on the right-of-way obstructed the view and caused the accident. In so leaving the car they were negligent and they also committed a breach of the statute. They should, therefore, be liable for the damages, unless they can prove that the plaintiff by the exercise of reasonable care could have avoided the accident."

Cameron, J.A., the result of whose judgment is for the plaintiff, at p. 278, says:—"If the defendant's cars obstructed this highway contrary to the provisions of the Railway Act, there is established against it a *prima facie* case of negligence."

Section 311 of the Railway Act is as follows:—

"311. Whenever any railway crosses any highway at rail level, the company shall not, nor shall its officers, agents or employees, wilfully permit any engine, tender or car, or any portion thereof, to stand on any part of such highway, for a longer period than five minutes at one time, or, in shunting, to obstruct public traffic for a longer period than five minutes at one time, or, in the opinion of the Board, unnecessarily interfere therewith."

Counsel for appellant argues that as this section is directed only to the obstruction of traffic and not to the obstruction of view, the statutory provision is not available to the respondent for a purpose for which it was not passed, and cites *Gorris* v. *Scott* (1874), L.R. 9 Ex. 125, 43 L.J. (Ex.) 92.

In that case the declaration alleged that the defendant contracted with the plaintiffs to carry on board his vessel the plaintiff's sheep from Hamburg to Newcastle, and omitted to provide any pens, battens or footholds for the sheep on board the vessel, as required by an order of the Privy Council; and that by reason of this omission the sheep were washed overboard by the sea and lost. The order was made by the powers conferred by sec. 75 of the Contagious Diseases (Animals) Act, 1869, (Imp.) ch. 70, which imposes penalties for disobedience: Held, that the declaration was bad, because the object of the Act and the order of the Privy Council was not to protect owners of animals from such injuries, but to prevent the introduction and spread of contagious diseases in Great Britain.

Pollock, B., in the course of his judgment, said at p. 95 (L.J. (Ex.)):—

"I think the declaration is bad. In these counts the plaintiff has not alleged negligence generally in the defendant, with a view of using the breach of the Privy Council regulations as evidence of negligence for the jury—as was done in *Blamires* v. *The Lancashire & Yorkshire Railway Company*, 42 Law J. Rep. (N.S.) Exch. 182—but he alleges special damage resulting from non-compliance with the order of the Privy Council. The only question is whether that gives a right of action? I think not; because the statute was passed, not to prevent animals from being washed overboard, but entirely *alio intuitu*."

The above remarks shew the difference between that case and

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the case at Bar. In the latter the respondent (in par. 4 of her claim) pleads general negligence on the part of the appellant in placing the cars as it did. It has what was lacking in the Gorris case.

But as the appellant would have the right to have a car or cars on the highway for a period of 5 minutes, in another part of her claim the respondent alleges that the appellant exceeded this limit.

The respondent is not alleging special damages for violation of the Act as was done in the *Gorris* case, but she alleges general negligence in placing the cars as stated, and shews the appellant cannot claim protection under the Act as the cars were there more than 5 minutes. For these reasons I think the case at Bar is distinguishable from the *Gorris* case.

The jury having found that the accident was caused by the negligence of the appellant in placing the cars as it did, and that there was no contributory negligence on the part of the deceased, and there being evidence on which these findings could be made, this Court should not disturb them.

As these findings are sufficient to support the verdict, I do not think it necessary for me to deal with the other particulars of negligence found by the jury.

The appellant also contends:—

1. That there was a mistrial in that the evidence of witness Harwood should not have been admitted. 2. That the fair trial of the action was interfered with by the observation of the trial Judge to the effect that to expect the driver to deviate from the planks of the crossing in order to assure himself that he was not about to run into a railway train was to "take an absurd position." 3. That important testimony offered by the defence to prove that deceased was a reckless driver was ruled out altogether. 4. That the damages awarded are excessive.

1. As to Harwood's evidence.

This evidence was directed to the question of damages, and does not affect the question of negligence or want of negligence on the part of the appellant or deceased.

Mr. Harwood's evidence is to the effect that the tables he was quoting from are used by his insurance company and others, and are the standard tables of expectations, and that these tables are prepared by actuaries for the purpose of ascertaining the expectancy of life. It was some evidence to guide the jury in the question they were considering, and, in my opinion, was admissible. But even if inadmissible, I do not think it would be a sufficient ground for directing a new trial, in view of the

fact that the trial Judge, if I may say so, very fully and correctly instructed them as to what they would have to take into consideration when assessing damages.

2. With regard to the observation of the trial Judge complained of, I do not think this remark would affect the fair trial of the action. The trial Judge, in any event, immediately followed this observation with the statement that "It was for the jury to say, whether they should get off the planks."

3. Exclusion of evidence that deceased was a reckless driver. Council for appellant states that the evidence which the appellant proposed to adduce and which was excluded, was the evidence of witness Kerr, to shew that a few days before the accident deceased had skidded his truck into a street gasoline pump at a garage, and had stated he had had several other accidents in the last few days, and the evidence of witness Robinson to shew that, a week or 10 days before the accident, the deceased drove recklessly across a railway crossing.

In my opinion this proposed evidence was correctly excluded. Phipson on Evidence, 6th ed. p. 158, says as follows:

"Facts which are relevant merely from their *general similarity* to the main fact or transaction, and not from *specific connection* therewith as shewn below, are not admissible to shew its existence or occurrence."

There is no specific connection between the driving of the deceased at the time of the accident and the other occasions proposed to be given in evidence.

And at p. 159 Phipson says:—

"Similar facts under the present rule are inadmissible whether proved by the direct admissions of the party himself (R. v. Cole post 165), or by independent witnesses."

4. Excessive damages. The jury have assessed the damages at $9,000, and I do not think that under the circumstances of this case they are excessive, and they should not be reduced.

The result is that, in my opinion, the appeal should be dismissed with costs. *Appeal dismissed.*

RIGBY v. RIGBY.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 4, 1922.

DOWER (§IA—5)—DOWER ACT—ALTA. STATS. 1917, CH. 14—NATURE AND EXTENT OF WIFE'S INTEREST—RIGHT TO PROTECT RIGHTS BY FILING LIEN DURING LIFETIME OF HUSBAND.

A wife has under the Dower Act (Alberta stats. 1917, ch. 14) such an interest in the homestead of her husband as to entitle her to file a caveat under the Land Titles Act (Alta. stats. 1906, ch. 24, sec. 84) to protect that interest.

[*Overland* v. *Himelford* (1920), 52 D.L.R. 429; 15 Alta. L.R. 332, followed.]

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RIGBY v. RIGBY.

Beck, J.A.

APPEAL by defendant from a decision of the Master at Edmonton. Affirmed.

S. W. Field, K.C., for respondent.

H. R. Milner, K.C., for appellant.

SCOTT, C.J., concurs with HYNDMAN, J.A.

STUART, J.A., concurs with BECK, J.A.

BECK, J.A.:—In this case, A. Y. Blain, K.C., Master at Edmonton, in a considered judgment held that a wife has under the Dower Act (ch. 14 of 1917) such an interest in the homestead (the home) of her husband as to entitle her to file a caveat under the Land Titles Act (ch. 24 of 1906, sec. 84) to protect that interest.

I think both his decision and the reasoning by which it is reached are correct, though I think the decision of this Court to which I am about to refer contains much more in favor of his conclusion than he seems to have found in it.

In *Overland* v. *Himelford* (1920), 52 D.L.R. 429, 15 Alta. L.R. 332, the meaning and effect of the Dower Act was considered. The precise point for decision in that case was whether a particular disposition by the wife of her interest under the Dower Act was effective. The Appellate Division of 4 members was equally divided upon this question; but all the members of the Court expressed opinions upon the nature of a wife's interest under the Act, which substantially agree.

Stuart, J., said at p. 432: "My opinion is that the Act of 1917 7 Geo. V., ch. 14, was clearly intended to create a right in the wife to stick to her home and residence if she pleased even while her husband lived *and in addition to that* to give her a life estate after his death, notwithstanding any disposition by will or by the statutes affecting distribution on an intestacy."

I myself, dealing with the wife's interest incidentally, make it clear that, in my opinion, the wife has a present interest followed by a life estate contingent upon her surviving her husband, though her entire interest is subject to be divested by her consent to a disposition of the homestead or to a change of residence given in accordance with the Act or by such a disposition as was in question in the case then before the Court.

Harvey, C. J., concurred in the reasons for judgment given by me.

Ives, J., agreed with the conclusions of Stuart, J., and expressed himself at p. 439 as follows: "Having secured the home to the wife during her husband's life, the Legislature then proceeds by sec. 4 to provide the same security for her in the event of her husband's death and grants her a life estate."

The Court then was, in truth, unanimously of opinion—in this, confirming Walsh, J., the trial Judge,—that the wife has a present interest in her husband's homestead.

Then it is urged that nevertheless the wife's interest is not such an interest as can be protected by a caveat.

Section 84 of the Land Titles Act reads:—

"*Any person claiming to be interested under* any will, settlement, or trust deed, or any instrument of transfer or transmission or *under* an unregistered instrument or *under* an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person, or *otherwise howsoever* in any land, mortgage or encumbrance, *may cause to be filed* on his behalf with the registrar, a caveat, &c."

It is urged that the *ejusdem generis* rule of interpretation is applicable to this provision and that consequently the words "otherwise howsoever" must be restricted to interests created or arising in the same manner as those specifically listed; and it is urged that the *genera* listed are cases only of interests created or arising from the act or omission of an individual and that consequently the words "otherwise howsoever" cannot be extended to cover a case in which the interest is created by or arises out of the provisions of a statute. I think this argument is unsound for two reasons; first, statutory law is only one form of law and there is no reason in this case to differentiate it from the general body of law; for instance, the law which says that the deposit of title deeds as security for a loan creates an equitable mortgage; and it is well settled that such an equitable mortgage affords a foundation for a caveat. Again, the law of succession, both that regulating the passing of the legal estate and that declaring the beneficiaries in the case of intestacy and to some extent in the case of testacy, is itself statutory law; and the case of succession is comprised in the cases listed in the section under the word "*transmission*"; secondly—even if the foregoing argument were not open, the words "otherwise howsoever" are, in my opinion, obviously so wide—and evidently purposely so—as to cover the case of an interest created or arising in any manner whatsoever though of a different kind from those previously listed. The form of words is quite different from the common one of listing a number of instances, which can clearly be thrown into one definite class followed by the word "other" preceding a noun applicable to all listed instances. In such a case the *ejusdem generis* rule doubtless applies; but not only is that not the way in which the sentence in question is framed

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but it is so differently framed as to make it plain by the use of the words "otherwise howsoever" that while some specific instances are listed they are so listed only by way of illustration and that interests created or arising in any other manner whatsoever—that is the clear grammatical and popular meaning of the words—may be protected by caveat.

I would, therefore, affirm the decision of the Master and dismiss the appeal with costs; subject to the agreement which the parties have made as to costs.

HYNDMAN, J.A.—I would dismiss this appeal largely for the reasons set out in the judgment of the learned Master.

Whilst it may not be necessary in this case to decide that the wife has a present vested right in the homestead, which as Stuart, J., said in *Overland v. Himelford*, 52 D.L.R. 429, gave her the right to stick to her home and residence even while her husband lived in addition to the life estate after his death, nevertheless there can be no doubt about the right or interest which she has in the property contingent on her surviving him.

If once being admitted that an interest, however small, does exist, it seems to me that is sufficient to justify her filing a caveat to protect that right. Section 80 of the Land Tiles Act is very wide in its terms and the *ejusdem generis* rule in my opinion cannot properly be applied, otherwise, there would be numerous instances where persons having an interest in land would be unable to protect or maintain such interest. The words "otherwise howsoever" seem unlimited in their scope and ought to be interpreted so as to extend to and comprise any valid interest, whether present, future or contingent.

The respondent should be entitled to her costs as though the appeal had come before a Judge sitting in Chambers in accordance with the agreement in that respect mentioned at the argument.

CLARKE, J.A.:—I agree that the plaintiff has such an interest under the Dower Act as entitles her to file a caveat against her husband's homestead, but reserve for further consideration, when it arises, the question of what possessary or other rights she has in the property during her husband's lifetime.

I would dismiss the appeal with costs as of an appeal to a single Judge. *Appeal dismissed.*

LEFAIVRE & GAGNON v. DE LISLE.

Quebec Superior Court in Bankruptcy, DeLisle (Registrar), May 9, 1922.

BANKRUPTCY (§I—6)—AUTHORISED TRUSTEE—AUTHORITY TO FIX DATE FOR MEETING OF CREDITORS—RIGHT TO CHANGE DATE WHERE IMPOSSIBLE TO GIVE PROPER NOTICE—ILLEGALITY OF MEETING HELD ON DATE NOT SO FINALLY FIXED.

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LEFAIVRE AND GAGNON. v. DE LISLE.

DeLisle, Registrar.

An authorised trustee under the Bankruptcy Act was duly authorised to take possession of the estate and to deprive the authorised assignor of the possession thereof, as though he were sequestrator of the estate of the assignor. The Court held that the authorised trustee was the only person who had the right to fix the date for the holding of the meeting of creditors, and where it is impossible to give the proper notice of a date first fixed, he may cancel such date and fix a new date, and a meeting held by certain creditors on any but the date so finally fixed is illegal and null.

PETITION for an order substituting the petitioners for the authorized trustee under the Bankruptcy Act. Dismissed.

L. Desbois, for trustee. *C. Gagné*, for petitioner.

DELISLE (Registrar):—On March 8, 1922, L. J. Lavoie, general merchant, of St. Alexis de la Grande Baie, P.Q., made an authorised assignment to Joseph Henri DeLisle, of Robervale, authorized trustee. The authorized trustee, J. H. DeLisle, by virtue of an order made on March 10, 1922, was authorized to take possession of the estate and to deprive the authorized assignor of the possession thereof, the whole as though he were sequestrator of the estate of the said authorized assignor. On March 10, 1922, the authorized trustee, J. H. DeLisle, sent to the "Canada Gazette" a letter containing notice of a meeting to be published on March 18, 1922, by which notice he called a meeting of the debtor's creditors for March 30, 1922. This notice which was to be published on March 18 did not appear until March 25 and notice of the meeting could not be given in the "Progres du Saguenay," a newspaper published in the locality where the authorized assignor lives, until March 30, 1922. This notice given on March 30 could not call a creditors' meeting for the same day, so it fixed a new date, April 6, 1922, for the meeting. The trustee sent to all the creditors by registered letter, a notice informing them that the meeting to which they had been summoned for March 30 could not be held and that he summoned them again for April 6, 1922.

On March 27, 1922, Thibaudeau & Frères et Cie. notified the trustee, J. H. DeLisle, that they could not consent to a postponement of the meeting and that they would be present at the meeting called for March 30, 1922. On March 30, 1922, a certain number of creditors, apparently represented by proxies, held what they termed a meeting at which a resolution was made and carried substituting Lefaivre & Gagnon as authorised trustees in the place and stead of J. H. DeLisle, the trustee in legal possession of the property of the authorised assignor. It was also proposed that Jean Charles Gagné be appointed attorney in the matter: this resolution in particular was passed.

The petitioners, Lefaivre & Gagnon, now ask the Court that

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they be substituted for the said J. H. DeLisle and that Jean Charles Gagné be appointed attorney for the estate.

The official authorized trustee alone had the right to fix the date for holding the meeting of creditors. As the date which he had fixed was April 6, 1922, and not March 30, 1922, it follows that the alleged meeting of March 30, 1922, held by certain creditors in spite of notice received by them that the meeting could not be held on that date, as it had been impossible for the authorised trustee, J. H. DeLisle, to give the required notices in time, must be considered illegal and null. Besides, one trustee cannot be substituted for another except by the majority of the creditors who have proved debts of $25 or more and who represent at least half of the number of proved debts of $25 or more, sec. 15 of the Bankruptcy Act as amended by 1921 ch. 17, sec. 16.

Furthermore, it appears by the debtor's statement that the number of unsecured creditors is 29 and that the amount of their claims is $10,093.52. There were only 9 creditors present at the alleged meeting of March 30, 1922, and even if that meeting could legally have been held, there was not a sufficient number of creditors present to make a substitution of trustees.

For all these reasons the meeting held on March 30, 1922, is declared illegal and null, the petition of the petitioners, Lefaivre & Gagnon, is dismissed with costs and J. H. DeLisle is confirmed in his appointment as trustee, and Lefaivre & Gagnon, the petitioners, are condemned personally to pay the costs of the contestation by distraction to Désiré L. Desbois, attorney for the trustee, J. H. DeLisle.

Judgment accordingly.

McKINNON & McKILLOP v. CAMPBELL RIVER LUMBER Co.

British Columbia Court of Appeal, Macdonald, C.J.A., McPhillips and Eberts, JJ.A. March 10, 1922.

INTEREST (§IB—20)—WHEN ALLOWABLE—MONEY ADVANCED AND USED FOR BENEFIT OF BORROWER—AGREEMENT BETWEEN PARTIES—AGREEMENT ULTRA VIRES—INTEREST IN FORMAL JUDGMENT ALLOWED AT RATE FIXED IN AGREEMENT—APPEAL—DISALLOWANCE OF INTEREST.

Upon an action being brought to compel specific performance of an agreement the agreement was held to be *ultra vires* the respondent. An action was then brought wherein the Court allowed the appellants the sum of $65,000 as being moneys advanced to the respondent and which moneys went to the benefit of the respondent, all being paid out to discharge debts of the respondent. The formal order for judgment as settled by the Registrar provided for interest at the rate provided for in the agreement until the date of the judgment. The Court held that the law in

British Columbia was the same as it was in England on November 19, 1858, and that the judgment as settled by the Registrar should be amended by striking out the provision allowing interest.

[*London, Chatham and Dover R. Co.* v. *South Eastern Railway*, [1893] A.C. 429, 63 L.J. (Ch.) 93, followed; *Toronto Railway* v. *Toronto City*, [1906] A.C. 117, 75 L.J. (P.C.) 36, distinguished; *Rhymney R. Co.* v. *Rhymney Iron Co. Ltd.* (1890), 25 Q.B.D. 146, 59 L.J. (Q.B.) 414, 38 W.R. 764, referred to.]

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MCKINNON AND MCKILLOP v. CAMPBELL RIVER LUMBER CO.

McPhillips, J.A.

APPEAL by motion from Registrar's settling of judgment on the question of interest on the judgment of the Court of Appeal of January 10, 1922, amended by striking out provision allowing interest.

C. W. Craig, for motion. *Joseph Martin*, K.C., *contra*.

The judgment of the Court was delivered by

McPHILLIPS, J.A.:—This is an appeal from the settlement of the judgment of this Court, which allowed the appellants the sum of $65,000 as being moneys advanced to the respondent and which moneys went to the benefit of the respondent, all being paid out to discharge debts due and owing by the respondent, i.e., the moneys were received by the respondent and were applied in the payment of debts of the respondent. It was first contemplated that the moneys would be secured by way of mortgage upon the property of the respondent, a saw-mill property, but, as that would have affected the financial standing of the respondent, an agreement to purchase certain shares in the North American Lumber Co. held by McKinnon and standing in his name (he holding the shares as trustee for the respondent), was entered into and it was agreed that the shares would be purchased by the respondent at a fixed price, which would have resulted in the re-payment of the $65,000 and interest thereon at 6½% per annum. The period of credit was to be 4 years; the moneys then together with interest to be repaid. Upon action being brought to compel specific performance of this agreement, the agreement was held to be *ultra vires* of the respondent—beyond its corporate powers. Then this action was brought and the decision of this Court was as above stated.

When the formal order for judgment was settled by the Registrar, interest was provided for from April 14, 1914 at the rate of 6½% per annum until January 10, 1922, the date of judgment of this Court. The question now is—Can interest be allowed at the rate inserted in the judgment as settled by the Registrar or at the legal rate of 5% per annum? This raises a very important question as to what the governing law of British Columbia is in the absence of a valid written agreement providing for the payment of interest. The question was

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considered in the Privy Council in *Toronto Railway* v. *Toronto City*, [1906] A.C. 117, 75 L.J. (P.C.) 36. That was a case that went from the Province of Ontario, and interest was allowed in the Courts of Ontario and affirmed in the Privy Council. In this Province, however, there is no statute law of the Province dealing with the matter. In Ontario, by the Ontario Judicature Act 1897, sec. 113, "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it." There are no decided cases upon the point in British Columbia. In view of the absence of statute law of the Province, it is clear that the law upon this point must be determined according to the law of England as it existed on November 19, 1858. (English Law Act, ch. 75, R.S.B.C. 1911). In *Toronto Ry.* v. *Toronto City, supra*, Lord Macnaghten said, at pp. 120-1:—

"The question as to interest is not so simple. If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *London, Chatham and Dover Ry. Co.* v. *South-Eastern Ry. Co.*, [1893] A.C. 429, would probably be a bar to the relief claimed by the corporation. But in one important particular the Ontario Judicature Act, (R.S.O. 1897, c. 51.) which now regulates the law as regards interest, differs from Lord Tenterden's Act. Section 113, which is a re-production of a proviso contained in the Act of Upper Canada, 7 Will. 4, c. 3, s. 20, enacts that 'interest shall be payable in all cases in which it is now payable by law, or in which it has been usual for a jury to allow it.' The second branch of that section (as Street, J. observes) is so loosely expressed as to leave a great latitude for its application. There is nothing in the statute defining or even indicating the class of cases intended. But the Court is not left without guidance from competent authority. In *Smart* v. *Niagara and Detroit Rivers Ry. Co.* (1862), 12 C.P. 404, Draper, C.J. refers to it as a settled practice 'to allow interest on all accounts after the proper time of payment has gone by.' In *Michie* v. *Reynolds* (1865), 24 U.C.R. 303, the same learned Chief Justice observed that it had been the practice for a very long time to leave it to the discretion of the jury to give interest when the payment of a just debt had been withheld. These two cases are cited by Osler, J.A., in *McCullough* v. *Clemow* (1895), 26 O.R. 467, which seems to be the earliest reported case in which the question is discussed. To the same effect is the opinion of Armour, C.J. in *McCullough* v. *Newlove* (1896), 27 O.R. 627. The result, therefore, seems

to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate, as the Court may think right. Acting on this view, the Divisional Court and the Court of Appeal, consisting in all of seven learned Judges, have given interest in the present case, though not without some hesitation on the part of Britton, J., in the Divisional Court, and some hesitation on the part of Osler, J.A., in the Court of Appeal. Their Lordships have come to the conclusion that the judgment under appeal ought not to be disturbed. The question is one in which the opinion of those familiar with the administration of justice in the province is entitled to the greatest weight. Their Lordships are not satisfied that the decision of the Court of Appeal, which evidently has been most carefully considered, is in any respect erroneous."

It is clear that the judgment of the Privy Council would have been the other way were it not for statute law of Ontario and the authorities in that Province referred to by Lord Macnaghten. It is evident then that the controlling decision is *London, Chatham and Dover Ry. Co.* v. *South Eastern R. Co.*, [1893] A.C. 429, 63 L.J. (Ch.) 93, a decision of the House of Lords. The head note of the case aptly defines the judgment in the House of Lords and it reads as follows (63 L.J. (Ch.) 93):—

"Interest—3 & 4 Will. 4 c. 42, s. 28—Written instrument—Time of Payment Dependent or Contingent Event.

By an agreement and an award the profits of certain railway traffic were to be shared between two railway companies, accounts exchanged monthly and verified, and the balances paid by the 15th of the following month. A dispute arose whether certain traffic was included under the agreement; and in an action for account the official referee found a large sum to be due from the respondents to the appellants, and allowed interest on that sum: Held, affirming the decision of the Court of Appeal (61 Law J. Rep. Chanc. 294; Law Rep. (1892) 1 Ch. 120), that no interest was payable—because, first, there was no sum certain due 'by virtue of a written instrument at a certain time' under 3 & 4 Will 4 c. 42, s. 28; secondly, no demand in writing for the amount with notice that interest would be claimed as required by the statute had been made; nor, third-

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ly, could interest be given by way of damages in respect of the wrongful detention of the money."

It is true there was a written instrument in the present case, but it cannot be looked at as it has been held to be invalid, *i.e.*, *ultra vires* of the company (the respondent.)

The situation then is—Can interest be allowed in the present case? Lord Herschell, L.C. at pp. 439-441 in the *London, Chatham and Dover R. Co.* v. *South Eastern Railway, supra,* said:—

"But in the case of *Page* v. *Newman* (1829), 9 B. & C. 378, 109 E.R. 140, the matter was considered by the Court of King's Bench, presided over by Lord Tenterden, the other judges sitting with him being certainly judges of high authority, namely, Bayley, Littledale and Parke, JJ. He there referred to the language of Best, C.J. which I have just read, and he said: 'If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in *Arnott* v. *Redfern* (1826), 3 Bing. 353, 130 E.R. 549, would seem to warrant—namely, that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at nisi prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule that interest is not due on money secured by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.'

Now my Lords, I cannot profess to be altogether satisfied with the reason which Lord Tenterden gives, although of course for so eminent a judge one entertains the greatest respect. To say that it might be made a question at nisi prius whether proper means had been used, and that it might be productive of great inconvenience, does not seem to me a satisfactory reason for excluding altogether any claim to interest by way of damages in cases where justice requires that it should be awarded. There might be inconvenience; but it seems to me that such inconvenience might reasonably be submitted to, and ought to be submitted to, if it is necessary for the purpose of applying a sound principle in a just manner. There are a great many things at nisi prius which are decidedly inconvenient; no doubt one would desire always to avoid inconvenience in de-

termining questions between litigants; but it cannot be avoided, and therefore I do not profess to be altogether satisfied with the reason which Lord Tenterden gives. Nevertheless, so far as I am aware, from that time down to the present the rule which Lord Tenterden lays down has been followed, and no attempt has been made (or at all events has received the sanction of the Courts) to revert to the earlier and, as I think, more liberal views of those who preceded him. And one cannot shut one's eyes to the fact that Lord Tenterden, who presided and delivered that judgment was the author of the statute to which I have been directing the attention of your Lordships, under which interest can now be allowed; and when he dealt with the allowance of interest in this statute he certainly introduced language which kept such claims within very narrow limits; speaking for myself, they seem to be too narrow for the purposes of justice. Nevertheless, having regard to the view of the law laid down by the Court of King's Bench in the case which I have just mentioned, and to the statute passed subsequently with obvious reference to it by the Legislature, and the absence since that time of any case in which the doctrine of Lord Mansfield or of Best, C.J., has received practical effect in any decision in any of the Courts, I do not think it would be possible nowadays to re-open the question, even in this House, and to hold that interest under such circumstances could be awarded."

And at pp. 441-2, Lord Watson said:—

"Upon both questions raised in this appeal I have had little difficulty in coming to the same conclusion with the Lord Chancellor. My noble and learned friend has dealt with the case, in all its aspects, so fully and satisfactorily, that I shall content myself with briefly indicating the leading considerations which have influenced my opinion.

Upon the second question I see no reason to doubt that the decision of the Court of Appeal is right. Whatever might be said in regard to the older authorities upon the matter of interest, I am of opinion that the law laid down by Lord Tenterden in *Page v. Newman*, to the effect that 'interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments,' is not now open to question. The Act 3 & 4 Will. 4 c. 42, is evidently framed upon the assumption that the law was correctly stated by Lord Tenterden in that case; and in dubio such a statutory recognition is not unimportant. Besides, Lord Tenterden's rule, except in cases

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when it has been relaxed by the statute, appears to have been followed in the decisions since its date.

The appellants cannot in my opinion bring their claim for interest within the first branch: and whilst I approve of the equitable rule to which Stuart, V.C. gave effect in *Mackintosh* v. *The Great Western Railway Company*, 4 Giff. 683, I do not think it can be strained so far as to give them the benefit of the second branch of the statute. I regret that I am unable to differ from your Lordships upon the question whether interest could be given in this case by way of damages; I think it clearly cannot, for the reasons which have been sufficiently expressed by the Lord Chancellor and by the learned judges of the Appeal Court. To my mind, the state of the law as settled by statute and decisions is not altogether satisfactory."

The judgment last referred to of the House of Lords was considered, as we have seen, in *Toronto Ry.* v. *Toronto City*, *supra*, and, as above quoted, Lord Macnaghten said at p. 120:—

"If the law in Ontario as to the recovery of interest were the same as it is in England, the result of modern authorities ending in the case of *London, Chatham and Dover Ry.* v. *South Eastern Ry.*, [1893] A.C. 429, 63 L.J. (Ch.) 93 would probably be a bar to the relief claimed by the corporation."

It would appear to me to be impossible, in view of the state of the law, to hold that interest could be awarded. Lord Shand expressed his regret in the *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, *supra*, in these words:—

"I shall only add that I regret that the law of this country in regard to the running of interest is not like the law of Scotland with which I am more familiar."

I also have my regrets in the present case as the respondent has had the benefit of the moneys of the appellants for now some 8 years and can only be required to pay the principal sum, namely, $65,000.

In passing I would refer to the *Rhymney Ry. Co.* v. *Rhymney Iron Co. Ltd.* (1890), 25 Q.B.D. 146, 59 L.J. (Q.B.) 414, 38 W.R. 764. It was in that case held that:—

"A claim in the writ for interest upon the amount claimed from the date of the writ till payment or judgment is not a good demand for the purposes of 3 & 4 Wm. 4, c. 42, s. 28, which provides for the allowance of interest in certain cases 'from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.'"

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I note that the judgment as drawn up is properly dated January 10, 1922. It was lately held in the Court of Appeal in England in *Nitrate Produce Steamships Co.* v. *Shortt Bros. Ltd.* (1921), 66 Sol. Jo. 5, that the judgment in that case must be entered as on the date the House of Lords gave its decision and that interest at the legal rate will only run from the date of the judgment in appeal not from any earlier date. The appeal, in my opinion, should be allowed and the judgment as settled by the Registrar should be amended by striking out the provision allowing interest.

Judgment accordingly.

NEEDLES v. SLOVARP.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

PLEADING (§IS—146)—STRIKING OUT ENTIRE—NOTICE OF MOTION —GROUNDS—DURESS AND COMPULSION—WHAT CONSTITUTES— SASK. KING'S BENCH RULES 157, 210, 211, AND 208.

The manager of a bank has the right to impose the conditions upon which he will consent to further carry on the liability of a customer, and a wife who signs a note jointly with her husband in accordance with the terms so imposed, cannot set up the defence that the note was signed under compulsion and duress, and a defence so alleging will be struck out.

APPEAL by defendant from an order striking out the appellant's defence with costs. Affirmed.

P. H. Gordon, for appellant.

S. F. Arthur, for respondent.

HAULTAIN, C.J.S. concurs with LAMONT, J.A.

LAMONT, J.A.:—I concur in the conclusion of my brother McKay, and for the reasons given by him, that the District Court Judge was right in striking out paras. 1, 2 and 3 of the statement of defence of the defendant Katherine Slovarp.

I am, however, also of opinion that he was right in striking out para. 4; for, assuming the facts to be as set out by the defendant herself, namely, that the manager of the bank did tell her husband that he would not renew the note of the defendant, Katherine Slovarp, unless she signed along with her husband the note sued on and also signed a renewal note for her own indebtedness; they do not constitute compulsion or duress, as alleged in para. 4. It was within the right of the manager of the bank to impose the conditions upon which he would consent to further carry the defendant's liability, and, in my opinion, the conditions imposed were not such as would con-

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stitute a defence to the action. I am unable to see that it is even arguable.

I would, therefore, dismiss the appeal with costs.

TURGEON, J.A.:—I agree that this appeal should be dismissed with costs. Paras. 1, 2 and 3 of the statement of defence do not call for any lengthy reference in view of what is stated by my brother McKay in his judgment. I think, however, para. 4 must go as well. Both in this paragraph itself and in her affidavit in support of it the defendant, Katherine Slovarp alleges facts which, apparently, disclose her whole case on this point and which obviously do not constitute duress.

McKAY, J.A.:—The respondent brought this action on a promissory note made by the defendants for $311, dated April 14, 1921, due on August 1, 1921, payable to the respondent at Eastend, Saskatchewan.

Judgment was signed against defendant Severt Slovarp, but the appellant filed a defence, wherein she denies:—1. That she is indebted to respondent or that she made the note sued on; 2. That it was presented for payment. And in the alternative, if she did make it, which she denies, she says:—3. That it was made without consideration. 4. That she signed it under compulsion and duress.

The particulars of the compulsion and duress alleged are shortly as follows:—On April 14, 1921, the respondent was indebted to the Union Bank of Canada at Eastend in the sum of $320, and the defendant Severt Slovarp and Percy G. Wood, the then manager of the said bank at Eastend, were indebted to the respondent in the sum of $300, and the appellant was indebted to the said bank in the sum of about $900. The appellant, through her husband, the defendant Severt Slovarp, applied to the said bank to take a renewal note for her said debt, and the said Severt Slovarp acting as agent for the said bank, she claims, told her that said bank manager Wood informed him he would not renew her note unless she signed the note sued on, which she did, and also signed a renewal note for her said debt.

The appellant was examined for discovery, and in her examination admitted that she made the note sued on. The respondent thereupon applied by notice of motion to the District Court Judge in Chambers to strike out the appellant's defences on the grounds:—1. That the said defence is false, frivolous and vexatious; 2. That the defence discloses no reasonable answer to the plaintiff's claim; 3. That the said defence tends to hinder, prejudice, embarrass and delay the fair trial of this

action; and for an order to enter judgment against the appellant for the amount of plaintiff's claim and costs.

The District Court Judge granted the application and struck out the appellant's defence with costs. The appellant now appeals therefrom.

The Rules of Court under which the respondent made his application are King's Bench Rr. Nos. 157, 210 and 211, which are made applicable to the District Court, and particularly Rr. 210 and 211, which are as follows:—

"210. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in the case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

211. Statements of defence or other pleadings which are false, frivolous or vexatious may on affidavit be set aside, in whole or in part, on such terms as to costs or otherwise as the court or a judge thinks fit."

The motion to strike out the defence involves questions of fact and law, and of course the said rules provide for the dealing with of such questions. For instance, R. 211 provides for the striking out of a pleading in whole or in part if "false." And this can only be done after ascertaining the truth or falsity of the fact alleged on evidence which is not contradictory. (*Canadian Grain Co.* v. *Lepp* (1916), 33 D.L.R. 185, 9 S.L.R. 447, and the cases there cited). And R. 210 provides for the striking out of the defence if "it discloses no reasonable answer" to the claim, "or in the case of the defence being shewn by the pleadings to be frivolous or vexatious."

Rule 208 also provides for a method of attacking pleadings on questions of law. This rule is as follows:—

"208. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial:

Provided that, by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."

The question to consider seems to me to be, even admitting that the defence is faulty, should the District Court Judge have struck out the whole defence on the application in ques-

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tion under Rr. 157, 210 and 211, or should the application as to part of the defence have been made under R. 208.

The authorities seem to be to the effect that a pleading should not be struck out on a question of law on a summary application unless it is so plainly and obviously bad that a Master or Judge can say at once that the pleading is insufficient. It is to be noted that R. 210 says "reasonable" answer, and the authorities go to shew that under this rule it is not necessary to have a valid defence. If it is a reasonable defence, but not a valid one, it can be attacked under R. 208.

In *Glass* v. *Grant* (1888), 12 P.R. (Ont.) 480, on a summary application to strike out a defence and counterclaim, Boyd, C., refusing the application, said:—

"As a general rule I think the Judge should be chary in setting aside defences on a summary application, unless the pleading is so plainly frivolous or indefensible as to invite excision . . . . Here I should not be disposed to uphold the defence complained of on demurrer, but that does not appear to me to be a sufficient reason for expunging it from the record."

And in *Hubbuck* v. *Wilkinson*, [1899] 1 Q.B. 86, 68 L.J. (Q. B.) 34, Lindley, M.R. said at p. 91:—

"Two courses are opened to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles plaintiff to relief. One method is to raise the question of law as directed by Order XXV, 2;" (our 208) "the other is to apply to strike out the statement of claim under Order XXV r. 4" (our 210). "The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious; so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression 'reasonable cause of action' in rule 4 shews that summary procedure there introduced is only intended to be had recourse to in plain and obvious cases."

In *McEwen* v. *North-West Coal and Navigation Co.* (1889), 1 Terr. L.R. 203, in an application to strike out a statement of claim under sec. 125 of the Judicature Ordinance, ch. 58 of R.O. 1888, similar to our R. 210, McGuire J., delivering the judgment of the Court allowing the appeal, said at pp. 208-9:—

"It seems to me that there is an important distinction between, 'no cause of action' and 'no reasonable cause of action;' the word 'reasonable' must I think, mean something, and in

my opinion it means a cause of action, which may or may not turn out to be a good cause of action, but which is at least reasonable or probable—one which is not clearly bad, but where there is, in the language of Fry J. above quoted, 'any question of law to be argued.' ''

In *Kew* v. *Watt* (1908), 1 S.L.R. 11, the Court *en banc* followed the above authorities.

It seems to me that the defence in question is not so plainly and obviously bad that the whole defence should be struck out on an application of this kind.

But, in my opinion, the District Court Judge was right in striking out paras. 1, 2, and 3, as being plainly and obviously false or insufficient.

The first part of para. 1 is insufficient because it is evasive, and the last part because it is false. Paragraph 2 is insufficient because a note not made payable at some particular place, such as the note sued on, does not require to be presented in order to render the maker liable. (Sec. 183, R.S.C. 1906, ch. 119. *Walton* v. *Mascall* (1844), 13 M. & W. 452, 153 E.R. 188.

Paragraph 3 is insufficient as a defence because it is false, as appellant's defence and examination shew that there was consideration for the note, in that it was given for a debt due to respondent by defendant Severt Slovarp and the bank manager, and the appellant, as far as respondent was concerned, made it for the accommodation of Severt Slovarp.

Without saying whether para. 4 is sufficient or not, it seems to me that it is at any rate not so plainly and obviously insufficient that it does not require some argument and careful consideration, and I think the District Court Judge was wrong in striking it out on the summary application in question.

The conclusion that I have arrived at is that the District Court Judge should not have struck out the whole defence, but only paras. 1, 2, and 3.

This decision is not to prejudice the respondent in attacking the balance of the defence under R. 208, should he desire to do so, and the time for replying to same is hereby extended to 20 days from this date.

The appeal is, therefore, allowed as to para. 4, and the District Court Judge's order reversed in so far as it set aside said paragraph.

The appellant will be entitled to her costs of this appeal in the cause.

Appeal dismissed.

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App. Div.

McINTOSH v. PREMIER LANGMUIR MINES Ltd.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins, and Ferguson, JJ.A. May 13, 1921.

COMPANIES (§IVG—120)—MONEY ADVANCED BY PRESIDENT—REPAYMENT—CONDITIONS—EVIDENCE—SALES OF SHARES BY PRESIDENT—COMMISSION—RESOLUTION AT ANNUAL MEETING—COMPANIES ACT (ONT.), SEC 92—CONSTRUCTION—RECOVERY BACK OF MONEY PAID.

Where the letters patent issued under the Ontario Companies Act, incorporating a company, contained a clause providing that "the company may pay a commission not greater than 25 per centum upon the amount realised upon the sale of shares," a by-law under sec. 92 of the Act, authorising payment to a director and president of the company for the sale of shares is not necessary, where the commissions do not exceed the rate authorised by the letters patent, the payments being made to him not as a director or president but as a selling agent, on the same terms as other selling agents. Held also, that the evidence did not justify a finding that advances made by the plaintiff were only to be repaid when the company's mines should become productive, when repayment was to be made out of profits.

APPEAL by defendant from the judgment of Logie, J., in certain actions for the repayment of monies advanced to the defendant, and also on four promissory notes given to the plaintiff by the defendant company, and for money paid by the plaintiff for the defendant. Affirmed.

The judgment appealed from is as follows:—

LOGIE, J.:—The first action was upon a stated account. The plaintiff claimed $6,617.59 for money advanced to the defendant company and paid for the use of the defendant company. The account was passed by the directors and shareholders and admitted.

In the first action the defendant company counterclaimed for the return of certain commissions on the sale of the defendant company's stock, received and retained by the plaintiff for his own use, and also commissions on the sale of the defendant company's stock paid to alleged agents of the plaintiff, without the authority of the directors or shareholders of the company.

The second action was for the amount of 4 promissory notes (and interest) given to the plaintiff by the defendant company, amounting in all to $20,333.32, and for money paid by the plaintiff for the defendant company, amounting to $308.85.

In the second action the defendant company made the same counterclaim as in the first.

In the first action liability is admitted for $6,617.59. There will be judgment for this amount, with interest from the 1st February, 1919, and costs.

The counterclaim in this action is admittedly the same as the

counterclaim in action No. 2, viz., a claim for the repayment to the defendant company by the plaintiff of certain commissions paid to him and others alleged to be his agents on the sale of the company's stock, amounting in all to $11,654.95.

It was agreed that I should try the question of the right of the defendant company to recover from the plaintiff the commissions paid to him personally; and also whether the defendant company was entitled to collect from the plaintiff certain other commissions on the sale of stock paid by the company's cheques, signed by the plaintiff as president and by the secretary-treasurer, to others, as being money illegally paid away by him for which he was liable to reimburse the defendant company, leaving in abeyance for a reference later on, in the event of my determining these questions against the defendant company, the question whether he had actually earned the commissions paid to him and if so how much.

No attempt was made at the trial to establish the relationship of principal and agent between the plaintiff and the various persons other than plaintiff to whom commissions were paid.

The plaintiff rests his right to commissions on the following grounds:—

1. The charter expressly provided for it.

2. The directors by their resolution of the 20th March, 1914, authorised the payment of commission on two blocks of stock to the plaintiff.

3. The shareholders, at the annual meeting of the company held on the 6th July, 1916, authorised the payment of commissions to "officers" of the company on the same terms as to outside salesmen—and the plaintiff as president was an officer.

4. The shareholders at the meeting of the 25th August, 1916, expressly ratified all payments to officers, etc., for commission on the sale of stock.

5. The books of the company shew that the course of business of the company was, from the inception of the company, to pay commissions on shares sold.

6. This course of business was disclosed to the shareholders by the various annual financial statements of the company, which were duly ratified and confirmed without objection or comment by the shareholders; and these authorised the payments to the president, but, if not, the company was estopped.

In addition, the company complied with the Ontario Companies Act, 1907, 7 Edw. VII. ch. 34, sec. 96, sub-sec. 1 (R.S.O. 1914, ch. 178, sec. 100, sub-sec. 1).

The payment of commissions and the amount or rate per

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cent. agreed to be paid were authorised by the letters patent dated the 20th April,, 1911, and disclosed by the company's prospectuses dated respectively the 7th November, 1911, and the 24th October, 1914, filed with the Provincial Secretary.

According to the evidence of Aikenhead, the secretary-treasurer, the individual commissions were, up to the 11th June, 1915, brought before and passed by the directors for payment.

After this, both he and the auditor took, as their authority to pay, the resolution of the shareholders of the 6th July, 1915, and the practice was, upon receiving a cheque for shares at the duly authorised price, to compute the commission and send a cheque for it to the person sending the company the cheque for the shares, and not to bring the individual amounts of the commissions so paid before the board.

There was ample authority for this course.

The meeting of the 6th July, 1915, was the annual general meeting of the shareholders of the company, and the resolution above referred to was as follows:—

"Moved by R. J. Watson, seconded by George McBroom, that in regard to any sales of the company's stock the directors be authorised to extend to any officer or shareholder of the company the same terms as to outside salesman (*sic*). Carried."

The meeting of the 25th August, 1916, was also the annual general meeting of the shareholders of the company. At it the following resolution was passed:—

"Moved by D. Urquhart, seconded by D. L. Chapman, that all expenditures and payments made by the directors and officers of the company up to and including the dates (*sic*) of the financial report presented at this meeting to any persons, whether officers or directors of the company, for commission on the sale of stock . . . be and the same (*sic*) ratified and confirmed."

The resolution of the 20th March, 1914, was a motion carried by the directors directly referring to payment of commission on two blocks of stock, of 150,000 shares each, to the plaintiff, and is as follows:—

"Moved by George McBroom, seconded by A. E. Somerville, that the president, J. A. McIntosh, be instructed to sell 150,000 shares at 10 cents per share and 150,000 shares at 15 cents per share at a commission of 25 per cent. Carried."

The books of the company shew a "commission on sales a/c." The ledger is produced. From the 1st March, 1914, to the 31st August, 1919, the above account discloses a consistent course of business dealing in respect of the payment of commission, not

only to the plaintiff, but to other directors and shareholders, amounting to nearly $17,000. The times when and the parties to whom these commissions were paid are spread upon the pages of the journal. These books were audited. The auditor's stamp appears upon them and upon the several cheques issued for commissions.

The payment of these commissions appears in the financial reports of the secretary-treasurer from year to year. These were audited by the auditor, submitted to and passed by the board, and finally ratified without question by successive annual meetings of the shareholders of the company.

Clearly, with the authority to pay which has been set forth above, the plaintiff is not liable to refund the commissions paid to him, much less to refund those paid to others.

Finding as I do that the plaintiff was entitled to the commissions paid him, it is not necessary for me to consider the question of estoppel.

But it is said that the commissions were secret commissions, and therefore should be repaid. I cannot agree.

The disclaimer by the directors Curtis and Greer, prominent and successful business men in London, of knowledge of payment of commissions to the plaintiff I do not credit. I believe they did know; but, if they did not, that fact does not render the payments secret.

Payments authorised by the charter, spread upon the pages of the company's books, disclosed in the prospectuses, passed by the directors, audited by the auditor, and included in the financial reports, could by no stretch of the imagination be classed as secret.

The counterclaims, therefore, in both actions fail, and are dismissed with costs, if no reference is had as to the plaintiff having earned the amounts paid to him.

The defendant company may have, at its risk as to costs, a reference as to whether the plaintiff actually earned the commissions paid him and if so how much; and, if it appears that any of the commissions paid to him were not properly earned by him and should be refunded, the case may be spoken to again as to this and also as to the costs of the counterclaim.

I come now to the defence in action No. 2.

The plaintiff agreed to give certain shares of his own, amounting to 100,000, to be sold for the benefit of the company and the proceeds repaid to him.

He made the announcement with reference to these shares at an informal meeting of shareholders held on the 6th October, 1917. The evidence is contradictory as to what he said.

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According to witnesses for the defendant company, he said in effect that he would give 100,000 of his own stock to assist in financing the company, to be repaid only when the mine was producing, out of profits, and, according to the plaintiff, to be repaid when the mine was producing, out of profits; but, as this was uncertain, though expected in a short time, to be repaid at all events within a year.

It was contended that this offer was not a proposition for a loan of the proceeds of the 100,000 shares, but that it was some intermediate thing, neither a gift nor a loan.

I have no difficulty in holding that it was a proposition for a loan; and, as no consideration passed from the defendant company, it was, until accepted, *nudum pactum* and unenforceable against the plaintiff. Now this offer was never in terms accepted by the shareholders as such; and, if it were necessary for the decision of this case to determine which of the two versions of the plaintiff's offer was correct, I would have no hesitation in holding that the plaintiff's account is the correct one.

It is corroborated by a resolution of the directors of the 14th December, 1917, and it is incredible to me that the directors, hard-headed business men as they were, could so soon have forgotten so important a provision and failed to include it in the resolution of that date.

I prefer to think that they have now forgotten that the plaintiff set a time-limit. The resolution of the 14th December, 1917, is as follows:—

"Moved by F. G. Rumball, seconded by J. P. Hunt, that, whereas it is necessary to borrow money to carry on the business of the company, to pay wages and other outgoings until the company is in a position to market its product, and whereas John A. McIntosh, the president of the company, has offered to advance money from time to time to the company, and whereas the said John A. McIntosh has already advanced to the company the sum of $2,000: now, therefore, be it resolved that the directors of the company be authorised to borrow such sums of money from time to time from the said John A. McIntosh as he may be willing to advance to the said company, and any sum or sums so borrowed, including the said sum of $2,000, shall be repaid to the said John A. McIntosh within one year from the date hereof without interest. The said John A. McIntosh, being interested in the subject-matter of the said resolution, refrained from voting on it. Carried."

It was admitted and I find as a fact that this resolution referred to the money then being advanced by the plaintiff from the

sale of the 100,000 shares, and it was the contract of the defendant company with the plaintiff in regard thereto. The directors had ample power, by virtue of the general borrowing by-law, to pass this resolution and to borrow from the plaintiff.

The plaintiff's case however does not rest here.

An agreement dated the 1st February, 1919, under the seal of the company, was entered into between the plaintiff and the company.

By it, after reciting as is therein recited, the company acknowledged its indebtedness to the plaintiff in the sum of $20,000 in respect of the proceeds of the sale of the 100,000 shares, and that it had given the plaintiff 4 promissory notes (the notes sued on) payable one year from the date thereof, and the plaintiff on his part agreed to place at the disposal of the company an additional 50,000 shares to be sold at a certain price, the proceeds of which were to be used for the benefit of the company. This 50,000 shares was an absolute gift.

The above agreement was authorised at the directors' meeting of the 15th February, 1919, and the agreement, though dated the 1st February, 1919, was executed after the 15th.

I reject the evidence of the directors who say they did not read it or understand its contents. I find as a fact that they both read it and understood its terms.

For the execution of this agreement no additional consideration was necessary. There was a valid existing consideration —the overdue debt of the company to the plaintiff.

But, if additional consideration was needed, I find as a fact that the gift of 50,000 shares of the plaintiff's stock, free to the company, afforded consideration for the execution of the agreement in question. I admitted, subject to objection, evidence which tended to add to, vary, or contradict this transaction, which was in writing.

I did so because I was not sure that such evidence might not bring the transaction within an exception to the rule, viz., that it might disclose a verbal collateral agreement on the same subject-matter consistent with the written agreement, or that there was a collateral verbal agreement suspending the operation of the written transaction.

I am convinced that the alleged verbal agreement "not to enforce payment of the notes till the mine produced," or "that payment of the notes was not to be made until they could be paid for out of profits," does not come within either of the exceptions above referred to; but that, if it was made at all, as to which I again prefer the plaintiff's evidence, it was a variation

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of the written agreement disclosed by exhibit 1 and the notes sued on, and should not have been admitted by me.

I therefore now exclude it. The notes being past due and unpaid, there will be judgment for the plaintiff for $20,333.32 and for the small account of $308.55, with costs.

P. H. Bartlett, for appellant.

N. W. Rowell, K.C., and *D. Urquhart*, for respondent.

The judgment of the Court upon the appeal with regard to the plaintiff's claim was delivered by

MEREDITH, C.J.O.:—This is a hopeless appeal so far as the attack on the judgment relating to the claim is concerned. The learned Judge upon ample evidence has found that there was no such agreement as Mr. Bartlett contends was established by the witnesses for the defence. The statement of the plaintiff is consistent throughout. The company was in need of money, and he said: "I will help you by putting at your disposal 100,000 of my shares; that probably will put the company upon a basis which will enable it to earn profits; if you get the profits, I am to be paid out of those profits; but it would be too indefinite to leave it in that way, and there must be a stipulation that in any event I must be paid within a year whether there are profits or not." Now all the documents are consistent with that and inconsistent with the story told by the appellant company's witnesses as to what took place at the meeting of the shareholders. It is one of those cases in which the writing corroborates the statement of the plaintiff and is inconsistent with the statement of the defendant. I can hardly understand how any business man could put himself into the position of saying that, understanding the agreement which has been made with the shareholders, he deliberately signed a note inconsistent with that agreement. The paltry excuse is given that the shareholders were overridden, misled, by the plaintiff into doing something that they did not wish to do. For this there is no foundation.

How any one could be expected, in the face of the documents, notwithstanding the testimony of the 15 or 16 witnesses for the appellant company, to believe this, I cannot apprehend. I think the learned trial Judge quite properly came to the conclusion which he reached.

I think the most charitable view to be taken is that there was a discussion about the profits, and that probably these shareholders have persuaded themselves into the belief that that was not merely a discussion, but that the arrangement was that he was to be paid only out of the profits. They probably believed that, but they were mistaken.

The appeal fails and must be dismissed.

MACLAREN, J.A.:—This is an appeal by the defendant company from a judgment rendered on the 1st February, 1921, by Logie, J., in two actions which were tried together, in the first of which the defendant company was condemned to pay to the plaintiff, who had been its president, the sum of $6,617.59 for money which he had advanced to the company, and his claim for which had been passed by the directors and shareholders and the money admitted to be due him.

The second action was based upon 4 promissory notes which the defendant company had given to the plaintiff for moneys advanced by him to the company, amounting to $20,333.32, and the further sum of $308,85, which he had paid out for the company, amounting in all, with interest, to $21,334.59, for which amount judgment was given.

In each of the actions, in addition to a denial of the plaintiff's right of action, the company set up by way of counterclaim that the plaintiff had received and retained to his own use money of the company for alleged commissions on the sale of stock of the company by himself and his agents, sums amounting in the aggregate to over $8,000, of which he retained $5,003.45 for himself and paid the balance to his agents. It was alleged that all these moneys were retained or paid over wrongfully, and that they should be returned by the plaintiff to the company.

The trial Judge was of opinion that the company had not made out a case under the counterclaim, for any amount against the plaintiff, but that if the company so desired it might have a reference as to the amount, if any, which the plaintiff had been overpaid. The company elected to have a reference.

At the close of the argument of the counsel for the appellant company before us, we were of opinion that the appeal of the company against the judgment of the trial Judge in favour of the plaintiff should be dismissed, for the reasons then given by his Lordship the Chief Justice, and called upon the counsel for the plaintiff to answer the argument for the appellant company in support of the counterclaim only.

Counsel for the plaintiff contended that there was no evidence to establish any such relation as that of principal and agent between the plaintiff and the directors and others who received commissions on subscriptions of stock which they had procured. They were paid by the proper officials of the company, in the usual routine, to those who had earned them, in accordance with the then existing by-laws of the company.

The charter contained a clause providing "that the said

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company may pay a commission not greater than 25 per centum upon the amount realised upon the sale of shares, debentures, or other securities of the company;" and none of the commissions in question exceeded that amount.

The Companies Act, R.S.O. 1914, ch. 178, sec. 100 (1), authorised the company to pay to the plaintiff the commissions he received and which are now sought to be recovered back, inasmuch as the same did not exceed the rate authorised by the letters patent and the prospectus. Nor was any by-law of the company required for such authorisation under sec. 92 of the Companies Act, as it was not a payment to him as president, or in connection with the government of the company or his official duties as such, but simply as a selling agent of the shares of the company on the same terms as other selling agents. See *Fullerton* v. *Crawford*, 59 Can. S.C.R. 314, 50 D.L.R. 457, where it was held that a director who sold real estate of the company, and received a commission therefor, did not receive the money in his capacity of director; that sec. 92 of the Ontario Companies Act did not apply, and a by-law authorising the payment was not necessary.

At a meeting of the directors held on the 20th March, 1914, the plaintiff was authorised to sell 150,000 shares at 10 cents per share, and 150,000 shares at 15 cents per share, upon a commission of 25 per cent.

At the annual meeting of the company held on the 6th July, 1915, the following resolution was adopted: "That in regard to any sales of the company's stock the directors be authorised to extend to any officer or shareholder of the company the same terms as to outside salesmen."

The payment of the commissions complained of in the counterclaim was in harmony with the requirements of the Ontario Companies Act, sec. 100 (1), inasmuch as the highest amount paid as commission was 25 per cent., the amount authorised by the charter and the two prospectuses issued and filed with the Provincial Secretary.

The sales and commissions objected to by the defendant company were all duly entered in the books of the company, passed by the auditors, and reported to the successive annual meetings and approved by the shareholders.

I am of opinion that the appeal should be dismissed.

MEREDITH, C.J.O., and MAGEE, J.A., agreed with MACLAREN, J.A.

HODGINS, J.A.:—In deference to the opinion of the majority of this Court, I concur in the result arrived at in this case.

I do not think that the case of *Fullerton* v. *Crawford*, 59

Can. S.C.R. 314, 50 D.L.R. 457, deals with or settles the law as to the construction of sec. 92 of the Ontario Companies Act, where the sanction of the shareholders is secured in advance and in necessary ignorance of the use that will be made of their consent. Can. S.C.

It seems illogical that large payments for their services to those who control and really manage the company should fall outside the statute, while allowances to them for attending board meetings are within it. Nor is it easy to understand why a by-law for routine acts done in the government of the company and for the services of subordinate officers should be required, while more important and weighty matters may transpire without the actual knowledge of the shareholders.

FERGUSON, J.A.:—I have considered the opinion of my brother Maclaren, and I agree in the result proposed by him; but, in the view I have taken, it is not necessary to the decision of this appeal to consider and determine whether the services rendered by the director were of such a nature that the director could receive remuneration therefor, without a by-law being passed, as required by sec. 92 of the Companies Act.

I rest my judgment on the opinion that the resolution of the 6th July, 1915, passed at a general meeting, was a by-law passed at a general meeting of the company, as required by sec. 92, and as such was a sufficient authority for the making of the payments complained of: *Mackenzie* v. *Maple Mountain Mining Co.* (1910), 20 O.L.R. 615, at p. 618; that, even if it were not, the payments were not *ultra vires* of the company, but payments that might be ratified by the company; and that such payments were expressly ratified by the resolution passed at the annual meeting of the shareholders held in 1916.

Appeal dismissed.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Brodeur, JJ. February 7, 1922.

NUISANCE (§IIC—40)—MALODOROUS FUMES—RIGHT TO OWNER OF COUNTY PROPERTY TO ABATEMENT—MANUFACTURE OF SULPHATE PULP—MAINTENANCE OF FACTORY BENEFIT TO VILLAGE.

The owner of a country estate is entitled to the enjoyment of his property free from the discomfort of malodorous fumes created in the manufacture of sulphate pulp by a factory in the neighbourhood. The fact that the paper mill where such pulp is manufactured is of financial benefit to the small village where it is established does not detract from such owner's right to an injunction restraining its manufacture, until this can be done without creating the objectionable gases.

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APPEAL from the judgment of the Quebec Court of Appeal sustaining the judgment of the Superior Court granting a perpetual injunction restraining the appellant from the use of certain material in its factory as created a nuisance. Affirmed.

D. L. McCarthy, K.C., *J. L. Perron*, K.C., and *A. W. P. Buchanan*, K.C., for appellant.

A. Geoffrion, K.C., and *G. H. Montgomery*, K.C., for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Anglin, I am of the opinion that this appeal should be dismissed with costs.

IDINGTON, J.:—The respondent as the owner of property acquired some years before the appellant, in conducting its business as the manufacturer of pulp and paper, had ventured upon methods complained of herein, and had built thereon for himself an expensive home and surrounded it with everything to make that home comfortable and enjoyable.

Such a venture was prompted no doubt by the sentimental reasons that the property had been the home of his father and ancestors for a hundred years or more and was suitable for a summer residence.

No matter, however, what his reasons were, as a matter of law he was entitled to reside there in comfort when and as he saw fit.

The appellant for mere commercial reasons, disregarding the rights of respondent and all others, saw fit to introduce, in the conduct of its business, a process in the use of sulphate which produced malodorous fumes which polluted the air, which the respondent was as owner for himself and his family and guests fully entitled to enjoy in said home and on said property, to such an extent as to render them all exceedingly uncomfortable.

The trial Judge granted a perpetual injunction restraining the appellant from the use of such material in such a way as to produce such results.

Upon appeal to the Court of King's Bench in Quebec that Court maintained said judgment and dismissed the appeal, the Chief Justice and Guerin, J., dissenting.

I cannot agree with the entire reasoning of those so dissenting.

I agree with the Chief Justice when he seems to recognise that, in principle, the relevant law of England and Quebec are hardly distinguishable, but with great respect, I cannot follow his reasoning, much less that of his colleague, Guerin, J.,

when attempting to give reasons which do not agree yet seem to me each to fall far short of protecting efficiently the rights of such an owner of property as appellant.

The discomforts arising from the operation of a business such as a railway duly authorised by law must be endured. The discomforts arising from the mass of impurities that city smoke produces must also, often being long established conditions of such life, be endured.

The legislative provisions made in France far in advance of anything we have in Canada dealing directly or indirectly with such a problem as presented herein and the opinion of commentators in light thereof and largely founded upon such light, cannot help us.

Nor, I submit, can the very minor modifications thereof, relegating to the municipal authorities the power to prohibit, be held as at all effective.

I cannot see why the power of a municipality to act, but which yet fails to act, can at all interfere with the rights of an owner to enjoy his property in the full sense thereof.

The municipality is not given and, I respectfully submit, should not be given power to take away unless upon due compensation the rights of the owner to enjoy his property which carries with it pure air, light and pure water.

The argument, that because the exercise by appellant of powers it arrogates to itself but are non-existent in law, may conduce to the prosperity of the little town or village in which the appellant's works are situated, seems to have led to a mass of irrelevant evidence being adduced, and as a result thereof the confusion of thought that produces the remarkable conclusion that because the prosperity of said town or village would be enhanced by the use of the new process therefore, the respondent has no rights upon which to rest his rights of property.

I cannot assent to any such mode of reasoning or that there exists in law any such basis for taking from any man his property and all or any part of what is implied therein.

Yet upon some such possible basis the mass of evidence before us seems to have been presented.

The invasions of rights incidental to the ownership of property, or the confiscation thereof, may suit the grasping tendencies of some; and, incidentally, the needs or desires of the majority in any community benefiting thereby; yet such a basis or principle of action should be stoutly resisted by our Courts, in answer to any such like demands or assertions of social right

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unless and until due compensation made by due process of law.

Progress may be legislatively made in that direction by many means offering due compensation to the owner but we must abide by the fundamental law as we find it until changed.

And I cannot find that in France or Quebec any such legal theory as that argument rests upon has any foundation.

In looking up authorities upon the question of injunction, such as this, I find in Kerr's Law of Injunctions, 4th ed., at middle of p. 155 and following, what I think expresses the right of the owner to an injunction such as in question.

The history of that mode of remedy might require a volume, which I have no intention of writing, but to the curious I would commend the perusal of Story on Equity Jurisprudence, sec. 865 and following sections, as instructive of how in all probability the history of Quebec law, as also English Equity Jurisprudence, had its origin in regard to the assertion of a remedy by way of injunction.

It is a most beneficial remedy and should not be weakened or emaciated merely because of preference of its development in one jurisdiction over that of another.

I was, indeed, in considering this case and trying to find the relevant law, somewhat struck with a remark of V.C. Sir W. Page Wood, in the beginning of his judgment in the case of *Dent* v. *Auction Mart Co.* and other cases (1866), L.R. 2 Eq. 238, 35 L.J. (Ch.) 555, 14 W.R. 709, that, though the doctrine invoked had been established by Lord Eldon in *Att'y Gen'l* v. *Nichol* (1809), 16 Ves. 338, 33 E.R. 1012, and never had been departed from, that it was remarkable how few instances had occurred until 10 or 12 years before 1866, when he was speaking, and within that short period how the number had increased.

The wave, if I may so speak of progress in way of applying any legal doctrine thus varies very much, but I must be permitted to think that the Courts should be tenacious in the way of abiding by such a beneficient remedy as that by way of injunction.

The case of *Directors of St. Helen's Smelting Co.* v. *Tipping*, in the House of Lords (1865), 11 H.L.Cas. 642, 11 E.R. 1483, 35 L.J. (Q.B.) 66, 13 W.R. 1083, is one of the landmarks, as it were in the modern English law on the subject, and the case of *Crossley & Sons* v. *Lightowler* (1867), L.R. 2 Ch. 478, 36 L.J. (Ch.) 584, 15 W.R. 801, and cases cited therein, and the more recent case of *Shelfer* v. *City of London Electric Lighting*

Co., [1895] 1 Ch. 287, 64 L.J. (Ch.) 216, 43 W.R. 238, may be found instructive as to the later development.

I have not heard or read in factums presented here anything cited in conflict with the principles therein proceeded upon.

Many early cases, and even late cases, can be found if one fails to take the principal of law involved as his guide rather than many decisions going off on special grounds which seem to conflict with said leading authorities.

The subject is a very wide one and in many phases of its historical development do we find much that may not be worth considering because of the peculiar facts involved.

And, I respectfully submit, that as long as we keep in view the essential merits of the remedy in the way of protecting the rights of property and preventing them from being invaded by mere autocratic assertions of what will be more conducive to the prosperity of the local community by disregarding such rights, we will not go far astray in taking as our guide the reasoning of any jurisprudence which recognises the identical aim of protecting people in their rights of property when employing their remedy of perpetual injunction.

I think this appeal should be dismissed with costs.

Nevertheless whilst strongly holding that, in cases such as this, the remedy by way of damages being inefficient and hence a basis for a perpetual injunction, yet, inasmuch as there may, ere long, be discovered by science or mechanical device, or both combined, a means of using sulphates in the process of manufacturing such as in question herein, there should have perhaps been expressed in the formal judgment a reservation entitling the appellant to apply to the Court below for relief in such event, if meantime it has observed the injunction.

Let us hope that such an inducement may lead to resorting to science in a way that is not obvious in the evidence to which we were referred in argument.

DUFF, J.:—The respondent has established that the enjoyment of his property as a dwelling house is prejudicially affected in a substantial degree and in a degree which entitles him to invoke the protection of the Court against the injurious consequences of the manufacturing operations of the appellant company who are clearly chargeable as for a *quasi delit* within art. 1053 of the Civil Code.

The substantial question for consideration is whether or not the respondent is entitled to the injunction which has been awarded him. There appear to be good reasons for thinking that the discontinuance of the appellant company's operations

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would result in material loss and inconvenience to their employees and their families who would probably be obliged to leave the locality in which they live at present in order to find means of livelihood elsewhere. But I am not satisfied that this will be the necessary result of the relief granted to the respondent. Indeed, my conclusion, after a perusal of the whole evidence, is that the cessation of the appellant company's operations would be neither the necessary nor the probable result of that relief.

I am far from accepting the contention put forward on behalf of the respondent that considerations touching the effect of granting the injunction upon the residents of the neighbourhood and indeed upon the interests of the appellant company itself are not considerations properly to be taken into account in deciding the question whether or not the remedy by injunction should be accorded the plaintiff under the law of Quebec. The Court in granting that remedy exercises a judicial discretion not, that is to say an arbitrary choice or a choice based upon the personal views of the Judge, but a discretion regulated in accordance with judicial principles as illustrated by the practice of the Courts in giving and withholding the remedy. An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others would suffer in consequence thereof may be a sufficient ground for refusing it. Where the injury to the plaintiff's legal rights is small and is capable of being estimated in money and can be adequately compensated by a money payment and where on the other hand the restraining or mandatory order of the Court, if made, would bear oppressively upon the defendant and upon innocent persons, then although the plaintiff has suffered and is suffering an injury in his legal rights the Court may find and properly find in these circumstances a reason for declining to interfere by exercising its powers *in personam*. This is not, as was suggested in argument, equivalent to subjecting the plaintiff to a process of expropriation; it is merely applying the limitations and restrictions which the law imposes in relation to the pursuit of this particular form of remedy in order to prevent it becoming an instrument of injustice and oppression.

These last mentioned considerations, however, are not those which govern the disposition of the present appeal; the respondent's injury is substantial, is continuing, and there is no satis-

factory ground for thinking that any kind of disproportionate injury to the appellant company or to others will ensue from putting into execution the remedy granted by the Court below.

ANGLIN, J.:—My impression at the close of the argument was that the findings of the trial Judge, affirmed in appeal,—that the odours and gases emitted from the defendant's sulphate plant were so extremely offensive to the senses that they "caused sensible discomfort and annoyance to the plaintiff and his family, diminished the comfort and value of the plaintiff's property and materially interfered with the ordinary comfort of existence in the plaintiff's said home;" and that "the plaintiff cannot be adequately compensated in damages for the deprivation of the useful enjoyment of his property by the nuisance created and maintained by the said defendant"—were well warranted. Subsequent consideration of the evidence has only served to convert that impression into a firm conviction. To these findings, moreover, I would add another. The evidence has also satisfied me that sulphate soda pulp can readily be purchased by the defendants, or, if they should prefer to take that course, can be made by them at some other place,—for instance at or near to their pulpwood limits—where its production will be innocuous. The manufacture of sulphate pulp at Windsor Mills is not at all essential to the defendants' continuing to produce there the classes and grades of paper for the making of which they now use such pulp prepared by a process in which sulphate of soda, salt or nitrate cake is an important ingredient.

As Flynn, J. points out, it is common ground that science has been unable to indicate any means whereby the emanation and diffusion of these highly objectionable gases and odours in the manufacture of sulphate pulp can be obviated.

The proposition that the existence of the state of affairs so found by the trial Judge implies an invasion by the defendants of the plaintiff's right of enjoyment of his property, likely to be persistent, far in excess of anything justifiable under *les droits de voisinage*, and amounting to an actionable wrong entitling him to relief in a Court of law and justice scarcely calls for the citation of authority. But, if authority be required, it may be found in abundance in the able judgment delivered by Flynn, J. and in the factum and memorandum of authorities filed by the respondent.

The power to grant an injunction is broad. Articles 957, 968, C.C.P. I cannot think that, under such circumstances

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as the evidence here discloses the Court is restricted to giving such inadequate and unsatisfactory relief as the awarding of damages. Beaudry-Lacantinerie; Des Biens, Nos. 215-225, notably 224; 2 Aubry et Rau (5 ed.) p. 305. See too *Wood* v. *Conway Corporation*, [1914] 2 Ch. 47, 83 L.J. (Ch.) 498; *Adams* v. *Ursell*, [1913] 1 Ch. 269, 82 L.J. (Ch.) 157.

Subject, therefore, to consideration of the several objections to that course taken in the dissenting opinions of the Chief Justice of Quebec and Guerin, J., I should be disposed to agree with the Judges who composed the majority of the Court of King's Bench (Flynn, Tellier and Howard, JJ.) that the injunction granted in the Superior Court should be upheld.

Three difficulties are suggested by the Chief Justice: (1) The nuisance created is public and the right to suppress it belongs to the municipal authority under the R.S.Q. arts. 5683 and 5639 (14) and not to the Courts at the instance of a private property owner affected thereby; (2) It is in the interest of the great majority of the inhabitants of Windsor Mills that the operations of the defendant should not be interfered with: balance of convenience therefore requires that the injunction should be dissolved: (3 The injunction sought is not susceptible of enforcement without personal constraint of the defendants' officials.

Guerin, J.'s view is that the injunction is "too radical and too heroic a remedy under the circumstances" . . . viz. the impossibility of operating the sulphate process without emitting the odors and gases complained of, and the non-interference of the municipal authorities—and that damages would be the appropriate legal remedy.

The nuisance caused by the defendants, no doubt, affects the entire neighbouring population and other persons who have occasion to come within the sphere of its annoyance. But the injury to the plaintiff's property is different in kind from the inconvenience suffered by the inhabitants at large—most of whom, moreover, are so dependent upon the operation of the defendants' mills for their support that they are quite prepared to submit to some personal annoyance rather than jeopardize their means of livelihood. The inaction of the municipal authorities is no doubt ascribable to similar influences. By the nuisance of which he complains the plaintiff's property is practically rendered uninhabitable and useless for the purposes for which he holds it. In my opinion, he suffers an injury sufficiently distinct in character from that common to the inhabitants at large to warrant his maintaining this action. *Adami* v. *City*

of Montreal (1904), 25 Que S.C. 1; *Barthélémy* v. *Senès*, Sirey 1858, Part 1, 305; *Derosne* v. *Puzin*, Sirey 1844 Part 1, 811, 813; *Polsue & Alfieri Ltd.* v. *Rushmer*, [1907] A.C. 121, 76 L.J. (Ch.) 365; [1906] 1 Ch. 234; *Francklyn* v. *People's Heat & Light Co.* (1899), 32 N.S.R. 44; Joyce on Nuisances sec. 14.

The fact that the making of soda-sulphate pulp at Windsor Mills is not essential to the manufacture of the products which the defendant's mills turn out is an answer to the objection based on balance of convenience—if indeed mere balance of convenience would be a sufficient ground under the civil law of Quebec for refusing to enjoin the use of a process which necessarily entails an unjustifiable invasion of the plaintiff's legal right to the enjoyment of his property. Article 1065 C.C. Fuz. Herman, Code Annoté, art. 544, Nos. 3 & 39; ibid. arts. 1382-3, Nos. 105, 109, 244 bis; 16 Laurent, No. 199; 24 Demolombe, Nos. 503-5; *Décarie et vir* v. *Lyall & Sons* (1911), 17 Rev. de Jur. 299.

I am of the opinion that the power of the Quebec Courts to punish for contempt (art. 971 C.C.P.) affords a means of enforcing their orders which sufficiently answers the suggestion that the injunction granted cannot be executed and is, therefore, obnoxious to art. 541 C.C.P. In France while the Court will enjoin the defendant from doing that which he is under obligation not to do, it has not the means of enforcement of the order available under English law and in Quebec by process of punishment for contempt (art. 971 C.C.P.; See art. 1033m. added to old code of Procedure by 41 V. c. 14 s. 12; art. 5991, R. S.Q. 1888). In France, the Court can award damages in advance for refusal to obey, either in a lump sum or *toties quoties*, but not as a means of constraint or of indirect compulsion. D. 82, 2, 81; S. 1897, 2. 9, 12; 3 Garsonnet, Procédure, No. 528; 24; Demolombe No. 491; Beaudry-Lacantinerie, Des Biens No. 224, n. 3. France has no provision similar to art. 971 C. C.P. and the art. 1142 C.M. is more restrictive than the initial clause of art. 1065 C.C. Whatever they may have been theretofore, since the changes made in 1878, by 41 V. c. 14, the jurisdiction and practice of the Quebec Courts in regard to the remedy of injunction would seem to resemble the jurisdiction and practice of English Courts rather than of the Courts of France. *Wills* v. *Central Ry. Co.* (1914), 19 D.L.R. 174, 24 Que. K.B. 102. I cannot assent to the third holding in *Lombard* v. *Varennes* (1921), 32 Que. K.B. 164, as indicated in the head note. The arm of injunction would fail in one of its most useful applications if it should, on this ground, be held

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not to be available in a case such as that at Bar. I am, with respect, satisfied that this objection rests on a mistaken conception of art. 541 C.C.P.

Nor is it possible to maintain that damages will afford an adequate remedy to the plaintiff. If he were confined to this method of redress he would, in effect, be forced to submit to partial expropriation of his property, as Tellier, J. suggests, without statutory authority for such an exercise of eminent domain.

No delay was established such as might debar the plaintiff from a right to relief. *Francklyn* v. *People's Heat & Light Co.*, 32 N.S.R. 44.

In my opinion, the difficulties suggested to granting the plaintiff's prayer for an injunction are more imaginary than real. I should be sorry indeed to think that this branch of the jurisdiction of the Courts of Quebec is as restricted as counsel for the defendants contends.

To confine the operation of the injunction to the periods of the year during which the plaintiff, his family or friends occupy the residence at Windsor Mills seems to be scarcely practicable. But there is no reason why liberty should not be reserved to the defendants to apply to be relieved from the inhibition if they can satisfy the Court that owing to scientific discovery sulphate pulp can and will be manufactured by them without interference with the plaintiff's right to the enjoyment of his property.

I would dismiss the appeal.

BRODEUR, J.:—This case has involved a consideration of the extent to which the exercise of the right of property is restricted in the reciprocal interest of neighbouring lands.

The appellant is a paper manufacturing company, and its factories constitute the most important industry in the town of Windsor Mills, which has a population of about 2,000.

The plaintiff-respondent is the owner of a fine country house in the neighbourhood of these works. It is a property which has belonged to his family for several generations and which he has improved since he acquired it in 1905. He asks for damages against the company appellant because one of the latter's factories gives out fetid odours which render his house and grounds uninhabitable at certain times, and he asks that the company be forbidden to use sulphate of soda, which causes these odours, in its operations.

When the plaintiff bought this property the company appellant, the Canada Paper Co., was operating its plant, but this operation did not cause any inconvenience. Materials and

chemicals were used at that time which had not the disadvantage of inconveniencing neighbours. In the last few years, for reasons which are not very clearly expressed, the Canada Paper Co. considered it expedient to use sulphate of soda and other chemicals which, under certain climatic conditions, seriously inconvenience the neighbours, and the plaintiff, Brown in particular, by the unpleasant smell they produce.

Brown then took the matter up with the company and was promised that what he considered to be an abusive exercise of the right of property would be remedied; but in spite of these interviews and promises nothing tangible was accomplished, so that he found himself obliged to appeal to the Courts. He won his case in the Superior Court and in the Court of Appeal. However the lower Courts did not grant him damages, but formally ordered the company to cease using odoriferous chemicals.

What are the consequences of this abuse from a legal point of view?

There can be no doubt from the evidence made in the case that these odours were absolutely unendurable and that they constituted an abusive exercise of the right of property on the part of the company which prejudiced the neighbours and the plaintiff in particular. The Judges are unanimous on this point.

Fournel in his Traité du voisinage, 4th ed., p. 336 says:—

"One of the first laws of neighbourhood is to allow no odour to escape which is of such a nature as to infect the air and impair the health of those who breathe it."

He cites an edict of Francis 1 dated November, 1539, which made most rigorous prohibitions against causes of infection. This edict came into force in the Province of Quebec when the general laws of the Kingdom of France were introduced there in 1663.

Fournel also cites (p. 337) the case of a certain Collin Gosselin who, in the 15th century, wished to manufacture pottery. The neighbours were not slow in resenting the inconvenience of such a neighbour by reason of the resulting infection and procured from the Courts an order putting an end to his activities.

In 1661 an ordinance was issued to the same effect against certain inhabitants of LaVillette who were using the offal resulting from the slaughter of cattle to fertilize their fields.

The modern French law gives the administration certain powers which naturally have not the force of law here. I am

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afraid that this modern legislation has introduced an element of confusion into the consideration of this case.

The Cities and Towns Act R.S.Q. 1909, gives municipal councils the power to legislate against nuisances caused by industries and to regulate the place, construction and management of unhealthy establishments. (R.S.Q. arts. 5639, 5683).

In the present case, the town of Windsor Mills did not consider it necessary to pass a by-law respecting the factories in question, but this absence of regulation must not be taken as sanctioning a nuisance.

The Legislature might give municipal councils the power to make by-laws contrary to the general law of the province (Tiedman, para. 146), but as long as a municipal council does not exercise this power, the general law applies to all the inhabitants of that municipality. In France, on the contrary, a permit must be procured from the administrative authority in order to establish certain industries in any locality. And if the permit is granted, then all the neighbours must respect the decision of the authorities. It is this difference in the legislation of the two countries which gives rise to the confusion of which I have spoken. Here, when there is no municipal regulation, any industry can set up in a locality, provided however that the general laws of the neighbourhood are rigourously observed, and that it does not transmit bad odours to neighbouring houses (Aubry and Rau, 5th ed., p. 304).

There is no ground for making a distinction in the present case between private and public nuisances. An individual is denied the right of action in a case where he attempts to exercise rights belonging to the public in respect of public property. But in the case of a nuisance affecting not only the private rights of a single person, but of a great number of citizens, every citizen has the right to appeal to the Courts to have the nuisance abolished. The fact that a great number of persons suffer does not prevent one of them from taking action alone. (Joyce, Law of Nuisances, sec. 14).

The Chief Justice is of opinion that the judgment which has been rendered prohibiting the use of sulphate is not susceptible of execution. As we have seen in the quotations from Fournel, the old French law recognised the right of the Courts to order the cessation of unhealthy operations. As soon as such an order is issued by the Court, its violation gives rise to the penalties provided by art. 971 of the Code of Procedure.

Furthermore, the Courts, in negatory and possessory actions, make orders every day requiring the defendants to cease from

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exercising such and such a servitude or to cease troubling some proprietor in the peaceful possession of his property.

For these reasons I think the appeal ought to be dismissed with costs.

Appeal dismissed.

PERSEN v. RAINBOW.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 1, 1922.

PLEADING (§IN—110)—SLANDER—VARIANCE BETWEEN WORDS ALLEGED AND WORDS PROVED—AMENDMENT ON APPEAL TO MAKE WORDS ALLEGED THE SAME AS THOSE PROVED.

Where in an action for slander there is some variance between the words alleged and those proved, but on appeal it appears that the trial practically proceeded upon the latter, the Appellate Court will allow the pleadings to be amended so that the words alleged in them will be the same as those proved.

[*Reilander* v. *Bengert* (1908), 1 S.L.R. 259; *Ecklin* v. *Little* (1890), 6 Times L.R. 366, followed.]

APPEAL by defendant from a County Court Judge in an action for damages for slander. Affirmed.

Frank Ford, K.C., for appellant.

E. C. Locke, for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—Appeal by the defendant from the District Court of Settler.

This action is for damages for slander and was tried by the District Judge, who awarded the plaintiff $100 damages.

The substantial grounds of appeal are that inasmuch as no special damages were alleged or proved there was no cause of action, as the words alleged to have been spoken by the defendant did not impute a criminal offence but only a suspicion thereof and that the words proved were not those alleged in the statement of claim.

There is some variance between the words alleged and those proved but as the trial practically proceeded upon the latter, I cannot see that any injustice will be done by now amending the pleadings so that the words alleged in them will be the same as those proved. This course has been adopted in different cases. See *Reilander* v. *Bengert* (1908), 1 S.L.R. 259, *Ecklin* v. *Little* (1890), 6 Times L.R. 366, even though in the latter case the plaintiff's counsel had refused to amend at the trial.

The evidence on behalf of the plaintiff accepted by the trial Judge establishes that on or about March 5, 1920, at the de-

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fendant's place the defendant had the following conversation with Oren A. Attwood:—

"Q. What did Rainbow say? A. Rainbow said he had lost wheat out of his granary, wheat was stolen out of his granary, he used the word 'stolen' I think. Q. You are giving us his exact words, are you, as far as your recollection goes? Give us his exact words if you can? A. He said there was wheat stolen and he said I have my suspicions where it went,—yes, he used the word 'suspicions' and then he said, Persen took it. He said a sleigh came along outside the fence and he tracked the sleigh to Persen's place."

The question upon this evidence is whether or not the words used impute more than a suspicion of crime, for if they do not they give no cause of action. Had the defendant stopped at the word "suspicions" I think he would be clear, but in my opinion he went beyond a statement of his suspicion when he added "Persen took it," and the words following as above quoted.

I think the words used would convey to the mind of an ordinary person in the position of Attwood that Persen had stolen the wheat, and in that view of it the plaintiff's right of action is complete.

There is further evidence that on or about July 10, 1920, the defendant had the following conversation with Charles J. McDevitt at the latter's home:—

"12 Q. Will you as far as you can, or as near as you can, give me the exact words used then? What was said on that occasion? A. Well as near as I recollect the words now and the statement that Rainbow made—well he drove up and asked if Mr. Persen bought any seed wheat from me and I told him no. 13 Q. You said what? A. I said no. He said, 'Well, his seed wheat wouldn't grow, and I know where he got his seed wheat. There was a lot of wheat stolen from my granary,—some wheat was stole from my granary and I tracked the wheat to Mr. Persen's place.' He then said that Persen had refused to let him go through his field. 14 Q. What were his words? A. He said, 'He tried to stop me from going through his field'. 15 Q. Yes? A. 'And I am going to get the police after him.' I think that is all."

It is not clear that the reference to the police was in connection with the wheat and so I dismiss that from consideration. The remaining words would I think convey to the mind of a person in the position of McDevitt that the plaintiff had stolen the wheat.

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I do not think the evidence of either Attwood or McDevitt above quoted was materially shaken on cross-examination.

I would therefore affirm the judgment below and dismiss the appeal with costs.

Appeal dismissed.

LOHSE v. TAYLOR.

Saskatchewan King's Bench, Judicial District of Swift Current, Taylor, J. February 23, 1922.

INTOXICATING LIQUORS (§IIIA—55)—INFRACTION OF BOTH FEDERAL AND PROVINCIAL LAW—POSSIBLE CONVICTIONS UNDER BOTH—UNLAWFUL MANUFACTURE AND KEEPING FOR SALE—SASK. TEMPERANCE ACT, R.S.S. 1920, CH. 194, 1920, SASK. CH. 70—INLAND REVENUE ACT, R.S.C. 1906, CH. 51, SECS. 180, 186.

A person may be found to have possession of intoxicating liquor for the purpose of sale in contravention of the Sask. Temperance Act although there was no evidence of any sale or offering for sale, and if it further appears that the accused was unlawfully manufacturing the liquor and would therefore be liable to the penalty provided by the Inland Revenue Act R.S.C. 1906, ch. 51, for having in his possession spirits unlawfully manufactured, such will not prevent his conviction under the provincial law. Semble, there might be valid convictions under both the provincial and the federal law upon the same facts as the offences are different.

[*R.* v. *Scott* (1916), 28 Can. Cr. Cas. 346, 37 O.L.R. 453, and *R.* v. *Thorburn* (1917), 39 D.L.R. 300, 29 Can. Cr. Cas. 329, 41 O.L.R. 39, specially referred to.]

APPEAL from a summary conviction under "The Saskatchewan Temperance Act," R.S.S. 1920, ch. 194, 1920 Sask. ch. 70. The appeal was dismissed.

C. E. Bothwell, for appellant.

W. D. Graham, for respondent.

TAYLOR, J.:—The appellant Albert Lohse was convicted by a justice of the peace on the 29th December 1921, at Vanguard, for that he on the 23rd December 1921, at Vanguard, did unlawfully keep liquor for the purpose of sale contrary to the provisions of "The Saskatchewan Temperance Act," fined $400.00 therefor and $8.00 costs, and in default thirty days in gaol. From this conviction Lohse appealed, and the regularity of the appeal was admitted by counsel for the Director of Prosecutions for the Province, who appeared for the respondent.

Constables Taylor and Pearson of the Provincial Police proceeded from Swift Current to Vanguard to search premises alleged to be occupied by the appellant and a woman named Susie Waldner, having in their possession a warrant to search which they thought sufficient therefor. The warrant was not produced nor, so far as the evidence goes, does it appear that the con-

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stables advised the occupants of the premises occupied by Albert Lohse and Susie Waldner that they were searching under the authority of any warrant. They intimated that they desired to search and were given permission to search. On the search in the premises occupied by these two they discovered two complete stills, 30 quart bottles, and one small jar of spirits or intoxicating liquor under a bed; about two barrels of wash suitable for the manufacture of spirits or intoxicating liquor, as well as a number of empty bottles ordinarily used for holding intoxicating liquor, cleaned and ready to be filled.

I do not believe the evidence adduced on behalf of the appellant. He and Susie Waldner are persons of low character; and I can attach no weight whatever to the evidence given by them, and, although there was no evidence of any sale or offering for sale, I am convinced that the pair were engaged in the manufacture of spirits on quite an extensive scale for sale, and that while some of the intoxicating liquor would undoubtedly have been used by them as a beverage, yet it was mainly kept for the purpose of sale.

The appellant had no license to manufacture, and in addition to the penalty imposed in "The Saskatchewan Temperance Act" had left himself open to the penalty for having in his possession spirits unlawfully manufactured contrary to the provisions of section 180 and 185 of "The Inland Revenue Act," R.S.C. 1906, Chap. 51.

The facts adduced in evidence to support a conviction for the offence charged under "The Saskatchewan Temperance Act" also proved the commission of an offence under section 185 of "The Inland Revenue Act," and I have had some difficulty in concluding that the conviction under "The Saskatchewan Temperance Act" would under the circumstances be warranted. It seems to me, however, that there is an essential difference in the nature of the offences. The provisions of "The Inland Revenue Act" aim to punish the illicit manufacture of spirits and the keeping or sale of spirits unlawfully manufactured. The aim of "The Saskatchewan Temperance Act" is to prohibit the sale of intoxicating liquor within the Province whether lawfully manufactured or not, and there is no inconsistency in imposing one penalty for selling any intoxicating liquor and imposing another penalty as well for selling an intoxicating liquor or spirit illegally manufactured. It is open to the legislature and to Parliament to treat them as separate offences.

Thus in *Attorney General* v. *Lockwood* (1842), 9 M. & W.

378, 152 E.R. 160, a statute which punished with a penalty any retailer of beer who had in his possession or put into his beer any colouring matter or preparation in lieu of malt or hops was held unaffected by a subsequent statute which imposed on beer retailers licensed by the Excise a different penalty on conviction before justices for selling beer otherwise than of malt and hops, or for mixing any drugs with it, or for diluting it. The objects of the two enactments were not identical, the one having solely a sanitary object in view and the protection of the customer, while the other was aimed as much at fraud on the revenue.

It would appear that it cannot be laid down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The true principle is that the law does not permit a man to be twice in peril of being convicted of the same offence. See *Rex* v. *Barron*, [1914] 2 K.B. 570; *Rex* v. *Tonks*, [1916] 1 K.B. 443; *Rex* v. *Blanchet* (1919), 61 D.L.R. 286, 36 Can. Cr. Cas. 10, 30 Que. K.B. 66.

In *Rex* v. *Scott* (1916), 28 Can. Cr. Cas. 346; 37 O.L.R. 453, 11 O.W.N. 132, the question was considered. A provision in "The Liquor License Act" of Ontario imposed a penalty on a person found drunk in a public place in a municipality in which a local option by-law was in force or in which no tavern or shop license was issued. In the district in question "The Canada Temperance Act" was in force. It was argued that the provincial legislation paralleled the Dominion legislation, and was therefore *ultra vires*, and no conviction could be made. In reference to the argument, I quote from Sutherland, J. at p. 456:—

"In *Regina* v. *Stone*, (1892) 23 O.R. 46, at p. 49, Rose J., expresses the opinion that Mr. Edward Blake in his argument in *Regina* v. *Wason*, (1890) 17 A.R. 221, 225, correctly stated the law as follows: 'The jurisdiction of the Provinces and the Dominion overlap. The Dominion can declare anything a crime but this only so as not to interfere with or exclude the powers of the Province of dealing with the same thing in its civil aspect, and of imposing sanctions for the observance of the law; so that though the result might be an inconvenient exposure to a double liability that possibility is no argument against the right to exercise the power.' And that Mr. Justice Osler, at p. 241 of the same report, put it in this way: 'I suppose it will not be denied that the latter' (i.e., the Parliament) 'may draw into the domain of criminal law an act which has hitherto been punishable only under a Provincial statute.' "

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to with approval by Masten, J., in *Rex* v. *Thorburn* (1917), 39 D.L.R. 300, 29 Can. Cr. Cas. 329, 41 O.L.R. 39, and the extract from Mr. Blake's argument has often been quoted as correctly stating the law. Clement Can. Const. 3rd ed., 567 *et seq.*

This judgment of Sutherland, J., was subsequently referred

The appeal will be dismissed and the conviction affirmed. My own opinion is that this is a case where the justice of the peace might well have imposed imprisonment instead of fine, for a fine in such a case is but a tax on a profitable business. The justice may, however, have had before him something not before me governing the infliction of the penalty, and I will not, therefore, interfere with his discretion in that respect. The respondent is entitled to the costs of the appeal.

Conviction affirmed.

LEONARD v. ST. PATRICK'S PARISH.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman, and Clarke, JJ.A. February 3, 1922.

RELIGIOUS INSTITUTIONS (§VII—50)—BUILDING CONTRACT—POWERS OF ECCLESIASTICAL CORPORATION TO BORROW MONEY—POWERS OF PRIEST AND BISHOP AS TO CONTRACT—NECESSITY OF CORPORATE SEAL AND SIGNATURE OF BISHOP TO CONTRACT.

An ecclesiastical corporation being a non-trading corporation has no implied power to borrow money unless such power is expressly or impliedly given by its constitution, but when in its constitution although there is no express power to borrow nor express power given to erect a church, the erection of a church is the principal reason for the incorporation and express power is given to mortgage, the power to borrow for the purpose of erecting a church will be implied and while a law of the church that "no proceeding or transaction shall be deemed legal without the consent in writing and the signature of the Bishop, and the seal of the corporation" is a direction to the priest and others concerned in the affairs of the parish, it does not have the effect of invalidating a transaction which is otherwise legal and in compliance with the Act of Incorporation, and where there is nothing in the Ordinance or Act of Incorporation which prescribes a writing or any other formality to be observed by the corporation in the transaction of its business it is not competent for the bishop to prescribe conditions restricting the legal liability of the parish not contained in the Act by the fact of the canonical erection the parish became incorporated and became subject to the provisions of the ordinance.

[*In re Wrexham Mold & Connah's Quay R. Co.*, [1899] 1 Ch. 440, 68 L.J. (Ch.) 270, 80 L.T. 130, 47 W.R. 464, 6 Manson 218; *Purdy & Henderson Co.* v. *St. Patrick* (1917), 37 D.L.R. 642, 12 Alta. L.R. 263, referred to.]

APPEAL by defendants from the trial judgment in an action for the recovery of money loaned to the defendants—and on a promissory note. Affirmed.

The facts of the case are fully set out in the judgment of Clarke, J.A.

A. M. Sinclair, K.C., and *A. C. McWilliams*, for appellants.
C. S. Blanchard, for respondents.

SCOTT, C.J. and STUART, J.A. concur with CLARKE, J.A.

BECK, J.A.:—I agree with the result arrived at by my brother Clarke, and for the most part with his reasoning but I still retain the view I expressed in *Purdy & Henderson Co.* v. *Parish of St. Patrick* (1917), 37 D.L.R. 642, 12 Alta. L.R. 263, at p. 305 where I say:—

"I think the legal effect of the Act of 1913 was to repeal the Ordinance so far only as it extended to the territory comprised in archdiocese of Edmonton and to leave the Bishop of Calgary as the partial successor of the Bishop of St. Albert as the episcopal representative of the Catholic parishes and missions in the diocese of Calgary."

My brother Clarke is of opinion that the Archbishop of Edmonton, in the view of the civil law, still remains—and is now—the Episcopal representative of the parishes and missions constituted in the present diocese of Calgary.

I think it important that the question of which of the two—the Bishop of Calgary or the Archbishop of Edmonton—is the Episcopal head of the parishes in the diocese of Calgary, and which of the two consequently is the proper person to execute instruments of transfer, mortgage, &c., should not be incidentally and as an *obiter dictum* pronounced upon in a sense against the view which all parties connected with these parishes have hitherto understood to be the correct view.

By Ordinance No. 11 of 1878 the Very Reverend Vital Grandin, Roman Catholic Bishop of St. Albert and each of his successors in the Diocese of St. Albert in communion with the Church of Rome were constituted a Corporation Sole. The ordinance recited that the Diocese of St. Albert was comprised within the North West Territories. That was a recognition by the Civil law of the existence of the Diocese of St. Albert.

Then the Ordinance No. 32 of 1895, (the material parts of which I quoted in the former case) authorised the Bishop of St. Albert to erect parishes or missions by Canonical Act.

The Canonical Act of erection necessarily included the territorial delimitation of the parish or mission.

The Parish of St. Patrick was erected by the Canonical Act of the Bishop of St. Albert on January 28, 1911. By ch. 82 of 1913 (1st session) it was recited in substance that the Right Reverend Emile J. Legal, theretofore Bishop of St. Albert, had been created Archbishop of the Archdiocese of Edmonton; that the Archbishop of the Archdiocese of Edmonton (following the

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wording of the Ordinance of 1895) wished to be assisted in the management of the property of the parishes and missions "*in the Archdiocese of Edmonton* now existing or which may hereafter be organised." Then the Act proceeded to authorise the Archbishop of Edmonton *in the future* to erect parishes and missions. It made no express provision for the governance of the parishes or missions outside of the Archdiocese of Edmonton and finally contains a repeal of Ordinance 32 of 1895.

On October 25, 1913 (Ch. 49 of 1913 2nd sess.) the Right Reverend J. T. McNally "Roman Catholic Bishop of the Diocese of Calgary, the whole of which is comprised in the Province of Alberta" was incorporated as a Corporation Sole.

This Act was a distinct—and the first—recognition by the Legislature of the Province of Alberta of the existence of the Diocese of Calgary; that is, it was now evident and recognised by the civil law of the Province that there was no longer a diocese of St. Albert and that that diocese had been divided into two dioceses namely, the Archdiocese of Edmonton and the Diocese of Calgary.

As has already been indicated the Archbishop of Edmonton is not given power *in the future* to establish parishes or missions outside of his own diocese, that is within the diocese of Calgary, and I think the repealing clause of the Act of 1913 must be construed as intended to apply only within the same territorial limits and in no way to interfere with existing parishes or missions in the Diocese of Calgary or prevent the continuance in operation of the Ordinance of 1895 in that diocese.

The intention is to my mind clear that just as the Archbishop of Edmonton became the successor of the Bishop of St. Albert in the Archdiocese of Edmonton so the Bishop of Calgary became the successor to the Bishop of St. Albert in the Diocese of Calgary.

So too, just as it was of no interest to the Legislature or the public or even the Catholic inhabitants of a parish or mission from the point of view of the Civil law to know the territorial limits of any particular parish or mission, so it was of no interest to know the territorial limits of the dioceses. If expedient in relation to any particular transaction these limits can be as easily ascertained in the one case as in the other.

This opinion, if adopted by my brother Judges will make it clear that in the future the Episcopal representative of the civil corporation of parishes in the Archdiocese of Edmonton is the Archbishop of Edmonton and of parishes in the diocese of Calgary the Bishop of Calgary.

This view however does not affect the liability of the defendant corporation in the circumstances of the present case, because the borrowing from the plaintiff was authorised by Archbishop Legal on June 22, 1913 and the loan was actually made on July 23, 1913, while the creating of the Diocese of Calgary and the appointment of a bishop thereto became known to the Civil law only on October 25, 1913, and Archbishop Legal who up to his appointment as archbishop was the Bishop of St. Albert, in my opinion, remained in the eye of the civil law the Episcopal head of the parishes in the Diocese of Calgary until the appointment of a Bishop of Calgary became known to the civil law.

The Bishop of Calgary took possession of his See on July 27, 1913, that is after the actual borrowing. Up to that time the Archbishop of Edmonton continued to exercise jurisdiction in the Diocese of Calgary and presumably in accordance with the canon law. Even though for the purposes of spiritual obligations, and perhaps of some civil obligations arising between Catholics as such, the date of the actual constitution of the Diocese of Calgary, the appointment of the bishop, the date of his taking possession of his See would doubtless be—though I think the date of taking possession is the material date—of importance, I think that with respect to the civil rights and obligations of the dioceses and parishes in respect of business transactions the dates of recognition by the civil law must govern.

HYNDMAN, J.A. concurs in the result.

CLARKE, J.A.:—This action is for the recovery of $3,000 loaned to the defendant by Michael Leonard, since deceased, and interest, as well as for the amount of a promissory note for $250 alleged to have been given by the defendant to the said deceased.

The judgment below was in favour of the plaintiffs in respect of the $3,000 claim, from which the defendant appeals, and in favour of the defendant in respect of the $250 item, from which there is no appeal.

I am satisfied from a perusal of the evidence that the money was loaned in good faith to be applied towards the construction of the parish church then in progress and that it was so applied.

The grounds of appeal are that the borrowing was *ultra vires* of the defendant and alternatively that the conditions requisite for a legal borrowing were not fulfilled inasmuch as the loan was not authorised by the consent in writing of the bishop and the seal of the corporation. I agree with the con-

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tention of the defendant that being a non-trading corporation it has no implied power to borrow money unless such power is expressly or impliedly given by its constitution. By reference to its constitution, under Ordinance No. 32 of 1895 N.W. Territories or the substituted Acts which at the time of the loan was contained in an Act of the Legislature of Alberta, 1913 (1st sess.) ch. 82, I find that there is no express power to borrow nor is express power given to erect a church but as the erection of a church is the principal reason for the incorporation and express power is given to mortgage, I think the power to borrow for the purpose of erecting a church is implied. I am fortified in this opinion by the evidence of the principal witness for the defence Rt. Rev. J. T. McNally, Roman Catholic Bishop of the Diocese of Calgary, which comprises the defendant parish, who in cross-examination gave the following evidence:—

"Q. There was no question that the corporation, as a corporation, had the power to borrow money. A. The law gives it that. Q. You have since borrowed money, that is, the defendant corporation. A. For the parish—yes. Q. For the defendant corporation—for the parish of St. Patrick. A. Yes. Q. That money has been borrowed from a bank. A. Yes."

It remains to consider whether the power was legally exercised. Admittedly there was no written consent by the Bishop of Calgary, who had been recently appointed to that office but did not take possession of the See till four days later than the loan was effected, nor was there any such consent in writing by the Archbishop of Edmonton.

Section 1 of the Act of Incorporation, (1913) above referred to, is as follows:—

"1. If any parish or mission of the Roman Catholic Church owns or wishes to acquire any land for the erection of a church, chapel, parsonage house, or for a cemetery or other worship purposes such parish or mission from the fact of its canonical erection shall become a body politic and corporate which will be represented by His Grace the Archbishop of Edmonton and in case of death or of absence by the Administrator of the Archdiocese, by His Vicar General or the Dean of his clergy and the priest canonically appointed for the administration of such parish or mission, with power to associate with them for any period of time to other members or representatives of the said corporation" which is the same as sec. 1 of the Ordinance of 1895 except that the latter has the words "His Lordship the

Bishop of St. Albert" instead of the words "His Grace the Archbishop of Edmonton."

It seems to have been taken for granted by the witnesses and by the trial Judge that upon the installation of the Bishop of Calgary he would take the place of the Archbishop of Edmonton in the representation of the defendant corporation, but I find no authority for such an assumption. At the time the Act was passed, March 25, 1913, the Diocese of Calgary had been created, though not filled by the appointment of a bishop until April, 1913. Yet neither in that Act nor in the Act of the following session, 1913 (2) ch. 49 (October 25, 1913) incorporating the Roman Catholic Bishop of the Diocese of Calgary, is there any suggestion that the parishes in the Diocese of Calgary shall be represented by the Bishop of Calgary in legal matters within the purview of the Ordinance or of the Act for the incorporation of parishes. I must, therefore, conclude that at the time of the loan in question, 23rd July, 1913, the defendant parish was represented by the Bishop of St. Albert who had then been created Archbishop of Edmonton, and the parish priest, with power to associate with them for any period of time two other members or representatives of the corporation. See Interpretation Act, ch. 3, 1906, sec. 7, subsections 45 to 48 inclusive. The Archbishop, as would be expected from his great distance from the parish and from the numerous duties of his office, entrusted the matter of the erection of the church pretty much to the parish priest, who was entrusted with the seal of the corporation. He, (the archbishop) did not personally take part in the borrowing of the money from Leonard, nor did he sign the contract for the erection of the church. It appears, however, that he was kept in touch by personal interviews and by letters; he officiated at the laying of the corner stone on June 22, 1913, and on that occasion conferred with the parish priest on the subject of raising money, and advised obtaining a small loan from some of his (the priest's) own men, instead of going to the loan companies. Leonard was one of the priest's own men, being a church warden, and shortly afterwards the priest borrowed the money in question from him and gave an official receipt therefor under the seal of the corporation, stating it to be a loan to the church up to December 1, 1913, without interest, and on January 1, 1914, the money not having been repaid, the priest gave the corporation's promissory note for the amount, payable, 12 months after date with interest at 6% per annum. The loan was therefore authorised by both members of the corporation, it was evidenced by a document

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under seal, and all that was lacking was the consent in writing of the archbishop. I do not think, however, that under the circumstances such a writing was essential to the creation of a valid agreement to repay the loan.

Much stress was laid at the trial upon the law of the church as contained in art. 645, of the Plenary Council of Quebec, 1909. The evidence as to the exact terms of this article is not very clear but I assume it is correctly stated by the Archbishop of Edmonton, who was then Bishop of St. Albert, in the instrument of canonical erection of the parish, dated January 28, 1911, which provides that:—

"No proceeding or transactions shall be deemed legal without the consent in writing and the signature of the bishop, and the seal of the corporation."

While this provision is a direction to the priest and others concerned in the affairs of the parish, I do not think it has the effect of invalidating a transaction which is otherwise legal and in compliance with the Act of Incorporation. I find nothing in the Ordinance or the Act which prescribes a writing or any other formality to be observed by the corporation in the transaction of its business and I think it was not competent for the bishop in the "canonical erection" to prescribe conditions restricting the legal liability of the parish not contained in the Act, for by the fact of the canonical erection the parish became incorporated and became subject to the provisions of the Ordinance. See *Balzer* v. *Township of Gosfield* (1889), 17 O.R. 700, which dealt with the case of a by-law of a county council which established a road as a county road and sought to limit the liability of the county in respect of it. Galt, C. J., at p. 704, says:—

"I see nothing in the statute to authorize the council to pass a by-law opening the road as a county road, and at the same time to limit the assumption in the manner proposed."

The Ordinance (sec. 3) as well as the Act (sec. 3) does authorise the corporation to enact such regulations as shall be deemed necessary and useful to the welfare of the corporation for their management and that of their business and property and from time to time to amend, alter or annul said regulations or any of them in such manner as said corporation shall deem fit and proper.

If the provision as to written consent in the canonical erection had been enacted by the corporation as a regulation I am inclined to think it would have been binding on the deceased, who was a member of the corporation (see 8 Hals. sec.

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756), but it does not appear that any such regulation was enacted by the corporation. The bishop was not the corporation. It required also the authority of the parish priest, who was the other member, and even if it had been so enacted it was subject to alteration in any manner the corporation should deem proper, and where both joined in doing an act verbally that would, I think, be a sufficient alteration. The Act gives a very wide latitude to the corporation.

Apart from the questions of the power to borrow and the regularity of the exercise of such power I would think that the fact of the corporation accepting the money and using it in payment of its debts would prevent it from escaping liability on any such ground.

This question is fully discussed in *In re Wrexham, Mold and Connah's Quay R. Co.*, [1899] 1 Ch. 440, 68 L.J. (Ch.) 270, 47 W.R. 464, and other cases, including *Purdy et al* v. *St. Patrick* 37 D.L.R. 642, in which this Court in a considered judgment held the defendant liable on the contract for the erection of the church, though not in writing, and not under seal.

I think on all grounds the appeal fails and should be dismissed with costs.

Appeal dismissed.

MORTIMER v. SHAW AND DREDGE.

Saskatchewan Court of Appeal, Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

DAMAGES (§IIIA—62)—VENDOR AND PURCHASER—CONTRACT FOR SALE AND PURCHASE—WRONGFUL DISPOSSESSION OF PURCHASER—MEASURE OF COMPENSATION.

Where a purchaser of land who has purchased the land with the intention of cropping it has been wrongfully dispossessed of the land, and the land has been cropped in a proper and husband-like manner during the time of such dispossession, the measure of damages is the mesne profits of the farming operations during the period of dispossession, and not the fair rental value of the property for such period.

APPEAL by defendants from the trial judgment (1921), 62 D.L.R. 672, in an action brought to recover possession of certain land sold to the plaintiffs, and of which he was wrongfully dispossessed. Allowed as to the assessment of damages, to ascertain which a reference is directed. Affirmed.

Avery Casey, K.C., and *L. L. Dawson*, for appellants.

S. R. Curtin, for respondents.

LAMONT, J.A.:—The real question in dispute in this appeal is, as to the measure of damages to be applied. The plaintiffs by

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an agreement in writing agreed to purchase a farm from the defendant Shaw, entered into possession and cropped the land. They were dispossessed of the land, as the trial Judge found, by the defendants, and the defendant Dredge cropped the land for the year 1921. The plaintiffs brought action to recover possession and damages. The trial Judge gave them possession, and awarded them as damages $4,000, which he found to be the fair rental value of the land. Against that judgment the defendants appeal.

In Salmond's Law of Torts, 5th ed. 211, the author says:—

"Any person wrongfully dispossessed of land has, in addition to a right of action in ejectment for the recovery of the land, a right of action for damages in respect of all loss sustained by him during the period of his dispossession; such an action is termed an action for mesne profits."

The principle upon which damages should be awarded, in my opinion, is that laid down by the trial Judge himself, but I think in awarding damages on a rental basis he did not adopt the most accurate method of ascertaining the loss sustained. The principle stated by the Judge is as follows:—

"The damages should be proportioned to the actual pecuniary loss sustained, measured by what might have been reasonably anticipated as probable. . . . 'In an action for trespass to land, based on a wrongful use for a period, where special damages arising from the deprivation of use for special purposes are pleaded and proven, the measure of damages is not the mere rental value of the land ,but it is the special damages resulting from such deprivation if they are such as the trespasser should have anticipated as the likely result of his act, and the trespasser should always be held to have anticipated that the owner intended to use his property in a reasonable and usual way.' 3 C.E.D. p. 43."

That this is the proper principle for awarding damages appears also from 27 Halsbury, 858, where the author says:—

"If the trespass has caused the plaintitff actual damage, the plaintiff is entitled to recover such an amount as will compensate him for his loss."

The loss which he has actually sustained is, therefore, the measure of the plaintiff's damages. Now, in ascertaining the loss sustained, the first consideration is the use the plaintiffs intended to make of the land. If they did not intend to crop it themselves, but to let it out to others, the rent they would have received would represent their loss. But where, as here, it is established that they did not intend to rent the land, but

to crop it themselves, their damage is the loss sustained by not being permitted to put in that crop. If that loss is ascertainable, the amount thereof is the damage and the only damage to which they are entitled. In this case, it was easily ascertainable. For the season of 1921 the land was cropped by Dredge. It is not contended that Dredge was not as good a farmer as the plaintiffs, and that he did not crop the land in a proper and husbandlike manner; in fact the evidence would indicate that he was the better farmer of the two. It is fair to assume, therefore, that he made as much out of the land as the plaintiffs would have done. The favourableness or unfavourableness of the season would have affected the crop of the plaintiffs to the same extent as it affected the crop of Dredge. The mesne profits of Dredge on the season's operation would, therefore, represent the profits which the plaintiffs would have made had they farmed the land. If that profit exceeds $4,000, the plaintiffs are entitled to the excess. If it was less than that sum, then awarding the plaintiffs $4,000 was giving them compensation for a loss which they did not sustain. To do so, would be unfair and unjust. Dredge's mesne profits could have been readily ascertainable. The trial commenced September 28, 1921, and judgment was given November 16, following. At that time the harvest had all been gathered, although at the date of the trial it had not been threshed; but it was stated on argument it had been threshed before judgment was given. All that was necessary, therefore, to ascertain the plaintiffs' exact loss was to direct a reference to ascertain Dredge's mesne profits. This, in my opinion, should have been done.

The plaintiffs should not be awarded an amount exceeding these mesne profits, nor should they be asked to take less. If it had been impossible or difficult to ascertain the plaintiffs' loss, the awarding of a rental value might be as close an approximation as the Court could adopt, but where there is a means of ascertaining the actual loss, the Court, in my opinion, should adopt it. Even in cases where the rental value is the closest approximation to the loss that can be made by the Court, it would seem that the defendant has a right to set off against the mesne profits the value of improvements made by him in good faith to the property. Sedgwick on Damages, 9th ed. 915, *et seq.*

I would, therefore, allow the appeal in so far as the assessment of $4,000 damages is concerned, and direct a reference to the local registrar to ascertain the mesne profits of the farming operations for the season of 1921, and would award as damages

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the amount thereof. The costs of the appeal and of the reference to be disposed of after the registrar makes his report.

TURGEON, J.A.:—On March 24, 1920, a contract in writing was made between the defendant Shaw and the plaintiffs whereby the defendant agreed to sell and the plaintiff, John Mortimer, and his two sons, Joseph and Stanley, agreed to buy a certain farm, consisting of sect. 22 and the south half of sect. 14 in tp. 16 and r. 16, west of the 2nd m., together with certain live-stock and farm implements, for the sum of $57,600 payable by crop payments of one-half share of the crop grown on the farm each year. The plaintiffs entered into possession of the farm in April, 1920, and cultivated the land during that year. At the end of the season the defendant Shaw received his half share of the crop pursuant to the agreement. In the autumn Shaw appears to have regretted selling the land to the plaintiffs, and he determined to put an end to the contract and find a new purchaser for the farm. Disagreements resulted between the parties, and finally a tentative contract was made, in writing, on December 16, 1920, through the instrumentality of a firm of real estate agents, whereby the plaintiffs agreed to surrender the rights in the farm and chattels to Shaw, and to take over instead another farm situated near Cedoux, belonging to one Ullrich, which the real estate agents had for sale. I say that this agreement was a tentative agreement because it was executed on the distinct understanding that it was not to be acted upon unless the Cedoux property, which the plaintiffs had never seen, was found upon inspection to be satisfactory to them. On the next day, the plaintiff, John Mortimer, visited the Cedoux farm, which he found unsatisfactory, and he returned at once to Regina and informed the agents and Shaw of this, and notified them that he and his sons refused to be bound by the tentative agreement and intended to retain possession of the land originally purchased from Shaw. I agree with the trial Judge that the plaintiffs were within their rights in taking this attitude.

It was part of Shaw's plan, however, in having his contract with the plaintiffs terminated, to re-sell his farm to the defendant Dredge, and an oral agreement to this effect between Shaw and Dredge was arranged by the agents at the same time that the tentative arrangement was made with the plaintiffs. The plaintiffs after rejecting the arrangement advised Dredge of the fact, and that they intended to retain possession of the Shaw farm, and they intimated to him that he ought not to move on to the farm. Dredge then consulted Shaw and the real estate

agents, and decided to go down and take possession of the farm; which he did, despite the protest of the plaintiffs. He entered into a written contract with Shaw for the purchase of the farm on January 15, 1921. Dredge occupied and cultivated the farm during the year 1921.

On February 11, 1921, the plaintiffs brought this action against the defendants. The trial Judge disposed of the issues in favour of the plaintiffs. He ordered the defendants to deliver up possession of the farm to them, and to pay them the sum of $4,000 for the damages sustained by the plaintiffs through the loss of quiet enjoyment and the use and profits of the farm during the time it was operated by Dredge. He further ordered that one-half of this $4,000 should be retained by Shaw and applied by him to the credit of the plaintiffs upon their contract of March 24, 1920.

In my opinion the trial Judge was right in his finding against both defendants. I am also of opinion that he was right in the disposition he made of the matters arising out of the counterclaim set up by the defendant Shaw. The only part of the case which, I think, creates any difficulty, is that part which relates to the award of $4,000 damages.

The trial Judge in fixing the damages at this amount places his assessment upon a rental basis. He finds upon the evidence that $4,000 would be a fair rental value as between the plaintiffs and the defendants, and he fixes the damages at this amount. The rule in cases of this kind is that, aside from any question of special damage, (and no such question arises here), the value of the estate taken, i.e., a lease for the term of the trespass, is the ordinary measure of damages, (10 Hals. 340 & 341; *Marsan* v. *G.T.P.* (1912), 1 D.L.R. 850 at p. 856, 4 Alta. L.R. 167, 14 C.R.C. 26.) The trial Judge therefore proceeded upon the right principle in arriving at his assessment. In fixing the sum, he relied upon evidence which, in my opinion, supports the figures adopted by him. He takes the evidence of Dredge himself, who states that the farm, if in proper condition, would be worth between $5,000 and $6,000 per year, and he finds that the farm was in proper condition. Then he had before him the fact that this farm of 960 acres, with buildings, occupied and cultivated by Dredge during 1921, had been valued in the agreement for sale of March 24, 1920, between the plaintiffs and Shaw at $57,600, with the chattels; and further, in the agreement between Shaw and Dredge made on January 15, 1921, and pursuant to which Dredge went on the land, this same property is valued at $67,200. I am of opinion under these circumstances

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that this sum of $4,000 is not an unreasonable amount of damages, and should be allowed to stand.

It is argued on this point that instead of fixing the damages at a lump sum, as he did, the trial Judge should have ordered a reference, in order to have an account taken of the produce of the farm during the time Dredge operated it; the plaintiffs to receive their share as if an agreement had been made between the parties for a rental upon a crop basis, and that because he did not follow this course his assessment cannot be allowed to stand. In my opinion this contention is not well taken. Our inquiry is limited to ascertaining, in the first place, whether the trial Judge based his finding upon a proper principle. In my opinion he did, since he based it upon the rule of the value of the estate taken: a lease for the term of the trespass. In arriving at the sum I can find no authority for the statement that he was obliged to deal with the matter as if the parties had agreed, in advance, upon a landlord and tenant arrangement for shares of the crop. He might have adopted this method, if he so chose,—and after all it is merely a question of method,—but I cannot find that he was obliged to do so. There is no rule of law on the subject. The only argument in favour of this method is that it is the usual sort of lease of farm lands made in this province; but, even if that fact were established, it does not set this method up as a rule of law. Leases may be made, and no doubt are made, upon other terms, and a Judge in disposing of a particular case is not obliged, in my opinion, to follow this method; and if he is not obliged to follow it, we cannot reverse his judgment because he refused to follow it. The crop lease plan, no doubt, is a satisfactory plan when the parties enter into their relationship by agreement: when the landlord chooses his tenant and they agree upon the methods to be followed in operating the farm; but I cannot find any rule which obliges a Judge to thrust it upon a proprietor who has been ousted from his home and his land by a trespasser who steps in, makes it his own home, and operates it in his own way. In effect, the trial Judge arrives at the damages by fixing them at an amount which the parties might reasonably be deemed to have agreed upon as rent for the year, if they had come together, say, in January, 1921,, and entered into a lease of the farm for a money consideration, and not a crop consideration, the defendant to be free to operate the farm as he pleased.

As the trial Judge committed no error in law in arriving at the damages, and as I cannot find that the amount of his award

is unreasonable and unsupported by the evidence, I think his judgment should be allowed to stand and the appeal dismissed with costs, (*Cossette* v. *Dun* (1890), 18 Can. S.C.R. 222).

MCKAY, J.A., concurred with LAMONT, J.A.

Appeal dismissed.

HOPFE v. CANADIAN PACIFIC R. Co.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 1, 1922.

STATUTES (§IIA—96)—LEGISLATIVE INTENT—PROSPECTIVE OR RETROSPECTIVE OPERATION—CONSOLIDATED RAILWAY ACT 1919 (CAN.) CH. 68, SEC. 391 (3)—CONSTRUCTION—LEGAL RIGHTS ARISING BEFORE PASSING OF ACT—APPLICATION OF ACT.

Where a statute is passed altering the law, unless the language is expressly to the contrary, it is taken to apply to a state of facts coming into existence after the Act.

There is nothing in the Consolidated Railway Act 1919, (Can.) ch. 68 sec. 391 (3) to suggest that it was intended to regulate the legal rights of persons which arose out of a set of circumstances, which had already taken place before the Act was passed. The commencement of the action before the repealing statute is not essential to the application of this principle.

APPEAL by defendant from the trial judgment in an action for damages for the loss of animals, killed by one of the defendant's trains. Reversed.

D. W. Clapperton, for appellant.

W. J. Loggie, K.C., for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—This is an appeal by the defendant from a judgment in favor of the plaintiff for $375 as damages for the loss of a horse and a mule which were killed by a train of the defendant company on February 6, 1918.

The action was begun on June 21, 1919. On July 7, 1919, the defendant filed a simple defence of "not guilty by statute", referring to certain specified section of the Dominion Railway Act, 1906, ch. 37. On that day however, there came into force a new revised and consolidated Railway Act, 1919, ch. 68, which by sec. 391 (3) provided that "notwithstanding anything in any Special Act, or elsewhere contained, the pleadings in any action or suit against the company shall be governed by the law or rules of procedure of the court in which such action or suit is brought and the company shall not unless permitted by such law or rules be entitled to plead the general issue."

By the rule of this Court No. 102 it is enacted that "Except where the right is given by Imperial Statute in force in this

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Province *proprio vigore* or by Statute of Canada a defence of 'not guilty by statute' shall not be pleaded."

Therefore the plea of "not guilty by statute" entered on July 7, 1919, was an improper plea owing to the statute which came into effect on that day. On December 10, 1920, the action came on for trial before a District Court Judge at Hardisty. When objection was taken by the plaintiff to the plea as entered (I now quote from the reasons for judgment).

"Defendant apparently recognised the soundness of that contention by announcing its intention of filing an amendment to the statement of defence and it was arranged that upon that being done the matter should come before me (the District Judge) at a later date for argument upon the pleadings and upon a statement of facts to be agreed upon between counsel, the plaintiff reserving his right to contend upon such argument that a defence setting up negligence on the part of the plaintiff was similarly not open to defendant by reason of the provisions of the Act of 1919."

An amended defence was filed on January 12, 1921, and in this the defendant pleaded that "the animals got at large through the negligence, wilful act or omission of the plaintiff in placing said animals in a pasture which was not fenced on all sides and in failing to keep same from getting astray."

A statement of facts as agreed was also filed. The District Court Judge gave judgment for the plaintiff partly on the ground as I understand it that the Act of 1919 in taking away the right to plead the general issue, that is, "not guilty by statute" had taken away the right to plead the negligence of the plaintiff as a defence to the action.

With much respect I think this view is erroneous. The section of the statute of 1919, quoted above took away the right to use a special and compendious form of pleading under which a defence of negligence could be proven but it obviously did not, and was not intended to, take away the substance of the defence. It dealt merely with the rules of pleading, not with the substantial rights of the parties.

But the statute of 1919 did also by other sections alter the law as to the substantial rights of the parties. The law as it stood in 1918 when the animals were killed gave the railway company a right to defend on the ground that the animals got at large through the negligence or wilful act or omission of the owner and this was the defence put forward in the amended statement of defence. But this right was taken away, or rather was not given by sec. 386 of the Act of 1919.

It is not necessary to refer in detail to the facts because these were admitted and it was admitted by the plaintiff that the animals had originally got at large through his negligence. They had got upon the highway and thence upon the property of the company and were there killed. The facts were practically the same as in the case of *Anderson* v. *C.N.R. Co.* (1918), 43 D.L.R. 255, 57 Can. S.C.R. 134.

The real question argued and the only one remaining to be decided is whether the law is it stood in 1918 when the animals were killed should be applied or whether the Act of 1919 was retroactive and applicable to decide the rights of the parties. In the former case the plaintiff admittedly must fail; in the latter case he admittedly must succeed.

The trial Judge apparently took the latter view basing his conclusion mainly upon a passage in 27 Hals. para. 307, reading as follows:—

"Although an existing right of action is not *prima facie* taken away by a new statute .. .. there is no rule that when a person has commenced an action he has a vested right in the then state of the law .. .. A saving clause in a repealing statute may however protect him as regards rights which he may have acquired or liabilities he may have incurred thereunder .. .. A mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a 'right accrued' within the meaning of the usual saving clause, providing that all rights accrued by virtue of the statute repealed are to be unaffected by such repeal."

Now I take the opportunity of saying that this well illustrates the danger of taking passages from text books, expressed in very general terms and attempting to apply them to a particular case. The second statement in the above quotation is based upon *Hurst* v. *Hurst* (1882), 21 Ch. D. 278, 51 L.J. (Ch.) 729, 31 W.R. 327, and what was said at p. 295. But a reference to the latter page and what was really said there will shew how great the danger is to which I refer. Jessel, M. R., there merely said:—

"Parties have no such vested right in a defence *arising from a defect of jurisdiction in a particular Court* as ought to be saved when that defect of jurisdiction is removed during the pending suit."

The passage in Halsbury is based also upon *Att'y Gen'l* v. *Theobald* (1890), 24 Q.B.D. 557, 38 W.R. 527, but a reference to what was really said will again shew that the text book is a dangerous guide. Pollock, B., at p. 560 said:—

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"It certainly was considered in many cases that where a person has commenced an action he had a vested right and that any subsequent statute ought not to be construed as retroactive so as to alter that right. *That is not an invariable rule and it does not apply if the language of the statute is clear and express.*"

So all that Pollock, B., said was, not that there was no such rule, but that it was not invariable, and would yield to the clear and express language of the statute which he held to be the case with the particular statute before him.

The subject is dealt with in Beal's Cardinal Rules of Interpretation 2nd ed. pp. 414 *et seq.* Many decisions are there quoted from which I select this from Cockburn, C. J., in *Reg.* v. *Guardians of Ipswich Union* (1877), 2 Q.B.D. 269 at p. 270, 46 L.J. (M.C.) 207, 25 W.R. 511, as typical and as expressing what seems to me to be the true legal principle:—

"It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts *coming into existence after the Act.*"

There is nothing in the Act of 1919 to suggest that it was intended to regulate the legal rights of persons which arose out of a set of circumstances which had already taken place before the Act was passed, and I do not think the fact of the commencement of the action before the repealing statute is essential to the application of this principle.

In 1918 when the animals were killed, certain circumstances admittedly existed which made the company free from legal liability with respect to the killing. But nevertheless the owner began an action and while the action was pending a statute came into force which declared that in such a state of circumstances the company would be liable. Clearly, unless the statute expressly stated that the new law was to be applied to the old and antecedent set of circumstances the law as it stood when that old set of circumstances arose should be applied by the Court in deciding as to the legal liability, with respect to the mere question of procedure and the form of pleading of course a contrary rule would apply.

I therefore think the appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

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HOWELL v. RUR. MUN. OF WILTON No. 472.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

HIGHWAYS (§IVA—127)—EXCAVATION AT SIDE OF HIGHWAY—TRAP FOR ANIMALS—ANIMAL FALLING IN—LIABILITY OF MUNICIPALITY.

A municipality which makes an excavation along the side of the road allowance and leaves it unprotected so that it constitutes a veritable trap for animals is liable in damages for injuries to animals resulting therefrom.

[*Dickson* v. *Township of Haldimand* (1903), 2 O.W.R. 969; *McDonald v. Dickenson* (1896), 24 A.R. (Ont.) 31; *Borough of Bathurst* v. *MacPherson* (1897), 4 App. Cas. 256; *Municipal Council of Sidney* v. *Bourke*, [1895] A.C. 433; *Levy* v. *R.M. of Rodgers* (1921), 63 D.L.R. 452, 15 S.L.R. 31, referred to. See Annotation, 34 D.L.R. 589.]

APPEAL by defendant from the trial judgment in an action to recover damages for injuries caused by plaintiff's horse falling into an excavation on the road allowance and being killed. Affirmed.

A. Murray Bayne for appellant.

E. M. Miller, for respondent.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

LAMONT, J.A.:—In 1912, the defendants, in order to get the necessary earth to grade and build up one of the roads under their charge, made an excavation on the road allowance adjoining the defendant's farm. The excavation was some 125 ft. long, and 9 ft. wide at the bottom. On the side next the grade it was sloping, but on the side next the defendant's land the slope was very steep and the excavation 3 ft. 6 inches deep. The plaintiff's horse fell into this excavation and was killed. The finding of the trial Judge on this point is as follows:—

"On April 19, 1920, while the plaintiff's son was driving the plaintiff's horses home, something frightened them and a few of them severed from their course and ran out on the road allowance in question. One of the horses went into the ditch which at the time was filled with snow up to within six inches of the surface of the ground. The horse approached the ditch from the east and went in head first and remained there practically standing on his head with his front feet bent under him and his hind feet in the air.

The horse was killed instantly or died very shortly after it fell in and I find that it was killed by falling into the ditch."

The Judge held that the making of an excavation of the depth and character of the one in question constituted misfeasance on the part of the municipality, and he gave judgment in favour of the plaintiff for $350, the value of the horse killed. From that judgment the defendants now appeal.

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Lamont, J.A.

In my opinion the appeal must be dismissed. The plaintiff's horse was killed by reason of the fact that the defendants made an excavation dangerous to animals and left it unprotected.

In *Dickson* v. *Township of Haldimand* (1903), 2 O.W.R. 969, the defendants constructed an open ditch by the side of the road and a stone wall to protect the road. The plaintiff fell against the wall and into the ditch, and was injured. The Divisional Court held that the defendants had been guilty of misfeasance. The report, in part, reads as follows:—

"The defendants had built a wall which was dangerous and caused the injury. They might have put up a guard, but their not doing so did not make the cause of the injury nonfeasance. The cases of *Rowe* v. *Corporation of Leeds and Grenville*, 13 C.P. 515, and *Bull* v. *Mayor of Shoreditch*, 19 Times L.R. 64, governed the case."

On an application for leave to appeal, Moss, C.J.O., said:—(1904), 3 O.W.R. 52):

"The act occasioning the injury in this case was found to be an act of misfeasance—the construction of a dangerous hole near to the sidewalk, which plaintiff was lawfully entitled to use."

In the present case, the defendants were entitled to excavate in order to get the earth necessary for the construction of the grade, but, when they had excavated, a duty rested upon them either to protect the excavation by a fence or to cut the sides down to such a slope that there would be no danger of animals going into it head first. The excavation as the defendants left it constituted, in my opinion, a veritable trap for animals.

In *McDonald* v. *Dickenson* (1896), 24 A.R. (Ont.) 31 at p. 42, Osler, J.A., said:—

"Misfeasance may involve also to some extent the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances: does not take that precaution: does not exercise that care which a due regard for the rights of others requires."

In *Borough of Bathurst* v. *MacPherson* (1879), 4 App. Cas. 256, 48 L.J. (P.C.) 61, the borough had constructed a barrel drain under or in proximity to the highway. The construction was lawful. The drain having fallen into disrepair, a portion of the highway subsided into it, leaving a hole into which the plaintiff's horse fell and was injured. It was held that the plaintiff was entitled to recover. Certain observations in the judgment of the Privy Council in that case seem to me to be

appropriate to the present case. At p. 267, the judgment reads:—

"Their Lordships are, therefore, of opinion that the appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment.

This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty."

In *Municipal Council of Sydney* v. *Bourke*, [1895] A.C. 433, Herschell, L.C. said at p. 441:—

"The owner of land adjoining a highway has been held liable to an action if he digs a hole so close to the highway as to create a nuisance to passengers lawfully passing along it. Why should the municipality be less liable than any other person, in respect of the same acts, merely because the road is vested in them and certain powers or duties in relation to its repair are committed to them?"

See also *City of Halifax* v. *Tobin* (1914), 50 Can. S.C.R. 404.

In the present case the defendants dug a hole in the highway, which was dangerous to animals and left it unprotected. This, in my opinion, was misfeasance on their part.

Counsel for the defendants relied on the case of *Levy* v. *R.M. of Rodgers* (1921), 63 D.L.R. 452, 15 S.L.R. 31. In that case the plaintiff brought an action for damages resulting, as he alleged, by reason of the failure of the defendants to keep the road in repair. The plaintiff was not using the road in the usual manner of travel, but was being driven as it were across country. The driver of the automobile attempted to drive across the road. Alongside of the travelled part of the road, the defendants had constructed a ditch about 3½ ft. deep. In the middle of the afternoon, in broad daylight, the automobile in which the plaintiff was riding was driven into the ditch, and the plaintiff was injured. The Judge of the Court below held that the defendants were guilty of negligence in leaving the ditch in the condition in which it was left, but he also found that the driver of the plaintiff's automobile was guilty of contributory negligence in crossing the road as he did, and he dismissed the action. The plaintiff appealed against the finding of contributory negligence. The defendants cross-appealed from the finding that there had been negligence on their part. This Court upheld the finding of negligence of the part of the driver of the automobile, but

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held that the defendants had not been guilty of any negligence contributing to the accident, because they had put the road in such a condition that it was reasonably safe for the requirements of travel where ordinary care was taken. Negligence on the part of a municipality entitling a plaintiff in such a case to recover must be a breach of some duty owed by the defendants to the plaintiff. A municipality charged with the responsibility of keeping the highways in proper repair is not called upon to contemplate that an automobile may be driven not along but across a road, or that the driver thereof will, in broad daylight, drive into a 3½ ft. ditch. The defendants in that case owed no duty to the plaintiff to protect him from such foolhardiness on the part of his driver.

In the case at Bar the defendants, in my opinion, should have contemplated that the excavation they made might be dangerous to the animals of the owner of the land adjoining, or any other animals lawfully on the highway, and they owed to the owners of animals a duty not to leave the dangerous trap unprotected. In the one case, the animals came upon the highway in a manner in which animals might be expected to do; in the other case the plaintiff did not; drivers of automobiles do not usually drive their cars across a 3½ foot ditch in broad daylight. In my opinion, the appeal should be dismissed with costs.

TURGEON, J.A.:—I agree that this appeal should be dismissed with costs. The question involved here must be distinguished from that which was before the Court in the case of *Levy* v. *R.M. of Rodgers* (1921), 63 D.L.R. 452, for the reasons given by my brother Lamont in his judgment which I have read. In the case at Bar the defendants, in digging this hole and leaving it unguarded, were guilty of negligence towards the owners of animals, and the respondent is entitled to recover.

MCKAY, J.A. concurred with LAMONT, J.A.

Appeal dismissed.

WOOLLEY v. GOLDMAN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart and Clarke, JJ.A. February 6, 1922.

CONTRACTS (§IID—170)—CONSTRUCTION—EXCHANGE OF LANDS—MISREPRESENTATION AS TO ENCUMBRANCES—ABSENCE OF FRAUD—INCOMPLETE TRANSFER BY DEFENDANT—TRUE AGREEMENT BETWEEN THE PARTIES—PROPER FORM OF JUDGMENT TO CARRY OUT.

In negotiations for the exchange of property the defendant represented that there was only $1,000 due on a mortgage on his property, and the exchange was made on this understanding. The amount due on the mortgage was much more than $1,000. The

Court held that the true agreement between the parties was that the plaintiff should assume a mortgage on the defendant's property, to the extent of what was owing thereon not exceeding $1,000 and interest thereon from the completion of the transaction and that beyond these sums was to be paid by plaintiff and he should get title free from all other encumbrances and that the defendant must satisfy the encumbrances in excess of this amount, and have them removed from the title.

APPEAL by defendants from the trial judgment in an action for damages for false representation and breach of warranty in connection with an exchange of lands.

A. Macleod Sinclair, K.C. for appellant, Lazarus Goldman.

B. Ginsberg for appellant, Louis Goldman.

I. W. McArdle, for respondent.

SCOTT, C.J., concurs with CLARKE, J.A.

STUART, J.A.:—My difficulty about this case has arisen chiefly from the nature of the action brought against the defendants. It was an action for damages for false representation and breach of warranty. The trial Judge did not find the defendants guilty of actual conscious deceit and upon the evidence I do not think it was possible to make such a finding. He did however find that the defendant Lazarus Goldman had made an untrue representation as to the amount which was unpaid upon the mortgage.

Now the question in my mind is whether that is sufficient to found a judgment for damages as claimed in the statement of claim. The line between a representation and a warranty is often difficult to draw but the authorities clearly draw a distinction, resting it upon this, that to establish a warranty it must be shewn that there was an actual collateral contract entered into by which the defendant has guaranteed or warranted that certain facts exist. The whole subject is fully discussed and explained by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, 82 L.J. (K.B.) 245, particularly in the judgment of Lord Moulton at pp. 47 and 48.

In the present case the trial Judge did not find, and on the evidence I do not think we ought to find, that Lazarus Goldman in making the repeated statements that there was only $1000 due on the mortgage was intending to make a separate collateral contract in the nature of a warranty that such was the fact. He handed the plaintiff's agent his pass book from the loan company. That agent examined it himself and as he stated in his evidence, came also to the conclusion that there was only $1,000 to be paid. It would take an actuary to discover how much was really unpaid owing to the system of monthly pay-

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ments containing both principal and interest which the mortgage provided for. I doubt if even an actuary would be very ready to warrant by contract his own calculations. It seems to me to be clear beyond question that the agent Hanton had not the slightest idea that Goldman and he were making a collateral contract of warranty—collateral that is to a distinct main contract of sale.

I therefore think that Lazarus Goldman was not liable in damages.

Assuming however, as I think we must in view of the findings of the trial Judge, that Hanton's statements and those of the witness O'Brien were true, it seems to me that, while there was not a collateral contract of warranty, the existence of an encumbrance not exceeding $1,000 was of the very essence of the contract of sale or exchange itself. I think it is properly to be inferred that the parties agreed to exchange their properties, that the plaintiff agreed to give his property in exchange for the defendant's upon the basis that the encumbrance on the latter was not to exceed $1,000, and in my opinion the defendant Lazarus Goldman is bound to fulfil this agreement by bearing everything above that amount.

I do not think we ought to be much concerned about the form of the action. There is obviously no possibility of any more evidence being given than was given on the trial in regard to the whole matter and therefore we ought to give the plaintiff his proper relief now without making another action necessary.

I therefore agree with the judgment proposed by my brother Clarke and would indeed be prepared to go somewhat farther and give the plaintiff a lien as for unpaid purchase money upon the property conveyed by him to the defendant, if it is still in the defendant's hands, subject of course to the rights of third parties acquired in the meantime. But this the plaintiff has not asked for and it appears probably that other rights have intervened to such an extent as to make it impossible.

CLARKE, J.A.:—Appeal from the judgment of Tweedie, J.

The plaintiff being the owner of a half section of land free from encumbrance listed it for sale with one Hanton, a real estate agent.

The defendant, Lazarus Goldman, being the owner of property in the city of Calgary, the title to which stood in the name of both defendants, subject to encumbrances, also listed it with the same agent; with instructions to sell it or to trade it.

In June, 1920, in the course of negotiations, with persons named Hogg and Leitweiler, for the sale of the defendants'

property, the agent procured from the defendants a transfer thereof signed by them in which the consideration was stated to be $6,500 but without naming any transferee. These negotiations having dropped, negotiations were later under way for the exchange of the plaintiff's half section for the defendant's city property, which were conducted by the agent, Hanton, on behalf of the two contracting parties, who did not come together personally at any time and the plaintiff executed to the defendant, Lazarus Goldman, a transfer, dated August 10, 1920, of the half section for the consideration of $4,800 which was sworn to by both parties as the true consideration passing between them.

Apparently the blank transfer, which had been signed by the defendants in June and was endorsed with the date "June, 1920" was at the same time dated August 10, 1920.

Both transfers were held in escrow pending a resale or exchange by defendant, Lazarus Goldman, of the half section, until about September 28, 1920, when the transaction was completed by the delivery over of the transfers to each other and possession taken, but the transfer to the plaintiff was not completed, it contains the name of no transferee, the memo of encumbrances was not filled in, nor was the amount of the consideration originally inserted during the negotiations with the former parties altered to correspond with the agreement between these parties, the affidavit of transferor is signed by Hanton as agent for the transferor and the jurat filled in dated September 28, 1920, but the body of the affidavit is not filled in and the affidavit does not purport to have been sworn to; the affidavit of the transferee is signed by the plaintiff and purports to have been sworn to on September 28, 1920, before W. A. Hanton, a commissioner for oaths, but lines have been drawn through Hanton's name and the body of the affidavit has not been filled in, the affidavit of execution by the witness purports to have been sworn before Hanton on August 10, 1920, in which the witness swears, that he saw the Goldmans sign, *seal* and execute the instrument whereas in fact it was not sealed and does not purport to be—such was the condition of what is called a transfer from Goldmans to Woolley, at the time of the trial. Of course it was never registered. The transfer from plaintiff to Lazarus Goldman was registered October 9, 1920.

If the transfer signed by the defendants were to be treated as executed to the plaintiff as transferee for the consideration therein named of $6,500 without further alteration, the result would be that the defendants would be under obligation to dis-

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charge all encumbrances and the plaintiff would owe defendants $1,700 the difference between the considerations named in the two instruments. Such was never intended by either party and was not their agreement.

After a careful perusal of the record, my conclusion is that the true agreement between the parties was that they should exchange properties without agreeing upon any amount at which either party should sell to the other. That the plaintiff should pay $250 for the purpose of discharging certain executions against Lazarus Goldman, which he did pay and that he should assume a mortgage on the property held by The Empire Loan Co., to the extent of what was owing thereon not exceeding $1,000 and interest thereon from the completion of their transaction, beyond these sums, nothing should be paid by the plaintiff and he should get title free from all other encumbrances.

The evidence is conflicting in regard to what plaintiff was to assume. In form it may be contended the agreement on the plaintiff's part was to assume the mortgage to The Empire Loan Co. whatever the amount, but the trial Judge has found upon conflicting evidence and I think properly, that Lazarus Goldman represented to Hanton that the mortgage did not exceed $1,000 certainly that is the representation made to the plaintiff by Hanton, who was the agent of Lazarus Goldman and there is no evidence that plaintiff at any time agreed to assume a mortgage for a larger amount. I have not overlooked the fact that Lazarus Goldman obtained from Hanton a writing signed by him dated September 28, 1920 containing a memorandum of the agreement as he understood it, which stated that the delivery of the city property should be subject to the existing mortgage, but this was upon the representation that the mortgage did not exceed $1,000 and in the light thereof, it can be read as being "subject to the existing mortgage not to exceed $1,000." This memorandum was not an agreement between the parties but only a memo. prepared by Hanton to shew the conditions of the sale without any authority from the plaintiff and without his knowledge—but treating the memo. as binding the plaintiff to assume the entire mortgage, I would, under the circumstances, treat the representation of the defendant, Lazarus Goldman, as an agreement binding upon him that $1,000 was the maximum amount of the mortgage.

The evidence of Lazarus Goldman does not impress me favourably. Without imputing to him any intentional dishonesty, his denial of the statement by him that there was no

more than $1,000 owing on the mortgage, sworn to by both Hanton and O'Brien, his denial of all knowledge of foreclosure proceedings, which he must have known of, his failure to inform Hanton of statements of arrears received by him from the loan company and his failure to produce those statements in the action, tell strongly against him. If the statement of the loan company as of December 31, 1920, put in at the trial is correct, and it bears every evidence of it, as all the payments in the passbook are credited, the standing of the account as of that date is as follows:—

Total payments up to December 31, 1920, including a payment of $27.80, made by plaintiff October 9, 1920.

68 at $27.80 each, $1890.40; interest, $1430.95; inspection fee, $5.00; insurance premiums, $186.07; costs, $75.65. Total, $1697.67. Balance applicable to principal, $192.73. Leaving balance owing on mortgage for principal, $2,000—$192.73= $1907.27. This is the amount which Lazarus Goldman is insisting the plaintiff shall pay after representing it was not more than $1,000. The difference is too great to be allowed to pass that way. See *Beatty* v. *Best* (1921), 58 D.L.R. 552, 61 Can. S.C.R. 576. *Whitaker v. Rumble* (1919), 45 D.L.R. 745, 14 Alta. L.R. 348.

I think the proper solution of the matter is to treat the agreement on the part of the defendant Lazarus Goldman as still executory. There is no transfer to the plaintiff and it is, therefore, the duty of the former to give a transfer of the land free from all encumbrances except $1,000 of the Empire Loan Co. mortgage and interest on the $1,000 according to the mortgage. A more appropriate action would have been for specific performance but I see no objection to allow the judgment to stand in its present form leaving it to the plaintiff if it be found necessary to take further proceedings to obtain a proper transfer. I see no justification for a judgment against Louis Goldman, he was no party to the agreement between the other parties and had for some months ceased to have any interest in the property, the only possible claim against him would be upon an implied covenant in the transfer he signed in blank but the covenant must be with some other person as covenantee; there is no other person named in the transfer to take the benefit of his covenant. The plaintiff is not a party to it and has no rights under it against this defendant.

I would, therefore, allow the appeal of Louis Goldman and dismiss the action as against him both with costs fixed at $100.

I would dismiss the appeal of Lazarus Goldman and affirm

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the judgment as against him with this variation viz.: By adding the following paragraphs to the judgment. 4. (a) And this Court doth further order and adjudge that the defendant Lazarus Goldman be at liberty to satisfy the encumbrances in excess of the said sum of $1,000 and interest thereon from October 7, 1920, and have them removed from the title in satisfaction of this judgment. 4. (b) And this Court doth further order and adjudge that upon payment by the defendant, the said Lazarus Goldman, to the plaintiff of the amount which shall be found payable by him or any part thereof the plaintiff shall indemnify and save him harmless from all further liability in respect of the amount so paid. 4. (c) And this Court doth reserve liberty to the parties to apply for further directions to a single Judge.

As to the costs of the appeal, I see no reason why the plaintiff should not now submit to Lazarus Goldman for execution by the proper parties a transfer in accordance with the agreement as declared in this action. If this be executed and delivered to the plaintiff within 2 weeks after its tender, I would give no costs of this appeal to the plaintiff, otherwise the appeal of Lazarus Goldman to be dismissed with costs. It is to be hoped that the costs which both parties have to bear in this litigation will in future deter them and others from continuing the reprehensible practice, all too common, of signing and accepting transfers of land in blank and altering or filling them in after being signed.

Judgment below varied.

MORRIS v. KLINE; DEMERS et al, garnishees.

Quebec Superior Court, Panneton, J. April 26, 1922.

BANKRUPTCY (§IV—35)—ACTION AGAINST BANKRUPT ESTATE—TRUSTEE RESIDENT IN ONTARIO—ACTION SUSPENDED PENDING PRODUCTION OF POWER OF ATTORNEY—SUBSTITUTION OF OTHER TRUSTEE RESIDENT IN QUEBEC—POWER OF ATTORNEY NOT NECESSARY—NEW TRUSTEE AUTHORISED TO TAKE UP ACTION — PRODUCTION OF POWER OF ATTORNEY NOT NECESSARY—MOTION TO DISMISS ACTION.

Where an authorised trustee resident in Ontario under the Bankruptcy Act has commenced an action and made a seizure of goods in the hands of a garnishee but on motion of the defendant the action has been suspended until security for costs has been given, and a power of attorney secured, and the plaintiff is then replaced by another trustee, resident in Quebec who does not have to give such power of attorney, and such substituted trustee is authorised to take up the action of the former trustee, the Court will dismiss a motion asking for dismissal of the action for default of production of the power of attorney.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

MOTION to dismiss an action for non production of a power of attorney necessary under the Quebec practice. Motion dismissed.

I. Popliger, for plaintiff.

Jacobs & Phillips, for defendant.

PANNETON, J.:—A seizure for security was issued on January 2 last in the Superior Court under No. 901 of the records of said Court at the instance of W. R. Morris of Peterborough, Ont., in his capacity of Trustee to the estate of Hyman Kline of Peterborough against said Kline to attack and seize in the hands of the above named garnishees the moveables and effects of said Kline in their hands and possession the said writ of seizure was returned into Court on January 9 last.

The object of that seizure was to attach in the hands of the garnishees $2,500 which it is alleged said insolvent Kline had deposited with said garnishees.

Upon a motion made by the defendant Kline on January 23, the proceedings in that case were suspended until plaintiff gave security for costs and a power of attorney to his attorneys. Security for costs was given, but no power of attorney was produced. On the contrary an affidavit of plaintiff was filed on March 29 last, to the effect that the plaintiff never authorised said seizure.

On January 21 at a meeting of creditors of the insolvent David Sommer was appointed trustee in the place of plaintiff Morris and proceedings taken by plaintiff Morris were approved of, the said Sommer being a resident of the city of Montreal in this Province. On February 1 last, the appointment of said Sommer as trustee was confirmed by the Court and the proceedings in insolvency issued in the Province of Ontario and the records by the same judgment of the Court were transferred to the Bankruptcy Court of this Province.

On February 3 last at a meeting of the inspectors the trustee Sommer was authorised to take up the instance in the suit of Morris against the insolvent Kline, notice of which was given to said insolvent Kline on February 10.

On February 6 expired the delay within which plaintiff Morris was ordered to produce a power of attorney, he having previously been replaced by Sommer, a resident of this Province, who is not obliged to give such power of attorney, and therefore the judgment ordering the production of such power of attorney lost its effect, the change operating satisfaction of the judgment.

On February 10 last, defendant made a motion asking the dismissal of plaintiff's action and seizure by reason of plaintiff's

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default to produce said power of attorney.

Considering that all that was ordered by the judgment of January 23 was a suspension of the delay to plead until a power of attorney was filed and that there is no more necessity for the production of such power of attorney; the Court dismisses said motion with costs limited to $20 for the attorney and disbursements.

Judgment accordingly.

Re MORDEN.

Alberta Supreme Court in Bankruptcy, Hyndman, J. February 3, 1922.

BANKRUPTCY (§V—45)—DISCHARGE OF BANKRUPT—BANKRUPTCY ACT SECS. 58 AND 59—DISCRETION OF JUDGE—ASSETS LESS THAN 50 CENTS ON DOLLAR—IMPOSSIBILITY OF DETERMINING AMOUNT OF ASSETS OWING TO FAULTY BOOKKEEPING.

A Judge in bankruptcy has no discretion under sec. 58 of the Bankruptcy Act to grant a discharge—unless he is satisfied that the fact that the assets are not of a value equal to fifty cents on the dollar in the amount of the unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible, and where on account of the confused and unbusinesslike way of keeping the accounts it is impossible to come to any conclusion on the point he has no discretion to grant the discharge.

[See Annotations 53 D.L.R. 125, 56 D.L.R. 104, 59 D.L.R. 1.]

APPLICATION for discharge of a bankrupt under the Bankruptcy Act 1919 (Can.) ch. 36, sec. 58. Dismissed.

A. E. Dunlop, K.C., for applicant.

W. Beattie, for Campbell, Wilson & Horne creditors.

HYNDMAN, J.:—The applicant moves for an order of discharge by virtue of sec. 58 of the Bankruptcy Act, 1919 (Can.) ch. 36.

The application is opposed by Campbell, Wilson & Horne only one, and the largest, of his creditors. The principal grounds which are in opposition to the granting of such discharge are:—

(1) The assets are not the value of 50c. in the dollar on the amount of his unsecured liabilities; (2) the bankrupt has omitted to keep such books of account as are usual or proper and as sufficiently disclose his business transactions and financial position within 3 years immediately preceding the bankruptcy; and (3) the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculations. (See sec. 59, (a) (b) and (e) of the Act.)

The authorised assignment was made on October 16, 1920. A meeting of creditors was held on November 3, 1920 at which

meeting it was arranged to retain the services of Morden to assist the trustee in collecting the accounts receivable. The assets at the date of the assignment consisted of:—

Accounts receivable $3,941.45, stock in trade (groceries, dry goods) $3,272.66, fixtures & fittings $1,268.50, horses $500., Farm machinery $140. Total: $9,122.61.

The real estate was valued at $2,700 but it was encumbered to the extent of $2,660 and the mortgagees were given possession. The assets mentioned were disposed of at auction and realised the following amount:—Accounts receivable $1,962.70, stock in trade and fixtures $3,011.72, horses $125.00. Total: $5,899.42.

The liabilities are:—Secured claims $2,660, preferred claims $189.87, ordinary claims $15,279.66. Total: $18,129.63.

The secured creditors were given possession of their security under the mortgages and the preferred creditors were paid in full and a dividend of 29.2% was paid to the ordinary creditors. Following is an extract from the report of the authorised trustee which was produced and made use of in the application:—

"Morden was in partnership with Bennett 5 or 6 years previous to the assignment. When the partnership was dissolved Morden owed Bennett a considerable amount which was reduced from time to time and $3,570.50 was the amount of the liability at the date of the assignment. Prior to the assignment Morden was also operating a farm, which operation was a financial loss.

Morden took every opportunity of assisting us in having his estate wound up and during the stocktaking the services rendered by him were valuable. His efforts were not confined only to the stocktaking but he was of material assistance at the auction sale and also in collecting the accounts receivable. We feel that we should commend Morden for the services which he has rendered us since the date of the assignment and we are of the opinion that his position today as a bankrupt was not caused with intent to defraud his creditors but chiefly through the fluctuation of stock values and losses on farm operations. In view of these circumstances we do not wish to raise any objection to Morden receiving his discharge.

Morden has fulfilled all the obligations entailed upon him as provided for under sec. 54 of the Bankruptcy Act.

The authorised trustee has complied with all the provisions of sec. 58 with regard to serving notice on all of the creditors

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of date and place of hearing of the application for discharge of the debtor, Robert Bruce Morden."

Dealing with the first objection that the assets were not of the value of 50c. on the dollar. It is clear that I have no discretion to grant the discharge unless I am satisfied that the fact that the assets are not of a value equal to 50c. on the dollar in the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible: sec. 59 sub-sec. (a).

The bankrupt was examined in discovery touching this and other matters and the result of my reading the examination does not satisfy me that such is the case. It may be so or it may not be but the fact remains that his town business and his farming operations were carried on in such a confused and unbusinesslike manner so far as keeping accounts is concerned, that in my opinion it is quite impossible to come to any conclusion on the point. That being so my discretion to grant the desired discharge is entirely removed by the statute.

Dealing with the second objection. It must be said that the bookkeeping methods adopted were of a very crude nature and in my view it was not possible for anyone except perhaps a skilled chartered accountant to make anything like a clear and businesslike statement which would exhibit a true condition of the debtor's affairs and then only after a great deal of work gathering together the various items of the business. That is not however, such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the 3 years immediately preceding his bankruptcy; sec. 59 sub-sec. (b).

The test seems to be whether or not the debtor can at any time tell just how he stands with regard to his assets and liabilities.

In *Ex. parte Reed and Bowen* (1886), 17 Q.B.D. 244 at p. 254, 55 L.J. (Q.B.) 244, 34 W.R. 493, Lord Fisher M.R. said:—"The way in which such books should be kept has been often enunciated by the Court. It is not enough that there should be books with entries in them which would require a prolonged examination by a skilled accountant in order to ascertain the result of them. That is not keeping proper books. The books should be properly kept and balanced from time to time so that at any moment the real state of the trader's affairs may at once appear. Those are the books which traders ought to keep."

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Now it seems to me that the above observations fit the case before me fairly completely.

As to objection No. 3.

I am not prepared to say that the farming operations of the assignor were such to amount to rash and hazardous speculations. It was not of very large proportions although it probably did have the effect of alienating a good deal of the time of the debtor which would otherwise have been spent in his store business and concentrated his attention there to the advantage of the business.

However, leaving the latter point out of consideration I think the first and second objections (regarding also the trustee's report) are such as to compel me to refuse the application at this time.

The application will therefore be dismissed with costs.

Application dismissed.

DALPHE v. FAIRBANKS, GOSSELIN & Co.

Quebec Superior Court in Bankruptcy, Panneton, J. April 11, 1922.

BANKRUPTCY (§IV—35)—SHARE CERTIFICATES DEPOSITED WITH BROKERS—INSTRUCTIONS TO SELL AND PURCHASE OTHER SHARES—SALE OF SHARES—DEPOSIT OF PROCEEDS TO GENERAL ACCOUNT—ASSIGNMENT UNDER BANKRUPTCY ACT—RIGHTS OF PERSON DEPOSITING—DAMAGES—ARTICLE 1709 QUE. C.C.

One who deposits certain share certificates with a brokerage firm with instructions to sell same and purchase other designated shares with the proceeds, has no privilege of any kind on the moneys received by the brokers for the sale of such shares, such brokers having made an authorised assignment after such sale and having failed to purchase the shares they were instructed to purchase, but having deposited the money obtained to their own general account in the bank but not in trust. Such money having lost its identity and not being capable of being followed or traced, the claim becomes one in damages for non-fulfilment of the obligation. Art. 1709 Que. C.C.

[See Annotations 53 D.L.R. 135, 59 D.L.R. 1.]

PETITION for an order that trustees under an authorised assignment be ordered to pay petitioner a sum of money which they refused to pay and in the alternative that the said sum be declared to have priority over the ordinary creditors. Dismissed.

A. Mathieu, for petitioner; *G. A. Campbell*, K.C., for trustee.

PANNETON, J.:—Petitioner alleges that on January 13 last the petitioner handed over to the firm of Fairbanks & Gosselin, one share certificate of the common stock of the Canada Cement No. A-18171 for 5 shares and one share certificate of the Pacific Oil Co. No. A-25873 for 5 shares to be sold by the latter for the

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petitioner's benefit as appears to their receipt of same date and bearing their number 1505;

The petitioner having no account with the said firm nor being at the time not in any way whatsoever indebted towards the said bankrupts instructed them, with the proceeds of the sale of the two above mentioned shares certificates to buy for his benefit seven shares of the preferred stock of the Canada Cement Co. at market price;

Pursuant to the said instructions, the bankrupts did, on January 13, last, sell for plaintiff's benefit the said 5 Canada Cement shares at 52-¾ making a total of $262.30 and his 5 Pacific Oil shares at 45-⅞ making a sum of $227.68, making a total sum of $490.98, commission deducted; which they did not send to the petitioner but kept same in deposit in trust only for his benefit as per instructions received to buy immediately at market price 7 shares the preferred stock of the Canada Cement preferred at market price as per instructions received as above mentioned.

On or about January 30 last, 1922, said Fairbanks & Gosselin made an authorised assignment under the bankruptcy law having not fulfilled the petitioner's instructions nor bought for his benefit 7 shares of the Canada Cement at market price and having still in deposit for petitioner's benefit the said sum of $490.98.

Wherefore, the petitioner is entitled to ask and asks that by the judgment to be rendered the joint trustees be ordered to pay him the sum of $490.98, which sum, though duly requested to pay him, they have refused to pay, and subsidiarily that by the judgment to be rendered, the petitioner's claim for said sum deposited in trust with the bankrupts be declared privileged with the rank of priority above the ordinary creditors to be determined by the said judgment to be rendered; the whole subject to the judgment of the Court as to costs.

For answer to the petition of the petitioner the trustee, hereunto duly authorised by the inspectors says:—

"1. The allegations of paragraphs 1 and 2 are admitted. 2. Paragraph 3 is admitted, except that the trustee does not admit that the said sum was held in trust as alleged. 3. Paragraph 4 is admitted, except that the said Fairbanks, Gosselin & Co. had not on deposit the said amount in trust for petitioner. 4. The only cash which the trustee found in the possession of said bankrupts on the said January 30, 1922, was the sum of $451.30, and there were and are many other claims substantially similar in character to that of petitioner so that the said amount would

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be quite insufficient to fully pay petitioner and or other similar creditors of said bankrupts having equal rights. 5. Petitioner is not entitled to have his petition granted or his said claim paid except as an ordinary claim of the said Fairbanks, Gosselin & Co. in liquidation, and on the same basis as other ordinary claims. 6. The claim of said petitioner against the said Fairbanks, Gosselin & Co., bankrupts, is merely a claim as on a debtor and creditor account for stock transactions between the said parties, and is not in any way entitled to preferential treatment, and is an unsecured claim against said insolvents. 7. The trustee has not yet had an opportunity of preparing any dividend sheet of the said insolvent firm, but it is quite clear that the unsecured creditors of said firm cannot be paid anything like the par value of their claims against said bankrupts. 8. If petitioner will file with the trustee a sworn statement of claim against said bankrupts in due form, petitioner will be collocated in due course for any dividend accruing to him from the estate of said bankrupts, but petitioner's present petition is premature."

The proof establishes that the moneys, being the proceeds of the sale of the shares above mentioned, were deposited by the debtors in their general account at the bank, not in trust, and thereby lost their identities and cannot be followed nor traced in any manner and it is further established that there are many claims of a similar character due by the debtors who are insolvents;

Considering that petitioner has no privilege of any kind on the moneys in the hands of the trustee: Considering that petitioner did not deposit any money but certificates of shares in the hands of the debtors, who became mandataries to use the proceeds of the sale of those shares and apply them to buy their shares and not to keep them in their hands as deposit to be returned to petitioner in money and that not having fulfilled their mandate in not buying the intended shares the claim of petitioner became one in damages against petitioner for non-fulfilment of their obligation article 1709 C.C.; considering that petitioner has not proved the allegations of his petition. The Court dismisses the same with costs.

Petition dismissed.

Alta.

App. Div.

ROWAN v. WHITE.

Alberta Supreme Court, Appellate Division, Beck, Simmons, JJ.A., Walsh, J. (ad hoc), Hyndman and Clarke, JJ.A. May 13, 1922.

STATUTES (§IIA—96)—CHAPTER 27, 1906 ALTA. STATS.—AN ACT TO PREVENT FRAUDS AND PERJURIES IN RELATION TO SALES OF REAL PROPERTY—CONSTRUCTION—LEGISLATIVE INTENT—ORAL AGREEMENT FIXING COMPENSATION—NECESSITY OF STATING COMPENSATION IN WRITTEN MEMORANDUM.

Chapter 27 of 1906 Alta. Stats. entitled an Act to Prevent Frauds and Perjuries in Relation to Sales of Real Property, requires the "contract upon which recovery is sought . . . or some note or memorandum thereof." The proper interpretation of this Act is that when there is an express verbal agreement, the written memorandum must, in order to comply with the statute, contain all the material terms of such agreement. The omission to include in the written memorandum the amount of commission payable where this has been orally agreed upon is, therefore, fatal to an action for its recovery. Held also that the plaintiff could not recover under the amendment of 1920, ch. 4, sec. 38, because the formal agreement for sale signed by the defendant and offered to the purchaser was refused by her and was not signed by all necessary parties entitling the purchaser to possession of the lands in question.

[See *Rowan* v. *White* (1922), 63 D.L.R. 445, granting leave to appeal.]

APPEAL by plaintiff from the judgment of the District Court dismissing an action for the recovery of commission for the sale of land. Affirmed.

Duncan Stuart, K.C., for appellant.

J. J. Petrie, for respondent.

BECK, J.A.:—I adhere to the opinion I have already expressed in this case (*Rowan* v. *White* (1922), 63 D.L.R. 445), with which my brother Hyndman agreed. I there held that ch. 27 of 1906 necessitated a writing showing only the creation of the relationship of principal and agent; not, in addition to this, the consideration for the agent's services. I understand that the other members of the Court agree with this proposition, if no consideration has in fact been agreed upon; for then, as in cases of sales of goods, a reasonable consideration will be implied; but, in the present case, a consideration of $1 an acre having been in fact agreed upon, they are of opinion that the express excludes the implied agreement; while, in my view, the consideration agreed upon being the usual compensation for such services in cases of farm lands in this Province—the case here—the express and implied agreements accord and, therefore, the former does not exclude the latter.

There is nothing in the evidence to show that if this view of the law is correct the plaintiff should not succeed.

In my opinion, therefore, the appeal should be allowed with costs and judgment entered for the plaintiff for $160 and costs.

SIMMONS, J.A.:—I agree with the conclusion of law of Clarke, J.A., 63 D.L.R. 445, in the judgment giving leave to appeal, for the reasons contained therein.

The correspondence upon which it is claimed there is made out a memorandum of contract signed by defendant to pay a commission does not indicate the rate of commission. The oral evidence is that the rate of commission was $1 per acre.

Even if from the correspondence a memorandum could be made out (which is somewhat doubtful) yet the omission therefrom of the rate of commission agreed upon orally is fatal. In regard to the claim that the plaintiff can come under the amendment of ch. 4, sec. 38, 1920, a fatal objection also intervenes. An agreement for sale was executed by the vendor and tendered to the purchaser and refused because of a reservation of mines and minerals, and the purchaser has made a declaration through her solicitor for renunciation and for return of the deposit of $500 paid when the agreement was made.

The words of the amendment:—"Or has executed an agreement of sale of lands, tenements and hereditaments or any interest therein signed by all necessary parties, entitling the purchaser to possession of the said lands. . . . . as specified in the said agreement and has delivered the said agreement to the purchaser."

The purchaser is not entitled to possession of the minerals under the agreement signed by the vendor, the purchaser has not taken delivery of the agreement. The agreement itself recites:—

"The purchaser shall immediately after the execution of this agreement. . . . . have the right of possession of said lands and shall have the right to occupy and enjoy the same until default be made in the payment of said sums of money, etc."

It would appear from this clause of the agreement which was tendered to the purchaser and refused by him, that the execution of the agreement was a condition precedent to the right to occupy the land and quite aside from the question of reservation of minerals he is not entitled to possession. Therefore, the agreement is not "*signed by all necessary parties entitling the purchaser to possession* of said lands."

For these reasons I would dismiss the appeal with costs.

HYNDMAN, J.A., concurs with BECK, J.A.

CLARKE, J.A.:—Still adhering to the views I expressed on

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the application by the plaintiff for leave to appeal, 63 D.L.R. 445, I would dismiss the appeal with costs.

WALSH, J., concurs with CLARKE, J.A. *Appeal dismissed.*

PROSKO v. THE KING.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. March 15, 1922.

NEW TRIAL (§II—7)—CRIMINAL LAW—MURDER—ADMISSION OF CONFESSION IN EVIDENCE—CONFESSION VOLUNTARY—ADMISSIBILITY AS AGAINST PERSON MAKING—AS AGAINST PERSON JOINTLY TRIED FOR CRIME—RIGHT OF PERSON TO BE TRIED SEPARATELY—JUDICIAL DISCRETION OF TRIAL JUDGE—INTERFERENCE WITH—NO PREJUDICE CAUSED BY JOINT TRIAL.

A conviction for murder will not be set aside or a new trial ordered, because of the admission as evidence of statements made by the accused to immigration authorities in the United States, while being examined there prior to his deportation as an undesirable citizen, and prior to his arrest in Canada on the murder charge, there being no evidence that such statements or confessions were induced or obtained "by fear of prejudice or hope of advantage exercised or held out" by such persons in authority; although such statements are inadmissible as against another person charged also with the murder and tried at the same time as the person making such statements.

The Court will not interfere with the judicial discretion of a trial Judge in refusing a separate trial where two persons have been accused of murder, and there has been no possible prejudice which could have arisen from such refusal.

APPEAL from a judgment of the Court of King's Bench (criminal side) of the Province of Quebec upholding the conviction of the appellant on a charge of murder. Affirmed.

Alleyn Taschereau, K.C., for appellant.

Lucien Cannon, K.C., for respondent.

DAVIES, C.J.:—Prosko had been tried jointly with another man named Janousky before Lemieux, C.J., and a jury. Both were found guilty by the jury but on appeal to the Court of King's Bench the conviction against Janousky was unanimously quashed and a new trial granted to him, while the conviction against the appellant Prosko was by a majority of that Court upheld, Lamothe, C.J. and Greenshields, J. dissenting.

The reasons of the Court for quashing the conviction against Janousky substantially were that certain statements or admissions or confessions made to the police officers of the City of Detroit by Prosko when he was in custody there, as to his own and Janousky's connection with the murder for which they were being jointly tried were inadmissible as against Janousky, and calculated to prejudice his receiving a fair and impartial trial,

and this notwithstanding that the trial Judge in charging the jury had fully and explicitly told them they were not to consider or give any weight to these alleged admissions or statements or confessions, as they were called, of Prosko as against his co-prisoner Janousky.

The Court was unanimous on this point of granting a new trial to Janousky but a majority, as I have stated, held, and in my opinion, properly that these statements, admissions or confessions of Prosko were admissible against himself in the circumstances and under the conditions in which they were made, and that they would not interfere, in Prosko's case, with the judicial discretion exercised by the trial Judge in refusing to grant the application of counsel for a separate trial of each of the prisoners.

The questions reserved for the consideration of the Court of Appeal were as follows:—

"(1) Was there error in refusing a separate trial to the accused? (2) Was there error in admitting the testimony of the two witnesses, Heig and Mitte, as to certain statements or so-called admissions made by one of the accused, Prosko? (a) as to the accused Prosko? (b) as to the other accused Janousky? (c) seeing the admissions made by Prosko were so made in the absence of Janousky, were the instructions of the trial Judge to the jury that statements made by one of the prisoners did not make evidence against the other, sufficient? (3) Was there error in admitting the testimony of the witness Roussin with respect to certain statements made by Prosko either before or after his arrest? (4) Was there error in permitting the Crown to produce before and exhibit to the jury as exhibits certain objects which were found in the possession of one or other of the accused, on or in the premises occupied by one or other of them?"

So far as Janousky is concerned, the questions are finally disposed of and we need not concern ourselves with them. As to the other accused, Prosko, question (3) was abandoned at the hearing before us, leaving the three questions to be considered by us on this appeal:—

(1) The refusal of a separate trial to him; (2) the admission in evidence of the statements or confessions sworn to by Heig and Mitte as having been made to them by Prosko; and (3) the production as exhibits of clothing and other articles such as a mask, a false moustache and an electric torch, said to have been found in a valise or parcel in Prosko's room in his boarding house in Montreal.

With regard to the first of these questions, I have no difficulty

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DAVIES, C.J.

in declining to interfere with the judicial discretion exercised by the trial Judge in refusing to grant the application for such separate trial for Prosko. It is true the application was made twice; once, when the trial began and, afterwards, when it was proposed to put in Heig and Mitte's evidence respecting Prosko's statements or confessions (so-called) to them. But I am quite unable to find any possible prejudice which could arise to Prosko from this refusal. There might be and in fact the King's Bench (criminal side) held it to be quite possible that a joint trial coupled with the admission of such evidence, notwithstanding the Judge's charge to the jury that they were not to consider or give any weight to these alleged admissions or statements of Prosko as against his co-prisoner, might prejudice Janousky, and that it was impossible to say what effect they might have had on the minds of the jurymen. But as regards Prosko, admitting for the moment the admissibility of such evidence, I cannot find any possible prejudice which its admission would cause to him.

Then as to the admissibility of this evidence as against Prosko, I think the statement of Lord Sumner, when delivering the reasons for the conclusions of the Judicial Committee of the Privy Council, in the case of *Ibrahim* v. *The King*, [1914] A.C. 599 at pp. 609, 610, 83 L.J. (P.C.) 185, correctly states the rule in that regard:—

" . . . . It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale . . . ." See also *R.* v. *Colpus*, [1917] 1 K.B. 574, 86 L.J. (K.B.) 459; *R.* v. *Voisin*, [1918] 1 K.B. 531, 87 L.J. (K.B.) 574; *R.* v. *Cook* (1918), 34 Times L.R. 515.

I have read the evidence of each of these witnesses Heig and Mitte most carefully.

I concede that they were persons in authority having at the time Prosko in their custody with the intention of bringing him before the United States Immigration Board to be examined whether or not he was an undesirable immigrant to the United States, and with a view to his deportation being ordered if he was found undesirable.

I fail to find the slightest evidence that Prosko's statements or confessions were induced or obtained from him either "by

fear of prejudice or hope of advantage exercised or held out" by either Mitte or Heig to him. On the contrary I conclude that Prosko's statements were absolutely voluntary ones.

After having been told by these witnesses in Detroit that they were going to take up his case with the United States Immigration officials and have him deported to Canada, Prosko replied:—"I am as good as dead if you send me over there."

The officers in reply to this naturally asked, "Why"? Whereupon Prosko proceeded to give his statement as given in evidence by these two witnesses. (It must be remembered that the time when he made these statements or confessions was before he was brought before the Immigration Board, and that later, when he was brought before that Board he repeated under oath, as Heig and Mitte say in evidence, the statement he had already made to them. The Immigration Board on hearing his statement or confession made the necessary order for his deportation). Under these circumstances I feel bound to answer the second question in the negative.

As regards the third question to be considered by us on this appeal, I feel bound to say that I cannot see any reason why the Crown, having by its officer, Roussin, visited the boarding house in Montreal of Prosko, and having there been shewn the rooms said to have been occupied by Prosko and one Yvasko, should not have produced the articles found there and put them in as exhibits.

If the Crown produced any of these articles found in this room of Prosko's it was bound, in my opinion, to produce all articles found there.

I do not attach any great importance to the production of these articles. They consisted in part of an electric flashlight, a false moustache, several photos of Prosko, a cap and other articles.

The question of their being improperly admitted as exhibits was not strongly pressed at Bar, and even if they were improperly given in evidence as exhibits, which I do not at all concede, I cannot think it possible that "any substantial wrong or miscarriage" was thereby occasioned on the trial as regards Prosko.

Unless there was in our opinion such substantial wrong or miscarriage occasioned, we are forbidden by sec. 1019 of the Criminal Code to set aside the conviction or direct a new trial.

Under all these circumstances and on my findings with respect to the questions submitted to us, I am of the opinion that the appeal must be dismissed.

IDINGTON, J.:—Four men entered, during the night of July

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27, 1918, a lumber camp in the Province of Quebec, for the purpose of robbing the men therein, and, in the course of such pursuit, shot and killed one of the men there.

Two of the said four were convicted of the murder and were executed in July, 1920.

Thereafter the appellant and another named Janousky were placed on trial in Quebec. In their defence they were represented by the same counsel who asked the Court to direct that they be tried separately, but this privilege was denied them.

The trial resulted in the conviction of both. Thereupon a stated case was directed by the Court of King's Bench and, upon the hearing thereof, a new trial was granted Janousky but, by a majority of the Court, denied the appellant.

The Chief Justice and Greenshields, J. dissented from the said denial of a new trial to the appellant. Hence this appeal here based on some of the grounds taken in such dissent.

The first question so raised is as follows:—(1) Was there error in refusing a separate trial to the accused?

The Court of King's Bench having unanimously arrived at the conclusion that as to Janousky there was error, we have nothing to say as to that aspect of the case except to make clear the reason for so distinguishing.

There were many statements made by appellant which the trial Court admitted in evidence against him, and in some of these he had referred to Janousky, under his nickname of "little George" in such a way as to implicate him.

There was a possibility of the jury having been impressed thereby to the detriment of Janousky and, in that result, to have confused that and somewhat similar incidents in other features of the case as presented by the entire evidence; notwithstanding the clear and express direction of the trial Judge to the jury to apply the evidence in such a way as to avoid such possible error.

There was no such counterpart in the evidence against Janousky alone as would tend to the confusion thereof with the case made against the appellant alone.

In the broad salient features of the case demonstrating the actual perpetration of the crime there was nothing to confuse.

It is merely when the evidence of the identification of the accused, or either of them, came to be considered by the jury that there was a possibility of undesirable confusion of thought.

Whatever may have been possible in that regard relevant to Janousky, and to his detriment, I cannot see how appellant was likely to have suffered the like from anything in the evidence directed to Janousky's part, if any, in the matter in question.

Counsel for appellant indeed did not point to anything specific in that regard but seemed to rest upon and press the possibility of appellant having been able to call Janousky as a witness on his behalf if a separate trial had been granted.

There is nothing specific in way of fact presented to support this contention. Nor, so far as I can see, was such a pretension presented to the trial Judge.

I cannot see any good ground for the allowance of this appeal by way of answering this question in the affirmative.

The next question raised herein is as to the admissibility of the evidence of Heig and Mitte who swear that appellant, after having been presented with the decision of the authorities in Detroit that he was to be deported back to Canada as an undesirable citizen, said, "I am as good as dead," which naturally evoked the question, "How is that?" and he proceeded to tell a story which, as I read its introduction was not improperly induced within the meaning of the rule in that regard as set forth by Lord Sumner in the case cited to us, as follows:—

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

I refer to the case of *Ibrahim* v. *The King*, [1914] A.C. 599 at pp. 609 and 610. The dictum from which I quote was approved in the later case of *R.* v. *Voisin*, [1918] 1 K.B. 531.

As pointed out in argument the said case was decided on other grounds and the ruling only an incident, but nevertheless, this is a fair presentation of the rule invoked by the dissenting Judges in the Court of Appeal.

It is the inducement exercised by the officers in charge that is to be guarded against and not the accidental circumstances of an arrest and the bearing thereof on the mind of one accused that has to be guarded against.

And the evidence of each of these witnesses is introduced by a distant categorical denial of having exercised any of these practices which would bring the evidence given within the rule against its admission.

I think, therefore, the trial Judge's ruling was right and that the question raised anent same must be answered in the negative.

Then as to Roussin's evidence the appellant was distinctly warned by him upon his arrest that anything he said would be used against him and hence no ground for the contention set up.

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In truth it seems to have been assumed in argument here as hopeless to argue, if held that the evidence of the American detectives of statements made by accused, without express warning, was admissible, then Roussin's story in what he tells, so far as it was substantially the same as had been told by the said detectives, could not be rejected.

I am decidedly of the opinion that both were admissible.

The only other question upon which counsel for appellant rested his appeal was the fourth question of the stated case, which reads as follows:—

"Was there error in permitting the Crown to produce before and exhibit to the jury as exhibits certain objects which were found in the possession of one or other of the accused on or in the premises occupied by one or other of them?"

I, with great respect, find it difficult to treat such a question seriously. Some of the articles found were not worthy of serious consideration by the jury, but the false moustache and flashlight, for example, were important items well worthy of consideration in a case such as this dependent to so great an extent as it was, upon circumstantial evidence.

That which was incapable of being fitted into the chain of circumstances to be relied upon of course would be discarded by the jury; to whom we must attribute common sense.

It became the duty of the Crown officer to present the suitcase contents as found and let the jury determine what was relevant and what was not. And then not leave the impression that accused was so intent in pursuit of easy money that he could think of nothing else, and hence carried only false moustaches, flashlights or glass cutters.

The question should be answered, as it was by the majority of the Court below, in the negative.

The appeal herein should be dismissed.

ANGLIN, J.:—The material facts are sufficiently stated in the judgments delivered in the Court of Appeal.

Of the three questions argued before us only one in my opinion called for consideration, viz. whether certain statements alleged to have been made by the appellant to two American detectives (Heig and Mitte) were admissible in evidence against him. To both the other grounds of appeal sec. 1019 Cr. Code appeared to me to afford a sufficient answer. But, having regard to the importance attached to the statements made to Heig and Mitte by the Chief Justice in charging the jury, the question of their admissibility cannot be thus disposed of.

My only reason for withholding concurrence in the judgment dismissing the appeal was that, owing to pressure of other work

of the Court, I had not had an opportunity of satisfying myself by a study of the record that the Crown had discharged the burden, which undoubtedly rested upon it, of establishing that the statements made by the appellant to Heig and Mitte were voluntary statements, in the sense that they had not been obained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority. *Ibrahim* v. *The King*, [1914] A.C. 599 at p. 609; *Reg.* v. *Thompson*, [1893] 2 K.B. 12, at p. 17; *R.* v. *Colpus*, [1917] 1 K.B. 574; *R.* v. *Voisin*, [1918] 1 K.B. 531, at p. 537.

The two detectives were persons in authority. The accused was in my opinion in the same plight as if in custody in extradition proceedings under a warrant charging him with murder. No warning whatever was given to him.

While these facts do not in themselves suffice to exclude the admissions, as Duff J. appears to have held in *R.* v. *Kay* (1904), 9 Can. Cr. Cas. 403, they are undoubtedly circumstances which require that the evidence tendered to establish their voluntary character should be closely scrutinised. *R.* v. *Rodney* (1918), 43 D.L.R. 404, 30 Can. Cr. Cas. 259, 42 O.L.R. 645.

If I should have reached the conclusion that the burden on the prosecution of establishing the voluntary character of the alleged admissions had not been discharged, the proper result would have been to order not the discharge of the appellant (sec. 1018 (d) Cr. Code), but his remand for a new trial (sec. 1018 (b) Cr. Code). Since the majority of the Court was clearly of the opinion that the impugned evidence was properly received and the appeal therefore failed, I did not feel justified in delaying the judgment and shortening the time available for consideration of the case by the executive, merely to complete my own study of the evidence, especially in view of the fact that the case must in any event go before the Minister of Justice, who may, if he should entertain any doubt of the propriety of the conviction, grant the appellant the only relief to which he would in my opinion in any event have been entitled. (sec. 1022 Cr. Code.)

For these reasons, while not dissenting, I refrained from concurring in the judgment affirming the conviction.

Since the delivery of judgment, however, I have had an opportunity of considering the material evidence and I think I should state that I now see no reason to differ from the conclusion reached by the majority of the Court that the evidence in question was admissible. At all events the discretion exercised

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Brodeur, J.

by the trial Judge in receiving it could not properly have been interfered with. *R.* v. *Voisin*, [1918] 1 K.B. 531.

BRODEUR, J.:—Three questions are raised.

The first is to determine if the accused Prosko was justified in demanding to be tried separately from Janousky.

The presiding Judge refused this request and both accused were tried and found guilty of murder at the same time.

The Court of Appeal decided that Janousky was justified in asking for a separate trial because the admissions made by his accomplice Prosko might have caused him a real prejudice and led to his condemnation. The Court of Appeal was of opinion that Prosko had suffered no prejudice by being tried at the same time as his accomplice. A new, separate trial was therefore granted to Janousky but not to Prosko.

The latter appealed from this decision.

The evidence at the trial was, generally speaking, common to both accused. They were both seen near the scene of the murder before and after. Articles were found in both their rooms such as persons who make theft their principal occupation are accustomed to make use of. In the case of Prosko this circumstantial evidence was strengthened by certain admissions which he made before and after his arrest for murder.

It is quite evident that Prosko's admissions might have damaged him considerably; but they could have been proved equally well whether Prosko was tried alone or with his accomplice. So a separate trial would not have been more favourable to him in this respect. Many articles were found in Janousky's rooms, mention of which at the trial of Prosko might have caused him prejudice. But similar articles were found in his rooms. So it seems to me that this evidence regarding articles found in Janousky's rooms cannot be regarded as having caused any real prejudice to Prosko. Section 1019 of the Criminal Code covers the case. I would therefore say that the Judge presiding in the Criminal Court was not in error in refusing to grant Prosko a separate trial.

The second question that is submitted to us refers to certain admissions made by Prosko to the witnesses Heig and Mitte.

Detective Roussin, who had been charged with the discovery of the murderers, had learnt that Prosko might be one of them and, about a year after the crime was committed, he traced him to Detroit in the United States. He then conferred with two detectives of that city, Heig and Mitte, and they decided, in order to avoid the costs of extradition proceedings, that Prosko should be brought before the immigration authorities, who, if

they found he was not a desirable citizen, might deport him from the United States to Canada.

He was arrested for violating the immigration laws. He was told that he was to be deported to Canada, whereupon he declared, in the presence of Heig and Mitte, that he did not wish to return to Canada, adding, "I am as good as dead." The detectives asked him why, and he then told them that he had been in a camp with certain men who had committed a murder while he was there. These statements were made voluntarily without threat or solicitation.

Recent decisions in England are to the effect that statements such as those made in the present case must be admitted by the Courts:—*Ibrahim* v. *The King*, [1914] A.C. 599; *R.* v. *Colpus*, [1917] 1 K.B. 574; and *R.* v. *Voisin*, [1918] 1 K.B. 531.

It remains to be noted that these statements were made by Prosko before he was arrested for murder. I do not think that the Court was in error in admitting the testimony of Heig and Mitte.

The third question is to decide if the articles found in the rooms of the two accused could be produced as exhibits in the case.

These articles were produced as in support of the accusation. It is in accordance with accepted rules, especially in the case of murder, to produce before the Court articles which the accused might have used in committing the crime with which he is charged. Things which might serve to identify him can also be produced.

It appears certain that theft was the motive for the crime in this case. I, therefore, can see no objection to producing before the Court articles which are generally used by thieves and which were found in the possession of the accused. It is possible that some of these articles may not have been used on the occasion when the crime was committed. But this circumstance would not be sufficient to constitute, in the case of Prosko, a denial of justice or a serious wrong. It would answer this third question in the negative.

The appeal should, therefore, be dismissed.

MIGNAULT, J:—The only question raised by this appeal which appeared to me at the hearing to have any substance was whether the evidence of some statements made by Prosko at Detroit to the American detectives Heig and Mitte should have been allowed.

When these statements were made Prosko was under arrest issued by the United States Immigration authorities, as an undesirable, which warrant was served on him by one Roussin, a

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Canadian detective, who was seeking to bring him to trial in Canada on a murder charge, and instead of instituting extradition proceedings, it was considered better to have Prosko deported as an undesirable when he would of course be arrested on the murder charge. Roussin brought Prosko before the immigration authorities in Detroit, and when informed by them that he would be deported, Prosko told them that he was as good as dead. Heig and Mitte then questioned him and it was under these circumstances that he made the statements which were given in evidence.

I have serious doubts whether this evidence should have been allowed. The American detectives were persons in authority and Prosko's exclamation when told that he would be deported shews that he understood that his deportation was sought in order to have him brought to trial in Canada on the charge of murder. He evidently made the statements he did with the hope to escape deportation and his consequent arrest for murder, and the American detectives were persons in authority. It is true that he subsequently made similar admissions in Canada to Roussin, but the trial Judge insisted in his charge on the evidence of Heig and Mitte as corroborating that of Roussin which otherwise the jury might have hesitated to accept as sufficient, so the introduction of this evidence may have caused a substantial wrong to the appellant.

A majority of the Court is, however, of the opinion, that the evidence of Heig and Mitte was admissible, so that Prosko's appeal cannot succeed.

Under these circumstances I have not entered a formal dissent, but I cannot do otherwise than express my serious doubts as to the admissibility of this evidence.

Appeal dismissed.

MUSSELMAN v. ZIMMERMAN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clark, JJ.A. June 9, 1922.

ANIMALS (§ID—35) — AT LARGE — WANDERING ON UNFENCED FARM— DEATH CAUSED BY EATING SEED WHEAT—LIABILITY OF OWNER OF LAND—DOMESTIC ANIMALS ACT, 1920 ALTA. STATS., CH. 33, SEC. 3 (2)—CONSTRUCTION—BARE LICENSEES—HIDDEN PERIL OR TRAP.

Section 3 (2) of the Domestic Animals Act, Alta. Stats. 1920, ch. 33, makes it lawful for all domestic animals to go on unfenced or insufficiently fenced land, but gives them only the rights of a bare licensee while on such land, and an owner of unfenced land is not, therefore, liable in damages for injuries caused by a horse wandering on his land, and eating seed wheat left in a wagon box temporarily during the seeding season, the leaving of such seed grain at such season of the year not constituting a peril or hidden trap.

APPEAL by plaintiff from the trial judgment dismissing an action for damages for injuries causing the death of the plaintiff's horse. Affirmed.

H. P. O. Savary, K.C., for appellant.

W. C. Robinson, for respondent.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—The point in this case is no doubt of considerable interest to farmers. The question is whether a farmer, who, while engaged in seeding, leaves an unprotected wagon box containing wheat out in his unfenced ploughed field during a period of 3 or 4 hours when his operations have been interrupted by rain is liable in damages to his neighbour, whose horses, lawfully running at large, come in the meantime and eat an overdose of the wheat, and die in consequence thereof.

But the question of liability or no liability may turn upon the very special circumstances of each case and will, I think, be found to do so here.

First, as to the law. By the Statute of 1920, ch. 33, sec. 3, assuming it to be applicable, which for reasons given hereafter may be doubtful, it is enacted as follows:—

"3. All domestic animals may run at large in the province save insofar as is otherwise provided by this Act.

(2). The owner of any animal running at large and permitted so to do merely by virtue of this section shall only have the rights of a bare licensee in the event of the animal being injured in entering upon or leaving or while upon the lands of another."

The Legislature in this section evidently intended to leave and did leave it to the Courts to decide what were the rights of a bare licensee.

It also evidently intended to make it lawful for all domestic animals to go upon unfenced or insufficiently fenced lands, that is, on the one hand to make such animals no longer trespassers on land, but, on the other hand, to enact that though they might be rightfully upon a stranger's land the right was to be the lowest kind of right viz.: that possessed by a bare licensee or a person merely permitted by the ower to enter without there being any obligation so to permit and with the right in the owner to revoke the permission at any time.

It is perhaps worthy of note, however, that the expression "run at large" is really not defined in the interpretation clause of the Act, *i.e.* sec. 2 (a) as "being upon a stranger's land." It is defined merely as being "off the premises of the owner" and though logically an animal cannot be off its owner's premises without being on some one else's (because all land has

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some owner) yet there might be room for a suggestion that all that was meant was running upon a highway, *i.e.*, upon property of the Crown, which is devoted or dedicated to highway purposes. But, in my opinion, the wording of the second subsection of sec. 3 above quoted is such that we must conclude that the Legislature did enact that domestic animals were permitted to be on the premises of persons other than the owner.

One further observation must be made as to the first subsection of sec. 3. The permission there given to let domestic animals run at large is qualified by the words "save as is otherwise provided by this Act." This refers to various provisions in the statute which limit the right to run at large. After reading the evidence, I do not feel sure that the plaintiff has really brought herself within the provisions of sec. 3. That section is within Part I. of the Act and the last section of the Act, sec. 103, provides that Part I. shall only come into force within municipal areas upon proclamation. The inference from one or two meagre questions in the evidence is that the place in question was within a municipality and there was nothing before us on the argument to shew that the proclamation was ever issued. This, however, seems now to be immaterial since sec. 103 was entirely repealed by ch. 50 of 1921, an amending Act, which came into force on April 19, 1920, that is, just 4 days before the event occurred out of which the action arose. The result of the repeal of sec. 103 of the Act of 1920 was no doubt to make the whole of the Act of 1920 as amended come into force at once, on April 19th, 1921.

But the meagre evidence to which I refer consists of these statements by the witness Macdonald, the uncle of the plaintiff, who was working the plaintiff's place and had, in fact, made a present of the horse in question to the plaintiff:—

"Q. At the time this operation took place were animals allowed to run at large or not? A. They were allowed to run at large. Q. And a mare of this nature would be allowed to run at large according to the law of the municipality? A. Yes, sir."

From this, as I have said, we may perhaps properly infer that the place was within a municipality. But the passage seems to refer to a "law of the municipality" as if there were a by-law in force. But no such by-law was proven.

Section 206 of the Rural Municipalities Act, ch. 3, of 1911-12, gives a municipality power to pass by-laws restraining animals from running at large and fixing the conditions and times under and at which they may be so restrained.

The legal situation is, therefore, left very obscure. The exist-

ence of a "law of the municipality," that is, presumably a by-law, is suggested in the evidence, yet we do not know what it is. The duty lay upon the plaintiff of proving it. It may have contained conditions and restrictions which, when applied to the facts of the case, would negative the plaintiff's claim entirely, while on the other hand, it might possibly have contained something which would have strengthened her case, although the latter is not likely or the plaintiff's counsel would doubtless have introduced it.

The real trouble is that one cannot be sure whether sec. 3 of the Act of 1920 above quoted, really applies or not. Apparently that section would apply in the absence of a local by-law because there seems to be nothing in the Act restricting its application to the "extra-municipal area" referred to in the Act within which the Lieutenant-Governor in Council may establish pound districts.

The Act of 1921 amending the Domestic Animals Act of 1920 specifically added sections, 15 a-i, giving the councils of municipalities power to prohibit animals from running at large and concurrently sec. 206 to 216 of the Municipal Districts Act (or Rural Municipality Act) dealing with the same subject were repealed by ch. 32 of 1921 sec. 21.

The question is whether we ought to give the plaintiff the benefit of sec. 3 of the Act of 1920 when, in her own evidence, she suggests the existence of a local by-law and does not give proper evidence of its contents.

It may be that the animal was in fact a trespasser pure and simple under a local by-law at the particular time in question. If so, the plaintiff properly failed in her action and the appeal should be dismissed.

On the other hand even if sec. 3 of the Act of 1920 should happen to apply to the case I think the appeal should also fail.

The rights of a bare licensee are described in Hals. vol. 21, pp. 392-3. The author of the article there found upon negligence says:—

"A bare licensee is entitled to no more than permission to use the subject of the licence as he finds it. He must accept the permission with its concomitant conditions and perils. The grantor of the licence is in a position similar to that of the donor of a gift and is not responsible for the safety of the licensee unless acceptance of the grant involves a hidden peril, wilful suppression of the knowledge of which amounts to a deceit practised on the donee. The licensee has, however, the right to expect that the natural perils incident to the subject of the licence shall not

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be increased without warning by the negligent behaviour of the grantor and if they are so increased he can recover for injuries sustained in consequence thereof."

The principles there laid down were adopted by this Court in *Thyken* v. *Excelsior Life Assurance Co.* (1917), 34 D.L.R. 533, 11 Alta. L.R. 344, where in delivering the judgment of the majority I quoted the above passage and after citing *Gallagher* v. *Humphrey* (1862), 6 L.T. 684, and *Ivay* v. *Hedges* (1882), 9 Q.B.D. added these words:—

"A bare licensee as distinguished from a person invited or there upon the defendant's business as well as his own must take the premises as he finds them, but the owner must not, after the permission is given, create by a negligent act a new danger not there before."

Here, the permission was given if at all, not by the defendant but by statute. There is obviously room for a distinction on this account. When the owner has given a licence either expressly or impliedly by virtue of continued acts of trespass known to him and tacitly permitted, he is generally aware of there being an acceptance and an acting upon the licence. But here, although the owner may be bound to know the existence of the statutory licence, it does not necessarily follow that he has any knowledge of its acceptance and exercise with respect to his premises. There is nothing in the evidence at all to shew that the defendant knew that the horses were running at large, even generally, much less that they were in the habit of coming upon his property and nothing indeed to shew that they had ever done so before in fact. Under the statute this may not be essential to liability but the absence of any proof of such knowledge certainly weakens any charge of negligence against him.

The statute, if it gave the licence, certainly did not intend to hamper the ordinary business operations of a farmer. The plaintiff, we shall assume, had a bare licence to let her horse go, if it would, upon the defendant's land. But she, and her horse, were bound to take the premises as they were found. She, and the man with whose horses she allowed hers to run, both knew that the defendant's land was not bald open prairie, but an operated farm. Knowing that, they must have known that in seeding time the farmer would be sowing seed and that for his own convenience, which he had a perfect right to enjoy, he would probably be leaving seed at certain places in his fields. That always happens during seeding operations. That is the ordinary condition of a farm in seeding time and at that time it is one of the perils attached thereto. I think the plaintiff, therefore,

took the risk of that peril when she let her horse wander where it did. Indeed the man Meadus, with whose horses she allowed hers to run, actually saw the seeding operations going on and, upon the evidence, must have known of the possibility of the danger. The plaintiff must have known that if her horse should wander upon an operated farm it might get access to something to eat and, at that season of the year, access to seed grain.

I think, therefore, there was no negligent increase of peril and no hidden trap and that the appeal fails and should be dismissed with costs.

The question is after all not a permanently important one, because I observe that the amending Act of 1921 has given Municipal Councils power to pass by-laws "providing for the prevention of loose wire, open wells or other excavation of sufficient area and depth to be dangerous to stock which may come or stray upon the premises and to regulate the storage of threshed grain upon any premises accessible to stock which may come or stray upon the premises." The matter is, therefore, in the hands of the local authority to remedy. The Legislature has in fact actually mentioned all the specific types of cases upon this point that we have had before us in recent years. Under this section, it is unlikely that any by-law was passed between April 19, when it came into force, and April 23, when the event occurred. And, in any case, such a by-law was not proven.

The passage of this last section no doubt suggests that the Legislature considers threshed grain unprotected to be a dangerous thing for stock to get access to. That it was dangerous may be true but that it was a hidden peril or a trap such as suggested in *McLean* v. *Rudd* (1908), 1 Alta. L.R. 505, I cannot, for my part, agree particularly when the seeding operations were openly going on.

BECK, J.A., concurs with STUART, J.A.

HYNDMAN, J.A.:—This is an appeal from the judgment of His Honour Judge Stewart, wherein he dismissed the plaintiff's action with costs but without stating his reasons therefor. The action is, to say the least, novel and peculiar.

The plaintiff is the owner of a quarter section of land occupied by her uncle, one James McDonald, as a tenant, and the defendant is the owner and occupier of the adjoining quarter section, between which parcels of land there is no line fence of any kind.

The plaintiff alleges that on April 23, 1921, the defendant was engaged in seeding his land but before noon, owing to rain coming on, he discontinued operations and went to his house,

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leaving a wagon full of seed wheat standing in his field and uncovered; that the plaintiff's horse was running with some other horses belonging to one Meadus, who lived on the same section, and some little time after the defendant ceased working, noticed his horses and the plaintiff's mare grouped about the defendant's wagon. He thereupon decided to ride over to the spot but just as he was ready to start he observed the defendant going to the wagon and saw him act as though levelling the wheat in the wagon box and then drove the animals towards his own buildings. On the following day, Sunday, Meadus found the plaintiff's mare lying sick in a field, took her home, and the following morning she died.

No veterinary surgeon was called in, but the parties themselves decided to hold a post mortem examination and they found the mare with a good deal of wheat in her stomach and decided that she died as the result of over-eating or gorging herself with wheat. Meadus testified, too, that one of his own horses was also affected and ill for several days, which he attributed to the same cause.

The present action was brought to recover the value of the mare from the defendant on the ground that the loss was due to the negligent and illegal conduct of the defendant in permitting the grain in question to be placed on or near the boundary of the plaintiff's property and to remain open and exposed and accessible, attractive and dangerous to animals that might get in or upon the land.

The action was dismissed at the close of the plaintiff's case.

A careful reading of the evidence discloses much uncertainty even as to whether there was any or what kind of grain in the wagon box. It is more or less very strong suspicion only. Had it been shewn that the horse in question did not, as a fact, have access to any other wheat, then, I think it almost conclusive that there was wheat in the wagon from which it was seen apparently eating. But the fact is that its whereabouts are unaccounted for between Saturday morning and the following day when it was found in a sick condition. It might have eaten wheat at other places for all the evidence discloses. I do not think that under the circumstances the statements of the defendant as sworn to by the several witnesses must, necessarily, be construed as an admission that there was wheat there at all.

Whether the supposed overdose of wheat was the cause of death is not satisfactorily established, as the opinion that such was the cause is only that of laymen quite unable to give expert evidence on the point.

All the evidence relating to these essential facts was before the trial Judge who dismissed the claim without giving his reasons, but it must be assumed, I think, that he found all the necessary facts in favour of the defendant: *Elliott* v. *Gibson* (1904), 7 Terr. L.R. 96.

However, admitting for the sake of argument that the plaintiff's allegations to the effect that there was wheat in the wagon, that the plaintiff's horse gorged itself therewith and died as a consequence, can it be said that the defendant is legally responsible?

Sections 3 and 9 of the Domestic Animals Act, 1920, ch. 33, enacts:—

"3. All domestic animals may run at large in the province save in so far as is otherwise provided by this Act.

(2) The owner of any animal running at large and permitted so to do merely by virtue of this section shall only have the rights of a bare licensee in the event of the animal being injured in entering upon or leaving or while upon the lands of another.

9. No action founded upon damage done by domestic animals lawfully running at large shall be maintained, nor shall domestic animals lawfully running at large be liable to be distrained for causing damage to property unless, in either case, the damage was done upon land surrounded by a lawful fence:

(2) The owner of any domestic animal which breaks into or enters upon any land enclosed by a lawful fence shall be liable to compensate the owner of such land for any damage done by such animal."

As mentioned above, there was no fence between the parties and there was no herd law and animals were permitted to run at large.

It will be noticed then that by statute the animals here were not trespassers but bare licensees.

Now what duty does the owner of land owe to a licensee?

"The rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or wilfully cause him harm. The licensee enters upon the premises at his own risk and enjoys the license subject to its concomitant perils." (29 Cyc. 449 *et seq* and foot notes).

Unless it is established, that a load of seed wheat standing in a field being seeded in the sowing season is or ought to be considered as a hidden peril or trap or dangerous thing, the action ought not to be maintainable. To the lay mind it must seem

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anomolous that in the heart of a wheat growing country, an inanimate load of wheat intended for immediate use as seed, should be looked upon as a trap, even if animals may be in the neighbourhood, and though left unguarded for a number of hours.

Speaking for myself, I think it almost too ridiculous and absurd for argument. The evidence certainly does not disclose that such is considered the case among farmers apart from the fact that in this particular instance a greedy animal, straying away from its own home upon the land of another uninvited, gorges itself to death with wheat to which it had no right.

The natural tendency would be to say that if anybody should be entitled to compensation it is the owner of the wheat. Apart from statutes protecting the owner of the animal, I think she would be liable. The statute is not for the purpose of giving to the owner of the animals greater rights but is, I think, to protect him from actions for damages by the owner of lands whose crops or goods are injured by his trespassing animals. The statute relieves the owner from being a trespasser but he must assume all the ordinary risks attached to the nature of the place or the business carried on (29 Cyc. 451).

Can it not be said then that when one allows his animals to stray, in an essentially grain growing district, in the seeding season, he must surely anticipate their running into a danger (if it can be called such) of this nature?

I think some people are apt to regard the statute as not only relieving them from liability for trespass, but as giving them greater rights than existed formerly in the case of bare licensees, which is not so.

On the facts and law I would dismiss the appeal with costs.

CLARKE, J.A., concurs with STUART, J.A. *Appeal dismissed.*

STERLING CLOTHING Co. v. MEN'S ATTIRE REGISTERED.

Quebec Superior Court in Bankruptcy, Panneton, J. June 19, 1922.

BANKRUPTCY (§ III—30)—FILING OF CLAIM OF CREDITOR—NO MENTION OF SECURITY HELD—NO FRAUDULENT INTENT IN WITHHOLDING—COMPROMISE SIGNED ON UNDERSTANDING THAT PROCEEDS REALISED FROM SECURITY TO BE DEDUCTED FROM CLAIM—AMENDMENT OF CLAIM SETTING OUT SECURITY HELD.

When the claim of a creditor of an authorised assignor under the Bankruptcy Act, is prepared, made and sworn to by an employee of such creditor without the knowledge of the creditor, and omits to mention the security held by the creditor, and such omission is not made with any fraudulent intent, not to disclose such security, and such creditor being under the impression that the claim was properly filed, has accepted a compromise, upon the understanding that the proceeds realised from such security would be deducted from his claim. Such creditor will be allowed to amend his claim and set out the security which he holds.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

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STERLING CLOTHING CO. v. MEN'S ATTIRE REGISTERED.

Panneton, J.

PETITION by a creditor for leave to file with an authorised trustee an amended claim mentioning the security which the creditor holds for its claim. Petition granted.

Weinfield, Sperber & Levine, for petitioner.

Pierre Ledieu, for trustee.

PANNETON, J.:—Petitioner alleges that he is a creditor of the authorised assignor in the sum of $2,257.59, and holds merchandise as security, that by inadvertence its claim was fyled without mentioning said security, but that the assignor and all the parties interested knew of said security—that under the impression that the claim was properly fyled he accepted a composition of 30 cents in the dollar, upon the understanding that the proceeds realised from the realisation of said security would be deducted from petitioner's claim, and that it was only after having signed said composition that he discovered that no mention was made in his claim of said security.

The authorised assignor, Men's Attire Reg., contests said petition, alleging that it is made too late, that the goods mentioned as given as security were so given by means of a warehouse receipt transferred by contestants to petitioner, that petitioner has taken an action in the Superior Court to revendicate said goods, which action is still pending, and that petitioner signed the deed of compromise, knowing all the facts and without any condition on the part of contestant.

It is fully proved that petitioner's claim was prepared, made and sworn to by petitioner's employee without the knowledge of petitioner and that the omission to mention the security held was a mere omission on the part of said employee, omission which became known to petitioner only after he had signed the deed of compromise, and that when he signed he was under the impression that the claim had been properly fyled and that he accepted 30 cents in the dollar for the surplus, of his claim after deducting what he would realise from his security.

It is proved that the said omission was not made with any fraudulent intent not to disclose it, that all the parties knew of the same.

The authorities quoted by petitioner fully justify his demand to amend his claim, notwithstanding the delay—Rule 106 and art. 68, par. 4 of the Act.

The Court gives permission to petitioner to amend his claim reserves to petitioner his other conclusion and as to costs seeing that the said omission to mention his security is the cause of the necessity of the present petition, that the authorised assignor ought not to have contested the same, that petitioner was obliged to make an enquête to prove the said omission, each party pays its own costs. *Judgment accordingly.*

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HASTE v. GOODMAN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. May 26, 1922.

SPECIFIC PERFORMANCE (§IE—30) — SALE AND PURCHASE OF LAND—AGREEMENT—PURCHASER ENTITLED TO IMMEDIATE POSSESSION—FACTS MISREPRESENTED BY OWNER AND TENANT—ACCEPTANCE BY PURCHASER OF CROP DUE UNDER AGREEMENT—KNOWLEDGE OF FACTS—COMPENSATION FOR DAMAGES FOR FAILURE TO GIVE POSSESSION.

Where under an agreement for the sale and purchase of land the purchaser is entitled to immediate possession of the buildings, and all the land, subject to the tenant's right to harvest and remove the crop which he has put in, but where both the vendor and tenant misrepresent the facts, so that on such facts as represented he would not be justified in ejecting the tenant, he is not entitled to rescission of the contract if with knowledge of the facts he accepts and retains his portion of the crop, under the agreement, but he is entitled to specific performance with compensation for his damage by reason of failure to get possession.

[See Annotations 2 D.L.R. 464, 636; 31 D.L.R. 485.]

APPEAL by defendant from the judgment of Ives, J., in an action for specific performance of a contract for the sale and purchase of land or in the alternative for rescission with a return of the purchase money paid and for damages. Reversed.

G. H. Steer, for appellant; *A. C. Grant*, for respondent.

SCOTT, C.J., concurs with BECK, J.A.

STUART, J.A., concurs with CLARKE, J.A.

BECK, J.A.:—This is an appeal by the defendant from the judgment of Ives, J.

The action is one by the plaintiff as purchaser against the defendant as vendor and the relief claimed is specific performance or alternatively, rescission, with a return of the portion of the purchase money paid with interest and $2,000 damages. The judgment rescinded the agreement and gave damages in the amount of $1,656 with costs.

The defendant, Mrs. Goodman, listed the land in question with a firm of real estate agents, Sutherland & Goodman, early in the year 1920. It was understood that they should have an exclusive listing for 3 weeks only as by that time the defendant would wish to make some arrangements for utilizing the land for the coming season.

As a matter of fact she did make an agreement with her son in-law, Emile Montpellier, in writing as follows:—

"Agreement between Mrs. M. Goodman and E. Montpellier, St. Albert, Alta., March 15, 1920, party of second party agrees to give party of first party one-third of crop free of all incumbrances delivered to elevator in St. Albert. Party of first agrees to lease farm for (3) three years subject to following

conditions:—1. Lease expiring automatically with sale of land. 2. Party of second party to be paid for his crop should land be sold when his crop is standing. 3. Party of first party agrees to pay school taxes. 4. Party of second party agrees to pay road taxes. 5. Party of second party to receive ($10) ten dollars an acre for all breaking not cropped on. 6. To receive first crop free.

Witness: (Sgd.) W. Goodman. Party of first party, (Sgd.) Mrs. M. Goodman. Party of second part, (Sgd.) E Montpellier."

Montpellier went into possession. The land had been advertised for sale in an Edmonton newspaper by Sutherland & Workman. The advertisement stated that there were 280 acres of which 150 were in crop. It was in consequence of seeing this advertisement that the plaintiff called to see Sutherland & Workman. Having had an interview with them and before agreeing to buy he, accompanied by one of the firm, went and inspected the farm. This was apparently on June 4. Mrs. Goodman had already signed the first of the two following documents on May 21. The plaintiff having inspected the property as already stated signed the second of these documents—an acceptance—on June 4.

"St. Albert, May 21, 1921.

This is to certify that I do this day agree to sell R.L. 16 tp. 54, r. 25, west of 4th, also R.L. 16 A. tp. 54, r. 25, west of 4th, containing 280 acres for the price of sixty dollars ($60) per acre $2,000 cash, balance to be paid $1,000 per year bearing 7%. One-third of the crop on the said lands to be delivered to the elevator at St. Albert free of charge for year 1921. Purchaser to have immediate possession if so desirable and has a right to work said lands that are not in crop as he wishes. (Sgd.) Mrs. M. Goodman. Witness: (Sgd.) W. R. Goodman."

"June 4, 1921.

I hereby agree to purchase the above on terms set forth, interest at 6% instead of seven per cent. (Sgd.) Frank Haste."

The plaintiff at the same time paid the agents, Sutherland & Workman $250 and on June 9, $700, and on June 18, $1,100, making a total of $2,050 on account of the purchase price.

On June 28 a printed form of agreement was executed which in fact bears date June 1. It contained as part of the printed matter the following clause:—"The vendor agrees that the purchaser shall *on the day of the date hereof* have the right to possession of the said lands and premises, *but must get possession at his own expense.*"

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In order to appreciate the effect of these documents it is necessary to see what took place between the parties.

Reverting to the plaintiff's first visit to the land on the day on which he made up his mind to buy and signed the acceptance, he says that when he purchased he knew that he was to get only one-third of the crop, that is, Mrs. Goodman's one-third:—"That was in the agreement that I should get one-third"—and that whoever was working the land was to get the other two-thirds. He says he made no enquiry as to the nature of the arrangement, that it didn't occur to him that it would be under a lease, nor did it occur to him to enquire. But he says that on the occasion of this first visit he saw that the land—the 150 acres—had been prepared for seeding, some of it seeded and the rest ready for seeding. He also saw that there was only one house on the land and he knew the occupant was living in it. Asked:—"Didn't you suppose if he had the right to crop the land that he had the right to live in the house?" He answered:—"He would have the right to live in the house, I suppose." He says, evidently referring to his first visit, this was before he had completed his purchase, that is, as I understand signed the preliminary agreement.

About the middle of June, the plaintiff went out with Sutherland and visited the land. They saw Montpellier. They told him that the plaintiff had purchased the land and asked him when it would be convenient for the plaintiff to take possession. He said that he didn't just know; the plaintiff asked him if there was a house he could get and he said he might be able to get one on an adjoining quarter; that he would see; the plaintiff said there need be no hurry for 4 or 5 weeks.

The plaintiff says he did not learn that there was a lease until the middle of July. This seems to me to be incredible unless he merely means that he did not know that there was a document constituting a lease or what the precise terms of the arrangement were. In the middle of July, he says, he went with Workman to see Mrs. Goodman who said to go to Montpellier and see what arrangements could be made with him. Both the preliminary and formal agreement in a general way, I suppose, were called to her attention. The plaintiff says that on this occasion Mrs. Goodman did not tell the plaintiff that by the (formal) agreement he was bound to put Montpellier off; that this provision was never called to his attention. Mrs. Goodman having advised him to go and see what arrangements he could make with Montpellier he went with Sutherland.

Montpellier's account of the conversation is as follows:—"Q.

Was there any conversation about the house? A. He asked me to give him possession of the house; he asked me if I could move in the house close enough to be able to do my work, and he said: 'You could leave your stock in the pasture if you can get a house close enough.' I said I would try. There are sometimes houses close, I might be able to get one. Q. Was there anything further said about the house? A. He says: 'If you can't get a house close enough to suit you,' he says, 'can we get rooms and live with you? We will work for you and you will work for me.' He was supposed to clean land. He says, 'I will work for you and you will work for me,' he says, 'and we might be able to get along.' Q. What did you say to that? A. I said, 'Yes, sir, you can have rooms,' and he was satisfied. Q. Was there anything said about any furniture or anything of the kind? A. He asked me if we had a spare bed. I said: 'No, we haven't got any spare bed.' Q. Anything further about a bed? A. And Mr. Sutherlanad was there and he says: 'Well, we can fix that part of it, we can bring a bed in a car.' He says we could come—'When do you want me to come up?' I said, 'Any time.' 'Well,' he said, 'if we don't come tomorrow we will come the day after,' and I believe the day after was a Friday, and I expected Mr. Haste on a Friday. Q. You were expecting Mr. Haste to come on Friday? A. Yes; he said, 'If we don't come tomorrow it may be the day after.' Q. After that did Mr. Haste ever tell you anything different or ever make any variation in the arrangements you made on the day in any way? A. He never said a word after that, he never mentioned the rooms at all that I offered him that day."

Montpellier says that the house was an eight roomed house, that his family consisted of himself, his wife and five children; the plaintiff had no children; that there was "lots of room" for both him and the plaintiff and his wife; that although he had 17 head of horses he kept in only 4 head; that there was 80 acres of pasture and the plaintiff told him he had no cattle or horses. He says he told the plaintiff he was willing to give up possession after the threshing. The plaintiff says that on a later occasion Montpellier said that he was not bound to go off till the spring of 1922; but Montpellier says he told the plaintiff he was ready to go out of possession after threshing and that he was always ready to do so; but the plaintiff didn't come to the place, consequently Montpellier was in possession at the time of the trial in February, 1922. The plaintiff went to the place at threshing time got and sold the one-third of the crop netting $232.39, which apparently by arrangement is being held

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by his solicitors pending the result of the trial of this action; and furthermore, by arrangement, the land has been leased for the current year without prejudice to the result. During the course of Montpellier's evidence there was an interruption: one counsel said:—"He is trying to explain;" the other said:—"He is trying to avoid explaining;" the Judge said:—"No, he is not, he is very fair." That is the impression I got from Montpellier's evidence.

The plaintiff himself says that he asked Montpellier whether if Montpellier could not get another house, he, the plaintiff, could live with him and that Montpellier said:—"Yes if he wanted to." Asked the question:—"Don't you think Montpellier would be justified in thinking you had acquiesced in the condition existing that he would continue to occupy the house and that you would live with him?" the plaintiff answered: "It looks that way but whether it would have been satisfactory I don't know." I think I have sufficiently set out the evidence.

It is clear that the plaintiff when he signed the preliminary agreement had the fullest notice that there was someone in possession, claiming a right to possession; that that person—Montpellier—had 150 acres partly seeded and the rest ready to be seeded; that Montpellier was entitled to two-thirds of the crop and the plaintiff to the remaining one-third; that Montpellier was entitled to remain in possession so as at least to reap and thresh and dispose of the crop. It seems to me that knowing all this the risk was his if he did not take the trouble to find out the precise right of Montpellier. It is to be noted, too, that the words of the preliminary agreement as to possession are "Purchaser to have immediate possession if so *desirable*"—not "desired;" and the difference it seems was intentional, for Mrs. Goodman when talked to by the plaintiff about possession consistently told him to go and arrange with Montpellier. In one place she states she said that "Montpellier's crop was in and it was *unjust* to ask him to leave, until his crop was taken off the land and that he was willing to leave in the fall."

In the result it seems to me the plaintiff could have got the fullest possession it was contemplated by the agreement he was to get, namely, a right to occupy and use the land provided that he did not interfere unreasonably with the occupancy and use of the land by Montpellier so far as he required it to seed, harvest, thresh and dispose of the crop on the 150 acres of cultivated land, with accommodation for himself and his wife, and for any stock he might have, such as is commonly considered

reasonable under similar circumstances. Montpellier agreed to all this and was always ready to carry out his agreement. The plaintiff although he appeared to acquiesce in the arrangement eventually failed to take advantage of it. It may be too that by coming to an agreement as he did with Montpellier he, as regards Mrs. Goodman, relieved her of any further liability to secure possession for him.

In my opinion, formal agreement does not change the position of the parties at all. So far as it was inconsistent in its terms with the preliminary agreement and what arose out of it, it clearly did not express the real intention of the parties. Both parties attack it. The plaintiff at the trial asked to amend by asking a rectification by striking out the words, "but must get possession at his own expense." The defendant also at the trial asked to amend by asking for rectification by setting up that the plaintiff bought subject to Montpellier's lease and alleging that a provision to this effect was inadvertently omitted from the agreement. These points not having been suggested in the original pleadings, it is pretty evident that they were never known to the parties and were discovered by counsel only, when the trial was about to come on. The evidence is clear that so far as the formal agreement was inconsistent with what went before it was not in accordance with the intention of the parties and is consequently not binding upon them. See an extended examination of the authorities on this aspect of the case in *Colonial Investment Co.* v. *Borland* (1911), 5 Alta. L.R. 71; (1912), 6 D.L.R. 211; see also *Jadis* v. *Porte* (1915), 23 D.L.R. 713, 8 Alta. L.R. 489.

Having regard to all I have said I think the proper view of the case is that the plaintiff got, or could have got, all that, according to the real concurrent intention of the parties he was entitled to; that Montpellier's interest having been eliminated, the plaintiff is entitled to the possession of the land, which he might have had in the fall of 1921 and to the proceeds of the one-third share of the crop of 1921. There is no case for rescission. There was no need for an order for specific performance.

I would, therefore, allow the appeal with costs and dismiss the action with costs.

HYNDMAN, J.A., concurs with CLARKE, J.A.

CLARKE, J.A.:—I think the real agreement between the parties in regard to possession is contained in the memorandum of May 21, 1921. (Ex. 3) viz.: that the plaintiff should receive one-third of the growing crop and have immediate possession if so desir-

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able and the right to work the lands not in crop as he should wish, and that such possession is what was meant by the formal clause as to possession in the formal agreement of June 1, 1921. I think the plaintiff was strictly entitled to immediate possession of the buildings and all the land subject to the tenant's right to harvest and remove the crop, he yielding one-third thereof to the plaintiff. Under the terms of the lease, it expired automatically with the sale of the land, but the plaintiff was not aware of that fact, and both the defendant and the tenant misrepresented the facts to the plaintiff in stating to him that the lease was not out till spring. It either expired automatically or ran until 1923.

Relying upon that representation the plaintiff would not have been justified in taking legal proceedings to eject the tenant and the defendant should be estopped from now saying to the contrary. In the circumstances, the defendant failed in her duty to give the plaintiff the possession he was entitled to receive under his agreement to purchase, but this failure did not, I think, under the circumstances entitle the plaintiff to a judgment for rescission, for with knowledge of all the facts and after bringing the action, he accepted his one-third share of the grain. He had not finally elected to rescind before action and claimed in the action as an alternative remedy to rescission, specific performance with compensation for his damage. I think the latter is the relief he is entitled to and not rescission and return of the purchase money. His right to specific performance was never denied and upon the evidence he suffered no substantial damage. He admits that there was nothing to prevent his use of the land not under crop, he did not want possession of the house till about August, and he was at liberty thereafter to reside in the dwelling house with the plaintiff until he should get complete possession, which the tenant was willing to give in the fall, after harvesting the crop. This would have been a reasonable arrangment and would have saved the plaintiff the expense of acquiring a dwelling house elsewhere.

I think $50 a sufficient sum to compensate the plaintiff for any loss he is entitled to by reason of failure to get possession. I would, therefore, allow the appeal with costs, set aside the judgment below and in lieu thereof direct judgment for the plaintiff for specific performance with an allowance to him of $50 against the unpaid purchase money.

No costs of the action.

Appeal allowed.

Re PACIFIC LIME Co. Ltd.

Exchequer Court of Canada, Audette, J. November 25, 1920.

TRADE MARK (§ II—8)—GEOGRAPHICAL NAME—LONG USER—SECONDARY SIGNIFICATION—REGISTRATION.

Geographical names are ordinarily incapable of being appropriated and registered as trade marks, but where such words are not calculated or likely to deceive they may be registered by leave of the Court, where by long user such words have obtained a secondary signification in derogation of their primary geographical meaning.

APPLICATION to have the words "Blubber Bay Lime" registered as a trade mark. Application granted.

L. P. Sherwood, for petitioners.

No one for Commissioner of Patents.

AUDETTE, J.:—This is an application, by the petitioners, who carry on the business of manufacturers or producers of lime, to register as their trade mark the words "Blubber Bay Lime."

Blubber Bay is a small place situate in the electoral district of Comox-Alberni, in the Province of British Columbia.

Therefore, it appears that the word "Blubber Bay" is, in its ordinary signification, a geographical name, and, *per se*, is not subject to registration as a trade mark. *Columbia Mill Co.* v. *Alcorn* (1893), 150 U.S. 460.

The Canadian Act, the Trade Mark and Design Act, R.S.C. 1906, ch. 71, does not contain a definition of trade marks capable of registration. To find what trade marks in Canada are subject to registration, one must read together secs. 5 and 11 of the Act. Section 5 provides what may be the subject of a trade mark, but that section must also be read with the provisions of sec. 11 whereby, among other things, it is set out what the minister may refuse to register. Subsection (e) of that section reads as follows:—"(e) if the so-called trade mark does not contain the essentials necessary to constitute a trade mark, properly speaking."

And as said in the *Standard Ideal Co.* v. *Standard Sanitary Co.*, [1911] A.C. 78, 80 L.J. (P.C.) 87: "the Act does not define or explain the essentials of a trade mark, it does not provide for taking off the register an alleged trade mark which does not contain the requisite essentials. In applying the Act the Courts in Canada appear to consider themselves bound or guided mainly by the English law of trade marks and the decisions of the courts of the United Kingdom."

By subsecs. 4 and 5 of sec. 9 of the English Act of 1905, it is provided that a geographical name cannot be registered as a trade mark, unless upon an order of the Board of Trade, or the Court.

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EX. C.

RE PACIFIC LIME CO. LTD.

Audette, J.

The words "Blubber Bay Lime" standing by themselves may not, strictly speaking, have reference to the character or quality of the lime as derived from the strata of the stone or the formation of the soil; but will not the registration of these words preclude any other resident of Blubber Bay, who might choose to manufacture lime, to use that name? Nothing could prevent him from manufacturing lime, if he so saw fit. Would not also that mark appear to be generic, in its very nature? Does it not convey the idea that Blubber Bay lime is the product of one individual residing at Blubber Bay, while it may also designate the product of many hundred manufacturers or residents of Blubber Bay, to whom the trade mark sought to be registered would equally apply? Would not the mark, in such a case, cease to be distinctive and therefore become objectionable?

Wood, V.C., in the *Anatolia Liquorice* case (*M'Andrew* v. *Bassett* (1864), 4 De G. J. & Sm. 380, 46 E.R. 965, 33 L.J. (Ch.) 561, 12 W.R. 777, said that: "the plaintiffs had established beyond all doubt the connection of their name with that mark, that was beyond dispute," and that "he could not treat the word as being otherwise than a designation mark, which the plaintiff had caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property."

See Sebastian, 5th ed., at p. 87.

Lord Westbury, C., in that case strongly confirmed the opinion of the Vice-Chancellor; and in the later case of *Wotherspoon* v. *Currie* (1872), L.R. 5, H.L. 508, where the subject of the dispute was the word "Glenfield," applied to starch, he stated that the word had acquired a secondary signification or meaning in connection with a particular manufacture; in short, it had become the trade designation of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with the starch had acquired that peculiar secondary signification to which he had referred. The word "Glenfield," therefore, as a denomination of starch, had become the property of the appellants. It was their right and title in connection with the starch.

In view of the liberal modifications in previous jurisprudence, together with the legislation, introduced by subsec. 5 of sec. 9 of the English Trade Mark Act of 1905, and the decision above referred to,—would it not be attaching an excessive regard to the geographical aspect of this mark to refuse its registration?

The American law upon the present subject would appear to be the same.

See Paul, on Trade Marks, pp. 101 to 104 inclusively, and pp. 434 et seq.

At p. 103 he states that geographical names, designating districts of country are incapable of appropriation as trade mark and concludes by saying (p. 104) that one must avoid, in selecting devices for trade mark, "geographical names which are descriptive of the local origin of the goods, if other persons have the right to deal in goods of a similar origin."

The words "Blubber Bay Lime" may not suggest to ordinary observers a geographical origin and may, therefore, remain special and distinctive. *In re Magnolia Metal Co.*, [1897] 2 Ch. 371, 66 L.J. (Ch.) 598. The user of these words for the period mentioned in connection with the lime manufactured or sold by the petitioners has given such words a secondary signification in derogation of their primary geographical meaning and has become the trade designation of the lime manufactured by them.

It would appear that if a word is strictly geographical according to its ordinary signification, that, where it is not calculated or likely to deceive, it may still be registered in a proper case by the leave of the Court. *In re Apollinaris Brunnen* (1907), 24 R.P.C. 436; *In re The National Starch Co.*, [1908] 2 Ch. 698, 78 L.J. (Ch.) 34, 25 R.P.C. 802; and *In re California Fig Sirup Co.* (1909), 26 R.P.C. 846; *The Stone Ale* case (*Montgomery* v. *Thompson*, [1891] A.C. 217, 60 L.J. (Ch.) 757; *The Bucyrus Co.* (1912), 8 D.L.R. 920, 14 Can. Ex. 35; (1913), 10 D.L.R. 513, 47 Can. S.C.R. 484.

It appears from the allegations of para. 5 of the petition that the application for registration made to, and refused by, the Minister of Trade and Commerce, was for a *general* trade mark. It is obvious that the petitioners are applying for the registration of this trade mark for the use of the same in connection with the sale of a class merchandise of a particular description,—namely, lime. In such a case they are not entitled to a general, but only to a specific trade mark.

Therefore, I have come to the conclusion, under the circumstances of the present case, but not without some hesitation,—after considering the *de facto* distinctiveness arising from fairly long and exclusive user in the past,—although the words are originally geographical,—to allow the registration of the same as a *specific trade mark* to be used in connection with the sale or manufacture of lime or of that class of merchandise coming within that particular description.

The granting of an order for the registration of this trade mark does not conclude the validity of the trade mark, should

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an action be hereafter brought contesting it. It amounts to no more than a *primâ facie* decision, open to being varied or set aside upon evidence produced by opponents. *In re Crosfield* (1909), 26 R.P.C. 561; *In re Akt. Hjorth* (1909), 27 R.P.C. 461. In *re Christie* (1920), 56 D.L.R. 286, 20 Can. Ex. 119, the present decree does not declare that the mark ought to be registered because it is a good mark but merely allows and permits its registration under the circumstances of the case. Such order, it would seem, ought to be decreed when there is a sufficient *primâ facie* case made out establishing a reasonably long user of the trade mark. Sebastian, 5th ed., p. 370.

Judgment accordingly.

R. v. MARCHINEK.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. May 13, 1922.

INTOXICATING LIQUORS (§IIIH—90)—ALBERTA LIQUOR ACT — OFFENCE UNDER—CONVICTION—SEIZURE OF LIQUOR—VESSELS AND CONTAINERS—MEANING OF.

A conviction for an offence under sec. 23 of the Alberta Liquor Act ordered that the liquor seized together with the vessels and containers be confiscated to the use of the Crown and held at the disposal of the Attorney-General for the Province of Alberta. The Court held that the words "vessels and containers" meant the bottles or barrels in which the liquor was actually contained, but did not include trunks in which these were packed, nor the truck on which they were being carried at the time of the seizure.

APPEAL from a judgment of Simmons, J. dismissing an application on certiorari to quash a conviction under the Alberta Liquor Act, 1916 ch. 4, and amendments. Affirmed, but opinion expressed that trunks and truck not included in words "vessels and containers."

J. D. Matheson, for appellant. *J. Short,* K.C., for respondent.

STUART, J.A.:—The charge was that the accused did unlawfully keep liquor for sale contrary to sec. 23 of the Act. The conviction is for this offence and after imposing the penalty the conviction adds "I further order that the liquor seized (72 bottles) together with the vessels and containers be confiscated to the use of the Crown and held at the disposal of the Attorney-General for the Province of Alberta."

The notice of motion raises 7 grounds of objection to the conviction (1) the information discloses no offence; (2) The Magistrate had no jurisdiction as the offence was committed in British Columbia, if at all; (3) that no warrant was issued for the arrest of the accused; (4) That there was no written

information to support the issue of a warrant to arrest; (5) That the Magistrate wrongly accepted evidence as to the analysis of the contents; (6) That the officers had no jurisdiction to search and hold the truck and trunks where the liquor was found; (7) that there was no legal evidence to support the conviction.

In my opinion the case can be disposed of without applying any new rule which may have been laid down in the recent decision of the Judicial Committee in *R.* v. *The Nat Bell Liquor Co. Ltd.* (1922), 65 D.L.R. 1. A perusal of the evidence shews that there was in any case ample evidence to support the conviction and to justify the Magistrate in making the inference that the accused was in possession of the trunks in question, and of their contents.

Counsel for the appellant contended that the place of the offence was wrongly stated both in the information and in the conviction. These say that the act was committed "at or near Hillcrest in the Province of Alberta." The evidence shews that the accused had shipped the trunks from Fernie, B.C. to Blairmore and had engaged a truck driver to take them to Hillcrest and that it was while on the way to the latter place that the seizure was made. The fact that the accused was taking the trunks in a truck from Blairmore to Hillcrest and the very reasonable inferences as to distance that can be made from the evidence make it plain that it was quite correct to say "at or near Hillcrest."

It is true that it does not appear to have been definitely stated in evidence that Hillcrest is in the Province of Alberta but both the information and the conviction so state and I think that this brings the case clearly within the decision in *R.* v. *C.P.R. Co.* (1908), 14 Can. Cr. Cas. 1, 1 Alta. L.R. 341.

There is no material in the case to shew that the accused was arrested without a warrant and this ground was in any case not urged upon us on the argument no doubt because the statute as amended in 1918 authorises such arrest where the accused is found committing the offence. The decision in *R.* v. *Pollard* (1917), 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 Alta. L.R. 157, no doubt led to this amendment.

There does not appear to be anything in any of the other grounds. Upon the argument some complaint was made as to the forfeiture of the trunks. But there is nothing in the material before us to shew that this was done. The conviction as above quoted merely refers to the "vessels and containers" in the words of the statute.

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But it is perhaps advisable to express an opinion that those words do not properly cover the trunks. Obviously what was intended was that the officers should not be bound to pour out the liquor into vessels of their own but might seize and forfeit the bottles or barrels in which the liquor was actually contained. This, however, does not cover the trunks or the truck or the railway car. No doubt this intimation of opinion will be sufficient to secure to the accused the return of his trunks.

The appeal should be dismissed with costs.

BECK and HYNDMAN, JJ.A. concur with STUART, J.A.

Appeal dismissed.

SELCH v. BAKER. Re MUNICIPAL ACT.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, and Dennistoun, JJ.A. March 2, 1922.

ELECTIONS (§ IV—91a)—ELECTION PETITION MADE TO ONE JUDGE—JURISDICTION OF ANOTHER JUDGE TO TRY CASE—MUNICIPAL ACT R.S.M. 1913, CH. 133—COUNTY COURTS ACT R.S.M. 1913, CH. 44, SEC. 68—KING'S BENCH ACT R.S.M. 1913, CH. 46, SEC. 84—CONSTRUCTION.

While the Municipal Act, R.S.M. 1913, ch. 133, standing by itself might bear the construction that the Judge to whom an election petition is presented is the Judge before whom the trial should take place, sec. 68 of the County Courts Act, R.S.M. 1913, ch. 44, makes sec. 84 of the King's Bench Act, R.S.M. 1913, ch. 46, applicable to procedure in County Courts, and authorises an election petition presented to one Judge of a County Court to be tried before another Judge of the same Court.

[*Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294, distinguished.]

APPEAL by plaintiff from a judgment of Macdonald, J., granting an order prohibiting a County Court Judge from proceeding under an election petition. Reversed.

The order appealed from is as follows:—

"The ground upon which the application is made is that Dawson, Co.Ct.J., has no jurisdiction to hear the said petition. A number of preliminary objections are taken by counsel on behalf of the respondent Baker but I do not deem it necessary to find upon these objections as the ground taken by counsel for the respondent does not appear to me to be tenable.

Mr. Heap, counsel for the applicant, contends that the Judge to whom the petition is addressed is *persona designata* and that no other Judge has jurisdiction to try the election petition.

Section 196 of the Municipal Act, R.S.M. 1913, ch. 133, provides that, 'a petition shall be presented to a Judge of the County Court for the judicial division in which the municipality is situate or partly situate.'

Section 200 provides for a notice of the presentation of the

petition and security and such notice and copy of the petition shall be served personally unless the Judge on application, etc. Section 202 provides that an objection to the security shall be decided preliminarily by the said Judge. Section 203 provides that objections may be cured by the deposit of such sum of money by way of security as will in the opinion of the Judge make the security sufficient. Section 207 provides for the place of trial within the municipality, except that the Judge may appoint some other convenient place; and sec. 210 provides that the Judge may in his discretion adjourn the trial.

All throughout the Municipal Act "the Judge" refers to the Judge to whom the petition shall be presented, as provided by sec. 196.

The Judge to whom the petition is presented is therefore, to my mind, the Judge who shall hear the petition and is therefore *persona designata*, and the order for prohibition must therefore go. Costs against the respondent."

B. B. Dubienski, for appellant.

F. Heap, for respondent.

The judgment of the Court was delivered by

FULLERTON, J.A.:—August Selch and James Baker were candidates for election as councillor of the municipality of Brokenhead. Selch was declared duly elected and Baker thereupon filed an election petition under the provisions of the Municipal Act, R.S.M. 1913, ch. 133, against the said Selch. It appears that the petition was presented to His Honour Judge Paterson, Judge of the County Court of Beausejour and the security for costs required by sec. 198 of the Municipal Act was given to His Honour Alexander Dawson, Judge of the County Court of Beausejour, who granted an appointment for the trial of the petition.

Selch thereupon gave Baker notice of an application to the Court of King's Bench "for an order prohibiting His Honour Judge Alexander Dawson from proceeding under (or to the trial of) the said petition."

No grounds are set out in the notice of motion. The main point apparently argued before Macdonald, J., who heard the application, was whether under the Municipal Act the Judge to whom the petition was presented was *persona designata*. Macdonald, J., held that "the Judge to whom the petition is presented is, therefore, to my mind, the Judge who shall hear the petition and is therefore *persona designata*, and the order for prohibition must therefore go."

The order appealed from was thereupon made by Macdonald, J. During the argument everybody assumed that this was an

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order for prohibition, but on looking at the order itself I find that it is not an order for prohibition at all. The operative part reads as follows:—

"The Court doth order and adjudge (it appearing that the said Hon. Alexander Dawson has no jurisdiction in respect of the petition) that *the said James Baker be, and is hereby prohibited from further proceeding in respect of the said petition before the said Hon. Alexander Dawson.*"

This is not an order for prohibition, but rather in the nature of an injunction order against James Baker. No such order could be made in a summary application of this nature. Selch has brought no action in the King's Bench against Baker and only in such an action could such an injunction order be made. The notice of motion does not ask for such an order and the reasons of Macdonald, J., shew clearly that he never intended to make such an order. On this ground alone the order cannot stand.

On the motion before Macdonald, J., counsel for Baker took the objection that there was no material filed in support which would justify the making of the order. The only material filed was an affidavit of F. Heap, solicitor for Selch, stating certain facts on information and belief. Rule 529 of the Rules of the King's Bench requires that "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, *except on interlocutory motions*, on which statements as to his belief, with the grounds thereof, may be admitted."

Clearly an application for prohibition is not an interlocutory motion within the meaning of the above rule. The affidavit of Mr. Heap should not therefore have been considered and without it there is no material whatever to justify the making of the order.

I think either of the grounds dealt with would justify the allowance of the appeal.

On the merits also I think the appellant is entitled to succeed.

The respondent relies on the case of *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294. This was an application to quash a by-law. The section of the Municipal Act in question there provided that, "In case a resident of a municipality, or any other person interested in a by-law, order or resolution of the council thereof, applies to a Judge of the Court of Queen's Bench sitting in Chambers . . . the Judge . . . may quash the by-law."

A summons to shew cause returnable before the presiding Judge in Chambers was granted by Bain, J., sitting in Chambers. It came on for hearing before Dubuc, J., who dismissed the application. On appeal the Court held the term "the Judge"

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persona designata and only the Judge who issued the rule or summons could hear the application on its return. This case was decided in 1892. In 1895 the Queen's Bench Act, 1895, ch. 6, was passed. Section 93 of that Act (now sec. 84) provides as follows:—

"Where any statute of Manitoba or any law in force in Manitoba provides that any proceeding, matter or thing shall be done by or before a Judge, the term "Judge" shall in all such cases mean a Judge of the Court mentioned or referred to in such Statute; and *any such proceeding, matter or thing, when properly commenced before a Judge, may be continued or completed before any other Judge of the same Court.*"

Section 68 of the County Courts Act, R.S.M. 1913, ch. 44, makes the last-quoted section applicable to procedure in the County Courts.

While the Municipal Act standing by itself may bear the construction contended for by the respondent, sec. 84 clearly authorises an election petition presented to one Judge of the County Court to be tried before another Judge of the same Court. Counsel for the respondent admits that the section has this effect providing the proceeding be "properly commenced before a Judge," but he contends that the proceeding is not "properly commenced" until security for costs is filed as required by sec. 198 of the Municipal Act. In support of his contention he refers to sec. 204 of the Municipal Act: "If no security be given as prescribed or if any objection be allowed and be not removed, as aforesaid, no further proceedings shall be had on the petition."

I am unable to follow his reasoning. It seems to me that the presentation of the petition to the Judge of the County Court clothes him with jurisdiction and is the commencement of the proceeding before such Judge within the meaning of sec. 84.

I would allow the appeal with costs and set aside the order appealed from with costs.

Appeal allowed and order appealed from set aside.

R. v. KNIGHT.

Alberta Supreme Court, Appellate Division, Stuart, Beck and Hyndman, JJ.A. May 13, 1922.

CERTIORARI (§II--24)—ALBERTA LIQUOR ACT, 1916, CH. 4, AND AMENDMENTS—CONVICTION FOR BREACH OF—CONVICTION REGULAR ON FACE—MAGISTRATE HAVING JURISDICTION—APPEAL—JURISDICTION OF APPELLATE COURT TO QUASH.

The Appellate Court of Alberta has no jurisdiction to set aside a formal conviction under the Alberta Liquor Act 1916, ch. 4, if the conviction is regular on its face and the charge one over which the Magistrate has jurisdiction.

[*Rex* v. *Nat Bell Liquors* (1922), 65 D.L.R. 1, followed.]

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Stuart, J.A.

APPEAL from a judgment of Simmons, J. refusing to quash a conviction under the Alberta Liquor Act. Affirmed.

J. D. Matheson, for appellant. *J. Short*, K.C., for Crown.

STUART, J.A.:—The information alleged and the formal conviction found that "William Knight between the 6th and 15th days of October, 1921 at Blairmore in the said Province did unlawfully keep liquor for sale contrary to sec. 23 of the Liquor Act."

At the opening of the argument counsel for the prosecution objected that the affidavit filed on behalf of the accused before the application was made to Simmons, J. ostensibly to conform with the requirements of sec. 41 sub-sec. 8 of the Liquor Act, 1916, ch. 4, did not in fact so conform and was insufficient. The affidavit recited the charge in full and then the deponent simply said "I am not guilty of the said charge as contained in the said information." The statute, however, requires that the affidavit "shall further negative the commission of the offence by the agent, servant or employee of the accused or any other person with his knowledge."

I think the affidavit was technically insufficient but inasmuch as upon the argument before us it was stated that Simmons, J. had in the exercise of powers given him by sec. 63 as amended by 1918, ch. 4, sec. 55, sub-sec. 17, suggested an amendment of the conviction to conform with the evidence it would appear probable that the sufficiency of the affidavit was not questioned before him and upon enquiry from him we are told that he does not remember that the question was raised. Possibly it may have been, nevertheless. But, however that may be, inasmuch as the time had not at the date of the argument yet elapsed within which an application to quash might be made provided a Judge should shorten the time for the return of the notice of motion and therefore it would still have been possible to make a fresh application with a sufficient affidavit and as the accused presented to us then an affidavit which was undoubtedly sufficient we ought not now, in my opinion, to give effect to the objection. The conviction is dated Nov. 8, 1921 and the time for a return of a new notice of motion would be until Monday May 8. So that if we had dismissed the appeal on the hearing on Monday last May 1, on this ground the accused could still have moved, even possibly without leave, as to a shortening of the time, upon a new notice of motion.

Therefore, I think we should dispose of the case on the merits without giving effect to the preliminary objection.

The case comes before us in an unsatisfactory shape in other

respects. Counsel for the accused contended that neither in the conviction nor in the information was it shewn that the offence was committed within the jurisdiction of the Magistrate viz: in Alberta. In the Appeal Book presented to us this appeared to be the situation but a reference to the original documents reveals the fact that both the conviction and the information do state the place of the offence, that is, Blairmore, as being in the Province of Alberta. Why the Appeal Book was certified as containing correct copies of the documents, when such is not the case, is a question which the Deputy Clerk of the Supreme Court at Macleod alone can answer.

Then, although counsel for the prosecution stated that Simmons, J. had exercised the power of amendment we find, upon looking at his order, that there is no reference to an amendment of the conviction nor is there any such reference in the memorandum endorsed by him on the back of the documents nor in the clerk's memorandum in the procedure book. Simmons, J. however, does inform us that he did orally state or suggest at the close of the argument before him, that an amendment of the conviction so as to conform with the evidence might be made.

The only real objection to the conviction is that it stated that the offence of keeping for sale had been committed in the period *between* the 6th., and 15th., of October whereas the only evidence of any possession of liquor related to the 6th., and the 15th., neither of which days was, so it is contended, between the 6th., and 15th. It was with reference to this defect that Simmons, J. seems to have suggested that an amendment could be made.

Nevertheless it is the conviction as it was originally drawn that is before us on this appeal. It is also the order of Simmons, J. as drawn which is before us. He has never amended his order, and we can only deal with the case as it comes before us.

The full report of the decision in *R.* v. *Nat Bell Liquor Co.* (1922), 65 D.L.R. 1, is now to hand. As the conviction is perfectly regular on its face and there is no question about the jurisdiction of the Magistrate it seems to me that the only thing to do, especially as the Court is for this case constituted with only three Judges, is for the moment, at any rate, to follow that decision and uphold the conviction. We are told that we cannot look at the evidence if the conviction is regular but I observe that although no one questioned either the regularity in point of form of the conviction in the *Nat Bell Liquor Co.* case or the jurisdiction of the Magistrate, yet the Judicial Committee seem themselves to have read the evidence rather carefully. Why they did so in the view they took of the law I do not for the

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moment, at any rate, understand, although the reason may appear on a more careful study of the judgment than I have yet been able to make.

While following the decision in the present case I desire to reserve full assent to the final adoption of it as the rule in this Court until I see how it is received in the seven provinces of Canada whose invariable practice, in some cases for 40 years or more, it has apparently condemned.

It may not be out of place to point out that by refraining from treating the conviction as amended by Simmons, J. we are really giving the prosecution a great advantage. If the conviction had been actually amended as suggested it certainly would not have been a conviction for the offence charged in the information and there is no suggestion that Simmons, J. exercised the power possibly given by sec. 63 of the Act, as amended in 1918 ch. 4, sec. 55, sub-sec. 17, of amending the information. Nor should I have felt disposed to exercise any discretionary power of amendment in that regard which we might possess upon appeal because I should hesitate greatly at this stage to amend an information without the informant being present to reswear it or at any rate without giving the accused an opportunity of adducing evidence if he so desired after the proposed amendment had been made.

The appeal should, I think, be dismissed but without costs.

BECK, J.A., concurs with STUART, J.A.

HYNDMAN, J. A.:—As I understand the decision of the Privy Council in *R.* v. *Nat Bell Liquors*, 65 D.L.R. 1, if a conviction under the Summary Convictions Act 1848, ch. 43, is on its face regular, and the charge one over which the Magistrate has jurisdiction, then on *certiorari* the Court cannot for any purpose go behind the formal conviction or inquire into the regularity or irregularity of any of the forms or proceedings anterior to such formal conviction.

The conviction herein appears in all respects to be regular on its face, and the charge one to which the Magistrate's jurisdiction extends; therefore, there is no alternative but to affirm the conviction, with costs. *Appeal dismissed.*

Re MORTON; Ex parte MORTON, BARTLING & Co. Ltd.

Saskatchewan King's Bench, MacDonald, J. May 31, 1922.

LIMITATION OF ACTIONS (§ IVC—166)—DEBT BARRED BY STATUTE—SALE OF STOCK CERTIFICATES HELD AS COLLATERAL—CONVERSION OF MONEY RECEIVED BY AGENT—LOAN OF MONEY—PAYMENT—REDUCTION OF ORIGINAL DEBT—STATUTE OF LIMITATIONS—REVIVAL OF ORIGINAL DEBT—REQUISITES OF ACKNOWLEDGMENT OR PART PAYMENT.

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RE MORTON; EX PARTE MORTON, BARTLING & CO. LTD.

MacDonald, J.

Although a debt is barred by the Statute of Limitations a liquidator may legally realise on collateral security, for the statute does not extinguish the debt, but only bars the remedy, and when an agent of a liquidator undertakes to realise on such collateral, payment to the agent is payment to the liquidator, and reduces the original debt by that amount, but is not a part payment of such original indebtedness so as to revive it under the Act.

APPEAL by a liquidator from the disallowance of a claim on the ground that it was barred by the Statute of Limitations. Affirmed.

L. McK. Robinson, for liquidator.

E. M. Miller, for trustee.

MACDONALD, J.:—The facts herein are briefly as follows: On August 14, 1914, an order was made for the winding-up of Morton, Bartling & Co., Ltd., and one T. Robertson of Prince Albert was appointed liquidator. The said Morton, Bartling & Co., Ltd., had carried on business at the city of Prince Albert as a private banker and the said Nelson W. Morton was the president of the company. At the date when the winding-up order was made and the liquidator appointed, said Morton was personally indebted to Morton, Bartling & Co., Ltd., in the sum of $39,047.46. As collateral security to said indebtedness the company held certain stock certificates in The Prince Albert Creamery Co., Ltd. Apparently Morton was giving some assistance to the liquidator in winding-up the affairs of the company and these collateral securities were at least for a time in a safe in the office of Morton. Some time before June, 1920, Morton told the liquidator that he could sell those shares of stock in the creamery company for $2,000 and the liquidator authorised Morton to sell the shares for said sum on the liquidator's behalf. Morton did sell the shares, but instead of paying over the $2,000 to the liquidator, he converted the same to his own use. The liquidator became aware of this in May, 1921, and demanded payment of said sum of $2,000 from Morton. Morton, however, put him off from time to time and eventually admitted that he could not pay it over. Thereupon, said Robertson, personally, loaned $2,000 to Morton for the purpose of making restitution and Morton did make restitution, placing the sum so advanced to the credit of the liquidator in the latter's bank account. Two or three months later Morton made an authorised assignment under the Bankruptcy Act, 1919 (Can.), ch. 36, to the Standard Trusts Co., as trustee, and thereupon the liquidator of Morton, Bartling & Co., Ltd., filed with the trustee a claim against the Morton estate for $37,047.46, being the original indebtedness of $39,047.46, less the said $2,000. The trustee disallowed the claim on the ground that the debt was barred by the Statute of

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Limitations. From such disallowance the liquidator appeals and his argument is that the original debt was revived by said payment of $2,000.

Banning on the Limitation of Actions, 3rd ed., p. 49, says: "In *Tippets* v. *Heane* (1834), 1 Cr. M. & R. 252, [3 L.J. (Ex.) 281] the requisites of an acknowledgment by part-payment were laid down as follows:—'In order to take a case out of the Statute of Limitations by a part-payment, it must appear, in the first place, that the payment is made on account of a debt; secondly, that the payment is made on account of *the* debt for which the action is brought; and in the third place, it is necessary to shew, that the payment is made as a part payment of a greater debt, because a part-payment implies a greater debt to be due at the time.'"

In *Ashlin* v. *Lee* (1874-5), 44 L.J. (Ch.) 174, 23 W.R. 287, it was held that where two sums are owing on the same contract part payment on account of one would not revive the other.

I have not been referred to any cases directly in point on the question involved herein, nor have I myself been able to find any. This is not surprising, for the circumstances detailed in the evidence are so extraordinary one could hardly expect to find a parallel case. However, as there is no evidence to the contrary, I accept the version given as the true one and must therefore endeavour to apply general principles of law to the peculiar facts herein. In so doing it is somewhat difficult to avoid confusion of thought owing to the fact that Morton was not only a debtor of the company in liquidation, but also acted as agent for the liquidator in disposing of the shares in question. It seems to me, however, that it will tend to lucidity if for a moment one supposes that the shares of the stock in question had been sold by some agent other than Morton, say, by our old friend John Doe. The liquidator held the shares as collateral to the indebtedness of Morton. The shares were therefore the property of the liquidator, subject to redemption by Morton on payment of his indebtedness.

Now, even though Morton's debt was statute barred, the liquidator could legally realise on the collateral, for the statute did not extinguish the debt, it only barred the remedy. John Doe, as agent of the liquidator, in May, 1921, or thereabouts, sells the shares of stock and receives the purchase price. Receipt of the purchase price by John Doe, the agent of the liquidator, is in law receipt by the liquidator himself, so that in May, 1921, on the receipt of the purchase price by John Doe, and even before payment over thereof to the liquidator, Morton's original debt of $39,047.46 becomes reduced to $37,047.46, and

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there arises an obligation on the part of the agent, John Doe, to pay the liquidator the $2,000 received as the purchase price of the shares. In other words, Morton's original debt of $39,047.46 becomes split up into two debts, one of $37,047.46 due by Morton, and one of $2,000 due by the agent. Payment by John Doe of his debt of $2,000 would not be a part payment of the debt due by Morton and the latter would not be thereby revived.

It seems to me that the same result follows even though the agent was in fact not John Doe, but Morton. Morton, as agent, sold the shares and received the purchase price; thereupon his original indebtedness became reduced by $2,000, and he, as agent, became indebted to the liquidator as his principal in $2,000. By borrowing the money from Robertson and paying the $2,000 over to the liquidator, Morton discharged the debt of $2,000, but it seems to me that that payment of $2,000 was not a part payment of the original indebtedness of $39,047.46. This seems to me to be clear because Robertson on the cross-examination of him on his affidavit makes it clear that the amount for which from time to time he was pressing Morton for payment was only the $2,000.

Of course, it is true that if Morton had not been indebted to the Morton, Bartling & Co., Ltd., at all, he could not be called upon to pay over to the liquidator the $2,000 which he had received as purchase price of the shares which had been held as collateral, but in my opinion the payment of said sum of $2,000 only recognises that he had converted to his own use $2,000 which he should have paid to the liquidator, and that he should have so paid it to the liquidator because he was still indebted on the original indebtedness in that amount, but not necessarily in any larger amount.

I am therefore of the opinion that the decision of the trustee in disallowing the claim is correct, and the appeal will be dismissed with costs.

Appeal dismissed.

JOHNSON v. JOHNSON.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Simmons, Hyndman and Clarke, JJ.A. May 17, 1922.

DOWER (§IA—5)—DOWER ACT—ALTA. STATS. 1917, CH. 14—NATURE AND EXTENT OF WIFE'S INTEREST IN HOMESTEAD OF HUSBAND—EXECUTION AGAINST HUSBAND—SALE OF HOMESTEAD—TITLE ACQUIRED BY PURCHASER.

The Dower Act, Alta. stats. 1917, ch. 14, gives the wife an interest in the homestead of her husband in the nature of a life estate which vests upon the husband's death, and this right or

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interest the husband cannot defeat by act *inter vivos* without the consent of the wife; and as only the interest of the execution debtor in the homestead can be sold by the sheriff under an execution, any such sale must be subject to the wife's right to a life estate vesting on the death of the husband, but there is nothing in the Act which further reduces the salable interest of the husband.

[*Rigby* v. *Rigby* (1922), 66 D.L.R. 261, referred to. See Annotation Conveyances to defeat dower, 55 D.L.R. 259.]

CASE stated for the opinion for the Appellate Division as to whether the sheriff acting on behalf of an execution creditor can sell the homestead of the execution debtor without the consent of the execution debtor's wife, so that the purchaser shall receive a transfer which can be registered in the Land Titles office free from encumbrance or claim by the wife of the execution debtor in the said land under the Dower Act.

J. A. Valiquette, for plaintiff.

R. C. Burns, for claimant.

STUART, J.A.:—This is a case stated for the opinion of this Court upon the following admission of facts:—

"Action was commenced by statement of claim in the Supreme Court of Alberta, Judicial District of Calgary, on August 9, 1921, by the plaintiff to recover from the defendant the sum of $2,000 lent to the defendant in October, 1915. The plaintiff is the mother of the defendant. The defendant did not defend. Judgment was signed against the defendant, September 7, 1921.

Writ of execution directed to the sheriff of the Judicial District of Acadia was issued September 9, 1921. The Writ of execution and a *nulla bona* return from the sheriff of the Judicial District of Acadia were filed with the Clerk of the Court at Calgary, December 6, 1921.

Upon the application of the plaintiff, unopposed by the defendant, Walsh, J., on November 14, 1921, made an order authorizing the sheriff of the Judicial District of Acadia to proceed forthwith to sell the defendant's land, namely, the land described in certificate of title No. 8337, book C.C. folio 235, reference No. 19-U-140, 'notwithstanding the provisions of R. 624 of the Consolidated Rules of the Supreme Court and notwithstanding that the writ of execution issued herein was delivered to him less than 12 months ago.'

Pursuant to the said order of Walsh, J., proper directions were given and the lands of the defendant were advertised for sale accordingly, the sale being advertised to take place at Munson in the Province of Alberta, Saturday, January 28, 1922.

Carry Johnson, wife of the defendant, claims an interest in the said land by virtue of the Dower Act being ch. 14 of the Statutes of Alberta, 1917, and amendments thereto.

On Thursday, January 26, 1922, the claimant applied before Harvey, C.J., for an order to set aside the order of Walsh, J. or in the alternative that the sale of the said land proceed subject to the rights or interest at law of Carry Johnson. Harvey, J. postponed the date of sale.

The grounds urged by the claimant were, among others, that she has an interest in the said land as wife of the defendant and that the sale should not be held or if held shall be so held subject to her rights and with her consent. It is admitted that Carry Johnson is the wife of the defendant.

By special leave of the Appellate Division of the Supreme Court of Alberta, the following question is submitted for the decision of the said Court:—

Can the sheriff, acting on behalf of an execution creditor, sell land, the registered owner of which is the execution debtor, without the consent of the wife of the execution debtor, if the land be the execution debtor's homestead as defined in the Dower Act, so that upon a sale of the said land by the sheriff under said execution the purchaser thereof shall receive a transfer which can be registered in the Land Titles Office free from encumbrance or claim, by the wife of the execution debtor, in the said land under and by virtue of the Dower Act?''

It is of course not possible to dispute the well settled principle that under a writ of execution nothing more can be sold than the interest of the execution debtor in the property in question. The execution debtor is admittedly the registered owner of the land proposed to be sold and it was also admitted on the argument although it is only stated hypothetically in the question submitted, that the land is the execution debtor's homestead within the meaning of the Dower Act.

As I see the matter the real question, therefore, is to what extent, if any, the debtor's interest in the land has been decreased by the provisions of that Act.

Apparently no question of the provisions of the Exemptions Ordinance has been raised. The execution debtor must have made no claim to exemption or if he did it must have been overruled for otherwise the order for sale would not have been made. This suggests a rather strange situation. A husband can, by continuing himself to reside on the homestead, retain the protection of the Exemptions Ordinance and is by the Dower Act prevented from disposing of it so as to defeat his wife's

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rights under the Act. But he may perhaps abandon it, whether his wife consents or not, and so expose it to sale under execution without any consent of his wife because sec. 5 of The Dower Act 1917, ch. 14, only declares that "the residence of a married man shall not be deemed *for the purposes of this Act*, (not therefore of the Exemption Ordinance) to have been changed unless such change is consented to, in writing by the wife of such married man."

But dealing first with what appears to me to be the simplest aspect of the case I am of opinion that the Dower Act gives a wife an interest in the homestead in the nature of a life estate which vests upon the husband's death. This right or interest the husband can not defeat by act *inter vivos* without the consent of the wife. This, at least, is the effect of secs. 3 and 4 of the Act. Whether those sections taken with sec. 5 have a still wider effect I shall presently consider. But it seems to me to be clear that the interest of the husband in the land, by which I mean the interest which he is free to dispose of by his own single act, is decreased by the existence of this interest in the wife. Whether this interest of the wife is in the nature of an estate in the old common law sense or not seems to me to be an unnecessary question to be considered. The interest of the husband is, in my opinion, subject to this interest of the wife and as an execution creditor can only sell the interest of the debtor it necessarily follows that the land cannot be sold under the execution except subject to the wife's right to a life estate vesting on the death of her husband.

Counsel for the plaintiff, the execution creditor, contended that a sale under execution is not such a "disposition" as is meant by sec. 3 of the Act. I think that is possibly the case but for the reasons I have given that does not settle the question against the wife. The question is, what can be sold under the execution. As that can only be the real interest of the husband and as the Act has reduced the extent of that interest by the extent of the interest given to the wife it must follow that the sale must be subject to the wife's interest.

There remains the question, however, whether in the life time of the husband the Act gives the wife any interest which further decreases the salable interest of the husband. Whatever I may have said in *Overland* v. *Himelford* (1920), 52 D.L.R. 429, 15 Alta. L.R. 332, my present opinion is that the Act does not do so. The husband could have sold without the wife's consent subject only to her life estate after his death. If I said anything inconsistent with this in *Overland* v. *Himelford*, which

I apparently did, it was not necessary for the decision in that case and upon further consideration I think it was wrong. The necessity of the wife's consent to a change of residence provided for in sec. 5 is expressly said to be only "for the purposes of this Act" which is to give the wife surviving her husband a life estate in the homestead but no present interest in it which further infringes upon the husband's interest. What the husband, therefore, can of himself sell the execution creditor can sell and this, I think, is the whole estate subject only to the wife's right to a life estate if she survives her husband. I would answer the question submitted accordingly.

The point being a new one and one of some doubt I think there should be no costs.

BECK, J.A.:—The Dower Act, 1917, (Alta.) ch. 14 as amended by 1919, ch. 40, defines "homestead as used in that Act as land . . . on which the house, occupied by the owner thereof as his residence, is situated."

It declares that, "'disposition' shall mean any disposition by act *inter vivos* and requiring to be executed by the owner and shall include every transfer, agreement of sale, lease or other instrument intended to convey or transfer any interest in land and every mortgage or encumbrance intended to charge land with the payment of a sum of money (and requiring to be so executed) and every devise or other disposition made by will."

Section 3 says that:—

"Every disposition by act *inter vivos* of the homestead of any married man, whereby the interest of such married man shall or may vest in any other person at any time during the life time of such married man or during the life time of such married man's wife living at the date of such disposition, shall insofar as it may affect the interest of the said wife in such homestead under this Act be null and void, unless made with the consent in writing of the wife aforesaid."

Section 4. "Every disposition by will of such married man and every devolution upon his death intestate shall, as regards the homestead of such married man, be subject and postponed to an estate for the life of such married man's wife hereby declared to be vested in the wife so surviving."

Section 5 says that:—"The residence of a married man shall not be deemed for the purposes of this Act, to have been changed unless such change of residence is consented to in writing by the wife of such married man."

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Section 7a. (added in 1919 ch. 40 sec. 5 and as amended in 1921, ch. 5 sec. 21) says that:—

"Where a husband and his wife are living apart or where the wife is a lunatic or a person of unsound mind a Judge of the Supreme Court may, by order, dispense with the consent of the wife to any proposed disposition, if in the opinion of such Judge it seems fair and reasonable under the circumstances, so to do."

The foregoing seem to be all the provisions of the Act which are material for the consideration of the questions now presented for our determination.

It seems impossible to identify the homestead under the Dower Act with the homestead under the Exemption Act, 1911, C.O.N.W.T. ch. 27.

Under the Dower Act the land on which is situated the residence of the married man remains his homestead even though he ceases to reside upon it unless and until the wife consents to a change of residence and there seems to be no power in a Judge to dispense with this consent. Under the Exemption Act the actual residence of the debtor for the time being is his homestead.

The interest of the wife in a homestead under the Dower Act is a life estate after her husband's death—that is, a contingent interest; contingent not only upon the life of each of them but also subject to be divested by consent, dispensation of consent by a Judge or, as I think, by estoppel.

In *Rigby* v. *Rigby* (1922), 66 D.L.R. 261, the Court held that the wife had such a present, (i.e. a presently-existing) interest, as to justify the filing of a caveat.

Up to the present time it has not been necessary for the Court to define the wife's interest more definitely. It seems to me that the only estate or interest created by the Dower Act in the wife is the contingent life estate above described; in other words, that this Act does not give her the right to remain in the residence on the homestead defined by the Dower Act against the will of her husband, but only to protect her contingent interest by refusing a consent to her husband's disposition of this homestead.

The Act itself permits him to dispose of the homestead except "insofar as it may affect the interest of the wife." This right in the husband is inconsistent with a right of the wife to continue to live in the residence on the homestead. If this conclusion is right it follows quite clearly that the husband's interest in the land or in other words, the land itself except

insofar as the wife's contingent life estate is concerned, can be sold under execution against the husband. The purchaser under the sale under execution would acquire the land and get a certificate of title for it only subject to the wife's contingent life estate. When, as here, such cases arise, probably means can be found according to circumstances to have the wife's consent on terms to the sale of the land freed of her interest or to have the execution debtor obtain an order to dispense with her consent to a sale by him in order to prevent what would otherwise likely result in a sacrifice of the property with a loss to all concerned.

I would, therefore, answer the question submitted by saying that the homestead can be sold under execution against the husband but only subject to the ultimate contingent life estate of the wife.

SIMMONS, HYNDMAN and CLARKE, JJ.A. concur with STUART, J.A.

Judgment accordingly.

GEGGIE v. H. H. KERR MOTORS Ltd. and WHITE.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, and Hyndman, JJ.A., and Walsh, J. June 10, 1922.

CONTRACTS (§ VC—402)—AUTOMOBILE—PURCHASE OF PARTICULAR MODEL—DELIVERY OF PATCHED UP OLD CAR—FRAUD OF DISTRIBUTOR—PAYMENT OF PRICE—REJECTION OF CAR UPON DISCOVERY OF FRAUD—RETURN OF MONEY—VALUE OF CAR TAKEN IN EXCHANGE.

A purchaser who enters into an agreement with an automobile distributor for the purchase of a particular kind or model of car has a right to expect that he will receive a car of that model as assembled by the manufacturer, although it may have been taken apart for shipping purposes, and where he has been induced by the fraud of such distributor to accept a made over and patched up car as the one he agreed to purchase he is entitled upon learning of the fraud practised upon him to reject and return such car and receive the purchase money paid, and another car taken as part payment of such purchase price will be allowed for at the price agreed upon by the parties at the time the contract was entered into.

APPEAL by defendants from a judgment of Harvey, C.J., whereby he gave the plaintiff judgment for $2,758 against the defendant company, and for $1,558 against the defendant White in an action to recover the purchase price of a motor car which the trial Judge held he was entitled to reject and return. Affirmed.

Frank Ford, K.C., for appellants.

H. H. Parlee, K.C., and *A. B. Macdonald*, for respondent.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—The judgment against the company is for the amount paid to it by the plaintiff as the purchase price of an

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automobile which the trial Judge held the plaintiff was entitled to reject and return. The price was paid, as to $1,558, in cash and, as to $1,200, by the delivery of the plaintiff's Dodge car which for the purpose of the bargain was valued at that sum. White was the defendant's agent in Edmonton, and was concerned with the negotiations for the purchase. The trial Judge did not, in his reasons for judgment, make any distinction between the two defendants so far as the amount of the judgment against them was concerned, but he approved of the formal judgment whereby White apparently was not treated as being liable for the value of the Dodge car, but only for the cash payments.

There are three main points in the case. First, what is it that the defendants agreed to sell to the plaintiff? Second, did they deliver what they agreed to sell? And, third, was there such an acceptance by the plaintiff as precluded him from rejecting the car and demanding a return of his money?

The H. H. Kerr Motors, Ltd., carried on business with its head office in Calgary and, as stated in its statement of defence, it was "the distributor of Hupmobile automobiles in the Province of Alberta, purchasing the same from the Hupp Motor Car Corporation." This latter corporation had been a defendant, but the action against it was dropped. H. H. Kerr Motors, Ltd., were therefore in the position of persons whose business it was to deal in automobiles, although they apparently confined themselves to the product of one particular manufacturing concern. They had an agency in Edmonton during 1920, which was in charge of the defendant White from May 1, 1920, to the end of June, 1920, during which period practically all the material facts occurred.

The plaintiff, who owned a Dodge car but wanted a new one, signed the following order:—

"Distributor's Agreement.

H. H. Kerr Motors, Limited, Calgary, Nov. 17, 1920.

Please enter my order for Model Hupmobile R, specifications, equipment and guarantee in accordance with manufacturer's warranty covering this particular model. Delivery of same is to be made F.O.B. Calgary on or about May, 1920.

It is further agreed that I will take delivery of said article within 24 hours after I have been notified that same is ready for delivery. Upon my failure to take delivery the H. H. Kerr Motors, Ltd., may dispose of said automobile to another customer, the first payment to remain in their possession and apply as against the next automobile they can deliver to me. Terms of purchase: Cash and lien notes covering balance (if any).

Cash value or price prevailing at date of delivery		2825	
Extras			
Cash payment			
Taken in Exchange Dodge 1918		1200	
Balance		1625	
Remarks: Payment $1000 cash	2825	2825.00	

Balance 3 months from date of delivery

Accepted by Purchaser: C. G. Geggie,

N. V. White, Sales Manager. 705 Tegler, Edmonton, Alta."

Apparently there was some slight variation ultimately made in the price, because the plaintiff paid in cash $1,000 and gave a note at 3 months for $540 and interest which at maturity and when paid amounted to $558, thus making in all only $2,758.

The Statute of Frauds was of course not pleaded, and the question as to what it was agreed that the plaintiff should get is to be decided both upon the words of the written order and upon what passed between the parties. After hearing the evidence, the trial Judge said:—"It is perfectly clear from the evidence in this case that what was being sold and what was being purchased was a Hupmobile car, of 1921 model. It is true it is not described in the contract as a 1921 model and that perhaps is not the technical method of describing it, but that is what both sides referred to it as, and it was understod as that—a car that was being sold as the 1921 car of the factory. Whether any car that had been a 1920 car—a new car—and adapted in the sales shops in the method notified from the factory, by making these alterations that were on the 1921 car, or improvements—whether any such car as that could be deemed to comply with that description, the car in question here certainly did not comply with that description. It was not a new car in some respects, and it was not of the 1921 model. There is some evidence,—Mr. Toole himself says that the difference is just in appearance, but that might be of very considerable importance when there are so many people driving cars as there are now who might want others to know this car as the latest car, and if that can be shewn by its appearance, even if it may be no better than another car, it is his right to have it; it is not for the vendor to say he will supply one that is equally good, he has to supply the one that is contracted for. Consequently, I have no hesitation whatever in coming to the conclusion that the car supplied in this case did not comply with the terms of the contract."

Not only do I think it is impossible to say that the trial Judge was clearly wrong in this finding of fact, upon which ground

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alone a Court of Appeal ought to interfere, but after reading the evidence I am bound to say that I would be strongly inclined to reach the same conclusion.

And I think the trial Judge might have made another finding which would point in the same direction. The written order itself speaks of a "guarantee in accordance with manufacturer's warranty covering this particular model." This evidently means that the vendor was proposing to give the same guarantee that the manufacturers themselves gave to their purchasers. It shews that it was understood that the vendors, the H. H. Kerr Motors, Ltd., had a guarantee from the manufacturers. The exact nature of that guarantee is not disclosed, and is in itself not material here. But the fact that it is referred to in the order signed shews that it was the intention of the parties that the plaintiff should get a car in respect of which the vendors could claim a manufacturer's guarantee.

Now the facts shew that when the plaintiff asked for his car in April, 1921, the agent White represented that the car would have to come from Calgary, and that at the Edmonton office or garage there was no car in stock that would fulfil the contract. As a matter of fact the car delivered was then in the show-room at Edmonton and had been there since May, 1920. It had been used as a demonstration car. Its pieces had been taken out and frequently changed. In fact it was a body and a chassis which had to be built up. Engine, generator, ignition system, wheels, and other things had all been taken out and replaced. The car had to be built up in fact in Edmonton.

Can it be said that a car treated or made up in this way was a car to which the manufacturer's guarantee attached? I can imagine what the manufacturers would have to say if the H. H. Kerr Motors, Ltd., should attempt to hold them on any guarantee in respect of this particular car. For this additional reason I am of opinion that the car delivered was not the car agreed to be delivered; that is, that it did not comply with the description of the article agreed to be supplied. The plaintiff, so the parties as I think intended by their agreement, was to be given a car which had been put together by the original manufacturers, even though for the purpose of transhipment there may have been some separation of its parts. Dealers in automobiles may, I think, as well understand that purchasers here have not such confidence in local mechanics in local garages that they are prepared to accept without question the assembling work of those mechanics in place of the work of the experts at the large factories. The very written agreement itself refers to the defendant company as a "distributor" of cars, and so

does the company's own pleading. This, I think, means a distributor of a number of cars, not of the separate parts of an individual car. The plaintiff was not dealing with the defendant company as a partial constructor of or assembler of the parts of cars, but as a dealer in a finished and complete article.

But the plaintiff took the car offered him in the innocent belief that he was getting a car such as he had ordered fresh from the factory. He paid his $1,000 and gave his note at 3 conths. At the end of the 3 months he paid the note and threw away his copy of his contract. In the meantime, however, he had been having continual trouble with the car, and had taken it to the garage of the defendant company at Edmonton a number of times to have it fixed. The defendant made repeated attempts to make it run satisfactorily but apparently it did not do so. Then, on July 28, about a week after he had paid the note, the plaintiff took the car into the garage again. He found out from someone, but then for the first time, the true facts regarding the car which had been delivered to him. On the 29th he demanded either a new car or repayment of his money. As his request was not complied with, he brought the action on August 4.

The chief contention of the appellants is that there had been an acceptance of the car in performance of the contract, that the plaintiff's right of rejection and return of the car was gone and that his only remedy, if any, was for damages. We must of course bear in mind the facts as to this acceptance which were found by the trial Judge. He used the following language:

"The contract was a perfectly good contract, and there is nothing to suggest anything wrong with the contract, nor do I think that it could possibly be contended that the contract was not in proper form. It is only in the performance of it, and here the defendants have supplied something which they did not agree to supply and the plaintiff has returned that to them and said he did not want it and asked for his money back. He did that immediately he found that it was not what he had ordered. Now he was undoubtedly led to believe that he was getting what he had contracted for by the deceit of White. White told him he would get the car from Calgary. He did not do that. Instead of that he proceeded to make over a car he had in the shop. One wonders why, if he was honest in saying that they made it a 1921 model, he did not tell Geggie what he was doing. It is perfectly apparent that the reason he did not was because he knew Geggie would not be satisfied with that, and that he would not accept it. I suppose that amounts to fraud. It is pretty hard to say what else it could be

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—in inducing the acceptance. And that certainly must have some effect in considering the case at any rate. He was lulled into a feeling of security. He naturally supposed he got what he ordered and had to pay for it when he paid for it at the time he did. I am not at all impressed by the statements of how well the car was going or the fact that he paid the money. Naturally he never knew it was a car that had been re-assembled here and was not such a car as he was entitled to receive, and he supposed he was bound by his contract. I cannot see any reasonable ground for saying that he should not be entitled to have, perhaps not rescission, but certainly the right to return the car and receive back the compensation he gave for it."

With the statements of fact, at least, contained in this passage, no one can possibly quarrel. White did undoubtedly deceive, and intentionally deceive, the plaintiff in the manner there stated. This means that the plaintiff was induced by a fraud of the defendant's agent, acting within the scope of his employment, to accept a car as fulfilling the terms of the contract, when in fact it did not do so. Fraud vitiates everything. An acceptance induced by fraud is in my opinion no acceptance at all. Just as a contract induced by fraud may be repudiated by the defrauded party when he learns of the fraud, so can an acceptance, which is nothing more in one sense than a subsidiary contract or agreement, be repudiated if it is induced by fraud. An acceptance is simply a deliberate and intentional agreement, or perhaps consent, to take the article tendered as fulfilling the terms of the contract and to become the owner of it. If that consent is induced by fraud it is, in my opinion, no consent. It is unnecessary to quote authority for this. On principle it is, I think, sound, and I can find no authority to the contrary.

In this view, the statement by Lord Loreburn in *Wallis* v. *Pratt*, [1911] A.C. 394, at p. 395, 80 L.J. (K.B.) 1058, even if not *obiter* in any case, which I think it is, is distinguishable, because the Lord Chancellor said nothing about what the position would be where the belief to which he refers is induced by fraud.

It may very well be, where the discovery of the fraud is only made after a long lapse of time, and the article has been continually used, that there would have to be considerable allowance made for the value of that use in applying the principle of *restitutio in integrum*, but I do not think the use here made of the car was sufficient, especially in view of the fraud, to justify any allowance being made on that score.

The only remaining point is as to the Dodge car. The judgment does not order a return of it to the plaintiff, but repayment in cash of the amount at which it was valued in the bargain.

After some question, I have come to the conclusion that this is the correct result. The defendant company took the car at that price back in November. It is hardly likely that they allowed more for it than it was really worth. If the plaintiff had, in April, when the Hupmobile car was tendered, become aware of the facts, and had refused to accept, and if the defendant had insisted on his taking that car or none, he could certainly have recovered $1,200 in cash for his Dodge car. Substantially, I think the parties are in the same situation now. The plaintiff did not, it is true, sue for damages for non-delivery of the proper car, i.e., of any car at all, having rejected the one tendered, which is the hypothesis I refer to; and this of course is because he was induced by fraud to accept the one tendered. But it having now been decided that he was justified in rejecting the car tendered, he is certainly entitled to damages for breach of the original contract. And part of that damage is loss of the value of the Dodge car which he delivered to the defendants in pursuance of the contract, and which was valued by the assent of the parties at $1,200. The plaintiff claims damages in his statement of claim and on that score I think he is entitled to the judgment he was given for the $1,200.

In other words, the plaintiff gets rescission *of his acceptance* and is placed where he would have been if he had rejected the car in the first instance. The defendants would have had the car and the plaintiff his $1,558. Then the defendants not having fulfilled their contract by tendering the right car and refusing to do so would, I think, have been liable in damages for the value of the Dodge car. For this, of course, White should not be liable, but I think the trial Judge properly held him liable in damages for $1,558, being the amount of money which the plaintiff was induced to part with through White's fraud. But of course the plaintiff cannot recover the $1,558 from each of the defendants.

I would, therefore, dismiss the appeal, with costs.

BECK and HYNDMAN, JJ.A., concur with STUART, J.A.

WALSH, J.:—In November, 1920, the plaintiff agreed to buy from the defendant company a new 1921 Hupmobile motor car for delivery in May, 1921. In April, 1921, the defendant company, through the defendant White, the manager of its Edmonton branch, delivered to him a car in alleged fulfillment of this contract. The plaintiff took delivery of it in reliance upon the representations of White that it was such a car as he had ordered, and he kept and used it until the end of July in the belief that it was. He then discovered that it was a 1920 car,

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which, at the date of his contract, was and had been for several months, in the defendant company's Edmonton show rooms. It was used as a demonstration car at times during the summer of 1920. The engine which came with it was taken out of it in the fall of 1920 and put into a car sold to another customer. The transmission was taken out and other parts were removed from it from time to time to supply the needs of other cars. In the spring of 1921, as it stood in the defendant's show-room, it consisted of nothing but body and chassis. The plaintiff was then clamoring for his new 1921 car, and the defendants had none for him and there was apparently none in sight. The head office instructed the Edmonton branch to fix up one for him out of the stock there, and so this dismantled year-old car was selected for the purpose. An engine was put in it which was taken out of a roadster that had been used for demonstrating purposes, although it had given very poor satisfaction when used in the roadster. The missing parts, including the transmission, were replaced. The 1921 external improvements, such as new door handles, plate glass in the rear curtain and "clear vision" for the wind-shield, were put on. And then this rejuvenated product of the year 1920, with its heterogeneous assembly of engine and mechanical and other parts, from here, there and everywhere, was presented to the plaintiff as his new Hupmobile which had just arrived from the company's headquarters in Calgary.

These are not conclusions which are drawn from conflicting evidence, but are facts which are clearly established by the plaintiff and his witnesses, and either frankly admitted or not disputed by the defendants. When the plaintiff discovered how he had been imposed upon, the car was in the defendant's hands for repair. He at once notified them of his discovery, refused to take the car from them again, and demanded that he get either the car contracted for or his money back. Getting neither, he brought this action. Harvey, C.J., who tried the case, found that the plaintiff was led to believe, by the deceit of White, that he was getting what he contracted for, and that this amounted to fraud in inducing his acceptance of it. He gave judgment for the plaintiff for the full amount of the purchase money, $2,758, and from this judgment the defendants appeal.

Upon these facts the plaintiff is certainly entitled to relief. The question principally, if not exclusively debated on the argument, was whether or not he was entitled to the particular form and quantum of relief awarded him by the judgment. The defendants' contention is that as the plaintiff had accepted the

car, even though that acceptance had been induced by fraud, his only remedy is in damages.

The plaintiff's acceptance of this car, if in the circumstances he can be said to have accepted it at all, was induced by the defendants' fraud, according to the finding of the trial Judge, a finding which is quite justified by the evidence. We have, therefore, the simple case of the plaintiff being led by the deceit of the defendants into doing something which he would not have done if the truth had been told him. His repudiation of the appropriation of this car to his contract followed promptly upon his discovery of this wrong. He gave the defendants an opportunity to carry out their contract with him by delivering to him the car contracted for. This they refused to do. Their whole struggle in this case is to compel him to keep what he did not buy, and to accept money by way of damages in compensation instead of a return of his full purchase price.

In my opinion, unless some insuperable difficulties arise in restoring the parties to their original position, the plaintiff is entitled to the relief given him at the trial. I am prepared to go even further than the Chief Justice went and hold that the plaintiff is entitled to rescission, not only of his acceptance of this car, but of the contract itself. I think that the vendor of such an article as a new motor car, with its constant and substantial fluctuations in price, and its frequent changes in style and equipment, who, when in default of 2 months in the delivery of the car, refuses to deliver it, and even now, 10 months later, does not even suggest his willingness to do so, cannot be heard to say that his contract is still subsisting.

There are only two difficulties in the way of a *restitutio in integrum*, and I do not think that either of them is insuperable. One of these is that by the use which the plaintiff made of this spurious car, he cannot return it as he got it. He drove it approximately 2,500 miles. It was by reason of that degraded into what is popularly known as a used car with of course a largely reduced selling value, although I am inclined to think that it was really a second-hand car when he got it. One of the bearings was burned out when he left it with the defendants. I am satisfied from the evidence that this was through no fault of his. I think that he used this car with the care which a prudent man would exercise over his own, for that is really how the plaintiff regarded it. The prices of all makes of motor cars have been materially reduced since it was delivered to him, and so, regardless of its condition through the use which the plaintiff made of it, its value is materially less now than it

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was a year ago. These are the reasons suggested why the defendants cannot be made to take this car back.

The answer to this argument is not difficult. All of these things are the results of the defendants' wrong-doing. They delivered this car to the plaintiff for use by him just as he has used it. They knew what the result of that would be on the character of the car even under the most favourable circumstances. They must have appreciated the possibility of such a decline in selling values as has actually taken place. They cannot be heard to say that because of these things which have happened to this car in these circumstances the plaintiff, and not they, must be saddled with the burden of this deteriorated car.

In *Blake* v. *Mowatt* (1856), 21 Beav. 603, 52 E.R. 993, it was held no objection to the rescission of a transaction for the purchase of shares obtained by fraud that the shares had fallen in value since the date of the transaction. Romilly, M. R., said at pp. 613-4: "It is urged that I ought not to do so" (That is set aside the transaction) "because I cannot replace the parties in the situation in which they stood at the time, that the Defendant might have disposed of these shares in a manner which the subsequent fall of their prices will not now permit him to do. It is no doubt true that in this respect it falls heavily on the Defendant, but all this ought to have been considered by him before. It is the leading principle of the equity administration in this Court that truth shall govern all transactions and that one who deludes another in a contract or permits him to be deluded and takes advantage of that delusion, cannot afterwards complain that if the contract be set aside he will be in a worse situation than if the contract had never been entered into." In *Moore* v. *Scott* (1907), 16 Man. L.R. 492, the Manitoba Court of Appeal held that the defendant, who had been defrauded in the purchase of a horse had a right to rescind without restitution where the horse had died without any neglect on his part.

The other difficulty in the way of restoring the parties to their original positions lies in the fact that the defendants took in part payment for this car a Dodge car at a value of $1,200, upon which they are since expended about $200 in repairs and improvements, and which car they have used to some extent. This car has, of course, fallen in value with the universal decrease in the selling price of automobiles.

This difficulty is, I think, more fancied than real. I doubt not that we have the power to decree the return to the plaintiff of the Dodge car at a price to be fixed with reference to current values and the present condition of the car, either allowing or

disallowing the expenditures made upon it by the defendants. See *Sager* v. *Manitoba Windmill Co.* (1914), 16 D.L.R. 577, a judgment of the Saskatchewan Court of Appeal and cases there cited. I do not think it necessary or proper to do that, however. This car was in substance accepted in payment of $1,200 of the purchase price of the Hupmobile. I see no reason why the principle of *Lundy* v. *Knight* (1915), 24 D.L.R. 886, should not be applied to this transaction, by judgment in that case having been subsequently affirmed on appeal, though there is nothing in the reports to indicate that this is so. I think justice will be better done by compelling the defendants to keep the Dodge car at its then admitted value of $1,200 in view of the facts that they took it in payment *pro tanto* of the plaintiff's purchase price, that they have now had and used it for a year and a half, that they have expended money on it, of which the plaintiff might not approve, and that there is absolutely nothing before us to indicate its present value or condition than by forcing it back upon the plaintiff after this lapse of time and under such changed conditions. The formal judgment after trial as entered, is for the recovery from the defendant company alone of the sum of $1,200, this being the portion of the purchase money represented by the Dodge car and from the company and the defendant White, of the sum of $1,558 these two sums constituting the aggregate of the purchase price. This judgment is right, I think. White cannot be held liable for the $1,200 because the Dodge car was not delivered by the plaintiff as a result of his deceit. It went to the company at the time that the contract was made, which was several months before White's wrong was done. All that the plaintiff paid the company as a result of White's deceit was $1,558, and that, therefore, is all that he can be held liable for. The judgment, therefore, in effect directs the repayment to the plaintiff by the company of the whole sum of $2,758 and gives him an additional or alternative remedy against White with respect to the $1,558 which he parted with on the strength of White's representations. This judgment appears to be quite justified by the judgment of the Court of Appeal in *Goldrei* v. *Sinclair*, [1918] 1 K.B. 180, 87 L.J. (K.B.) 261.

I would dismiss the appeal with costs.

Appeal dismissed.

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RE REYNOLDS AND HARRISON.

Ontario Supreme Court, Middleton, J. October 18, 1921.

EXECUTORS AND ADMINISTRATORS (§IIA—29)—WILL—NO POWER OF SALE —DEBTS—DIRECTION TO PAY—R.S.O. 1914, CH. 121, SEC. 47—IMPLIED CHARGE ON LANDS.

A direction by the testator to the executors to pay debts implies a charge on the lands of the estate and the executors can give good title to any purchaser.

[R.S.O. 1914, ch. 121, sec. 47.]

MOTION by the executors of Rhoda Reynolds, deceased, the vendors, for an order, under the Vendors and Purchasers Act, declaring that the applicants were able to make a good title to lands of the deceased which they had agreed to sell to Harrison, the purchaser.

H. W. Nickle, for the applicants.

O. R. Macklem, for the purchaser.

F. W. Harcourt, K.C., Official Guardian, for the infants concerned.

MIDDLETON, J.:—The question raised is as to the power of the executors to sell the lands of the testatrix.

By will Rhoda Reynolds, who died on the 23rd March, 1920, after appointing her executors, directed that her debts and funeral and testamentary expenses be paid, and she then bequeathed to her executors certain personalty to be held upon trust, and, after giving certain legacies, she devised and queathed to her executors certain property in trust for her daughter, Bessie Reynolds East, and her issue, and this was followed by a general clause appointing the executors trustees, and giving to them, and their survivor, all powers and authority given or allowed by law. The executors are now selling part of the real estate of the testatrix, and the purchaser questions their power to do so under the will.

The direction to pay the debts constitutes a debt-charge upon the lands of the testatrix: *Clifford* v. *Lewis* (1821), 6 Madd. 33; *Sissons* v. *Chichester-Constable*, [1916] 2 Ch. 75; *In re Bailey* (1879), 12 Ch. D. 268, 273; *In re Tanqueray-Williams and Landeau* (1882), 20 Ch. D. 465; *Mercer* v. *Neff* (1898), 29 O.R. 680. It follows that, under our statute R.S.O. 1914, ch. 121, sec. 47, the executors have the power to sell and that the purchaser is not bound to inquire whether the power has been duly and correctly exercised by the executors.

The only question which calls for discussion is whether the section applies unless there is an express charge of the debts upon the land. The uniform holding in all the cases is that the statute applies, not only where a charge is express, but where it is implied or arises from the operation of the law.

The order will, therefore, declare that a good title can be given.

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Re E., a Solicitor.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 10, 1922.

COSTS (§ II—26)—ATTORNEY'S FEES—BILL FOR SERVICES IN BOTH CRIMINAL AND CIVIL PROCEEDINGS—REFERENCE TO JUDGE FOR TAXATION.

On an application for taxation of a solicitor's bill of costs, when the larger portion of the bill relates to criminal proceedings, and a small portion relates to civil proceedings arising out of the criminal proceedings, the entire bill should be referred to a Judge, instead of referring the criminal part to a Judge and the civil part to the clerk of the Court.

APPEAL by a solicitor from an order of Ives, J., on an application for an order that a bill of costs be referred to the Clerk of the Court for taxation. Varied.

A. M. Sinclair, K.C., for appellant.

I. F. Fitch, for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—On the application of the client, Cucco, Simmons, J., made an order for the delivery of a bill of costs. The bill was delivered accordingly. The client then made an application for an order that the bill be referred to the clerk of the court for taxation and that further details, etc., be delivered for the purposes of the taxation. On this application, Ives, J., made an order; the formal order taken out (1) refers the bill, so far as it related to civil proceedings, to the clerk for taxation; and (2) refers the bill, so far as it related to criminal proceedings, to a Judge "for the purpose of enquiry as to agreements between the solicitor and client upon which the charges for services were based and to pass upon the disbursements made on behalf of the client." The solicitor appeals against this order on the ground (1) that the Judge had no jurisdiction because the application was not properly before him; and (2) that the Judge had no jurisdiction to do otherwise than refer the entire bill to the clerk.

In *Re Johnson & Weatherall* (1888), 37 Ch. D. 433, it was held that the provisions of the Solicitors Act, 1843 (Imp.) ch. 73, did not restrict the exercise of the general and inherent power of the Court over solicitors as officers of the Court or its power to deal with a solicitor's bill in a way different from that laid down in the Act or under circumstances not contemplated by the Act. This decision was affirmed *sub nom. Storer* v. *Johnson* (1890), 15 App. Cas. 203, 60 L.J. (Ch.) 31, 38 W.R. 756. Our Court has undoubtedly a like jurisdiction independent of the particular provisions of the Legal Profession Act and the Rules of Court.

An application for the taxation of the solicitor's bill being before a Judge, he had power to exercise this general and in-

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herent power, which is properly exercised in an unusual case such as the present one.

The bill consists of two parts, one for fees for services in defending a criminal charge and the other for defending a civil action arising out of the criminal charge. A question is raised of an agreement between the solicitor and the client. From what has been said it seems quite unlikely that the agreement is one in writing provided for in Rule 748. The question of an agreement, whether effective to the extent laid down in the Rule or whether as a circumstance affecting the quantum of the bill is one which, I think, it is desirable should be left to be dealt with by a Judge rather than the clerk.

The English decisions of long standing hold that where a solicitor acts in a professional capacity, it is immaterial on a question of taxing his bill whether his bill relates to a contentious or non-contentious business or, as regards contentious business, whether the business was civil, *criminal* or parliamentary (26 Hals. tit Solicitors, p. 781).

In this jurisdiction, the distinction between barrister and solicitor does not exist. Both titles are necessarily borne by the one person, whose rights and obligations with respect to costs and the taxation and recovery of his bill of costs are identical, whether the services rendered be such as are ordinarily performed by a barrister rather than a solicitor. Doubtless, the value of services rendered as a barrister to a client is much less easily estimated than that of services rendered as a solicitor and much less easily brought into accord with any tariff of fees intended to govern as between party and party; and, doubtless, too, the services of a barrister and solicitor, acting in both capacities, in relation to a criminal charge are much less easy of estimation than in a civil matter. As the clerks of the Court have necessarily little experience in the taxing of costs in criminal matters, I think that the question of the amount which the respondent in this case is entitled to charge his client, the applicant, ought to be referred to a Judge; and inasmuch as the civil proceedings to which the smaller portion of the bill relates arose out of the criminal proceedings, to which the greater part of the bill relates, I think the entire bill should be dealt with by a Judge. Enough has been said, I think, to shew that the grounds of appeal specifically taken are not tenable, but the order appealed from, I think, ought to be varied in the way I have indicated, namely, so as to refer all questions to a Judge, and I would so vary the order, giving no costs of the appeal. The costs below and of the taxation I would leave to a Judge; the latter are not necessarily governed by the provisions of the Legal Profession Act, ch. 20, 1907 (Alta.).

Judgment accordingly.

EARL v. G.T.P.R. CO.

Alberta Supreme Court, Harvey, C.J. July 15, 1922.

RAILWAYS (§IV—96)—SWITCHING OPERATIONS—FAILURE TO PROVIDE WATCHMAN—ORDER OF BOARD OF RAILWAY COMMISSIONERS—INJURY TO PERSON CROSSING TRACK—NEGLIGENCE OF PERSON CROSSING—RIGHT TO RELY ON WATCHMAN—LIABILITY OF COMPANY.

The failure of a railway company to provide a watchman at a railway crossing, and to confine its switching operations to the hours permitted by an order of the Board of Railway Commissioners, is negligence which renders the company liable for injuries to a person crossing the track caused by his being struck by an engine during such switching operations, although such person saw the engine approaching, and was negligent in not dismounting from his bicycle in time to make sure of avoiding the accident.

[*G.T.R. Co.* v. *McAlpine*, 13 D.L.R. 618, [1913] A.C. 838; *Calgary* v. *Harnovis* (1913), 15 D.L.R. 494, 48 Can. S.C.R. 494, applied.]

ACTION claiming damages for personal injuries caused by being struck by defendant's train.

I. B. Howatt, K.C., and *R. E. McLaughlin*, for plaintiff.

N. D. Maclean, K.C., for defendant.

HARVEY, C.J.:—The plaintiff's claim is for damages for personal injuries caused by the defendant's train. The accident happened about 6.30 p.m. on July 5, 1921, at a level crossing on 96th St. or Kinistino Ave. in the City of Edmonton. The plaintiff was proceeding north on his bicycle and just as the front wheel was over the rail he was struck by the tender of the engine which was moving reversely hauling a train of ten loaded cars in an easterly direction.

Just west of 96th St. at this point, the defendant has a freight shed with a number of sidings to the south of the main track, covering an area of one city block. The train was proceeding from the easterly end of the freight shed along one of the side tracks which connect with the main track on the east side of 96th St. This main track crosses 96th St. almost exactly at its intersection with the south side of 105th Ave., approximately at right angles, and there is another parallel main track at almost exactly the intersection with the north boundary of 105th Ave. A train was coming from the east apparently along this northerly main track and the plaintiff, as he approached the crossing, saw both trains and says that he intended to wait for both of them to pass.

The central part of 96th St. is paved but between the paved part and the sidewalk is an unpaved strip. He was riding on the pavement and turned to the east across the unpaved portion, which was somewhat muddy, to the sidewalk intending, as he

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says, to get off his bicycle on the sidewalk before he reached the track and wait there. He was in fact on the sidewalk when he was struck and he says he did not see the track and did not know that he had reached it when he was struck. He apparently was familiar with the crossing as he says he had crossed it before though he did not know how many tracks there were. His explanation for not dismounting sooner was that he thought from the direction in which the train was moving it would not cross the street till farther on. This explanation is not very satisfying. Anyone knows that railway tracks constantly change their course and the fact is as shewn by the plan which the plaintiff filed, that the diversion of this track is farther back, quite in the other direction and even at the point of the accident apparently only a few inches toward the south, the point of intersection with the east side of the street being considerably farther north than that with the west side.

I can see no explanation of his conduct consistent with reasonable care and I think he was guilty of negligence in riding onto the track blindly in this way knowing as he did that a train was approaching the crossing.

But even if that be so, he bases his claim on the ground that the defendant was guilty of negligence but for which even if he was negligent the accident would not have happened.

No question was raised that the operation of the train was not, but on the contrary both in the evidence and the argument it was assumed that it was, one of switching, and at the opening of the case there was put in a certified copy of an order of the Board of Railway Commissioners relating to this crossing, which provides that "the switching movements over the said crossing be carried on between the hours of 1 and 2.30 o'clock p.m. and 9 o'clock p.m. and 6 o'clock a.m., and that a watchman be provided at the expense of the applicant company (i.e. the defendant) to protect the said crossing during the periods that switching operations are being carried out."

The particulars of negligence alleged of which there was evidence, were; no proper look out, no whistle or bell, excessive rate of speed, no one stationed at forward end of tender to give warning, and no warning given, no switchman as required by the order, and disregard of the order as to the time of switching.

I do not question the good faith of any of the witnesses, and I think the apparent conflict of evidence is explainable consistently with their honesty, and I was particularly impressed with the evidence of the engineer and fireman of the engine.

Even if material the evidence does not satisfy me that there is any room for exception as to the whistle, and bell and rate of speed. I am satisfied too that the fireman tried to warn the plaintiff.

It is clear however, that there was no one at the end of the tender and that there was no watchman or flagman at the crossing and that the hour was not one during which the defendant was authorised to cross the street for switching operations.

The last matter has given me much consideration. The order impliedly prohibits switching at other hours than these specified. The failure to do something required by statute is negligence, but the doing of something prohibited by statute seems to be something more and I have grave doubt whether contributory negligence alone can be urged as a sufficient defence to a claim resting on such a ground. I have not, however, found it necessary to search for authority or form a decided opinion on that point.

No question was raised in the argument that the defendant was not bound by statute to have a man on the front of the tender but it was contended that it would have been immaterial because the plaintiff was aware of the approaching train and also was warned by the fireman as well as he could have been by a man on the tender. Under sec. 276, R.S.C. 1906, ch. 37, there is no doubt that there would have been a statutory obligation to have a man on the front of the tender, but in 1917 by ch. 37 sec. 7 a new section was substituted and the express provision has been eliminated and the words changed so as to lead to the apparent conclusion that that obligation was intended to be removed. In view of this change I am not prepared to hold on the facts of this case that there was any negligence in having no man on the end of the tender. It is not very important, however, any more than are any of the other alleged acts of negligence because there was a breach of duty in not having a watchman, which constitutes statutory negligence, the order of the Board having statutory authority, and the presence of a watchman would probably have been more effective to prevent the accident than compliance with any other requirement. At first I was disposed to think that in as much as the plaintiff had seen the train and was therefore aware that it was approaching and of the danger, the presence of a watchman would be immaterial because his duty would be merely to warn persons and not to forcibly prevent them from crossing in front of the train. I see, however, that the fallacy in that is that it supposes that the plaintiff went on the track deliber-

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ately with a knowledge of the danger involved which of course was not the fact. His negligence was in my opinion in not dismounting in time to be certain of being in safety or in not seeing the track before he was on it. The engineer himself, who is familiar with such conditions, says that if there had been a watchman on the track perhaps the accident would not have happened. He might perhaps have expressed it as a reasonable probability, for it would seem reasonably clear that a watchman standing to guard the track and warn approaching persons, if properly performing his duties, would almost certainly have observed and warned the plaintiff in time to prevent the accident.

Such being the case is the defendant liable notwithstanding the plaintiff's negligence?

This brings up the whole question of negligence, contributory negligence, and what has sometimes been designated as ultimate negligence, which has given rise to so much confusion in the application of the principles.

There is a very interesting and suggestive article on the subject by O'Connor, L.J. of the Irish Court of Appeal in the Law Quarterly Review for January 1922 in which some of the more important recent cases are considered.

In *G.T.R.* v. *McAlpine*, 13 D.L.R. 618, 16 C.R.C. 186, [1913] A.C. 838, 83 L.J. (P.C.) 44, in which the facts were not very dissimilar to those of the present case, Lord Atkinson in delivering the judgment of the Board said at p. 623: "A plaintiff whose negligence has directly contributed to the accident that is, that his action formed a material part of the cause of it, can recover provided it be shewn that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence."

The principle had been expressed in much the same terms in the House of Lords in *Radley* v. *L. & N. W. Ry. Co.* (1876), 1 App. Cas. 754, 46 L.J. (Ex.) 573, 25 W.R. 147, by Lord Penzance at p. 759 and concurred in by all the other Lords. We applied the principle in our own Court in *Harnovis* v. *Calgary* (1913), 11 D.L.R. 3, 6 Alta. L.R. 1; 15 D.L.R. 411, 48 Can. S.C.R. 494, and the Irish Court of Appeal came to the same conclusion on very similar facts in *Gaffney* v. *The Dublin Limited Tramways*, [1916] 2 I.R. 472.

In these cases however, there was room for active intervention on the part of the defendants, after the negligence of the plaintiff became apparent, to prevent its consequences and it seemed to be thought by some that the principle was capable of applica-

tion only when the defendant had done or failed to do something negligent after the plaintiff's negligence.

This point was set at rest by the Privy Council in *B.C. Electric R. Co.* v. *Loach*, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719, 85 L.J. (P.C.) 23, the head note of which is as follows: "The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant by the exercise of care, might have avoided the result of that negligence, applies where the defendant although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence."

In that case a street car had been sent out with defective brakes by reason of which it could not be stopped in time to prevent the accident.

This seems to be merely getting back to what was decided in the donkey case which has always been considered the leading case. *Davies* v. *Mann* (1842), 10 M. & W. 546, 152 E.R. 588, 12 L.J. (Ex.) 10, approved by the House of Lords in the *Radley* case, *supra*. The owner of the donkey, the plaintiff, had been negligent in having the donkey tied in the road. The defendant's team of horses unattended by a driver who was following behind drove over the donkey. The defendant was held liable though apparently neither he nor his servant became aware of the plaintiff's negligence before the accident.

If in the present case it had been the plaintiff's horse negligently left in the street which had been injured, apart from any statutory restriction about animals, there seems little doubt that the case would have been almost identical with the donkey case if the fireman and engineer had been looking the other way, as the plaintiff's evidence indicated. In the early case the injury was done by a team unaccompanied by a driver who might have prevented it if present. In this it would have been a train unaccompanied by a watchman who if present might have avoided the accident.

I cannot see that the fact that the injury was to the plaintiff personally can strengthen the defendant's case because it is his negligence in either case that is of importance.

In my opinion therefore, the defendant must be held liable.

The plaintiff is a man of about 45. He was a bookkeeper and operated a typewriter. By this accident he lost all but the little finger of his left hand and had one finger of the right hand dislocated and received some other injuries, and at the

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time of the trial complained of a weakness in the back and of a nervousness and slight mental defect. Doctors who examined him ascribed to the accident a loss of 35% in earning capacity. He was receiving a salary of $100 a month and was away from work for 3 months. An actuary said that for a man of 45, $35 a month for the rest of his life, capitalised at 5% would give almost $6,000. One needs to be a little chary of taking at full value these theories and figures of experts but there can be no doubt that the damage to the plaintiff is a serious one and of course he was occasioned much pain and suffering.

After 3 months he went back for a time to his old work at the former salary but while a former employer might not be disposed to make any reduction in a case of misfortune other prospective employers might not be actuated by the same kindly motives.

For financial loss of salary and expenses, not including the damage to the bicycle he has proved $350.50 and I think $3,500 will be a fair amount to allow for the general unascertainable damages. There will therefore be judgment for the plaintiff for $3,850.50 with costs.

Judgment accordingly.

REX v. MANITOBA GRAIN Co.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, J.J.A., April 24, 1922.

CONSTITUTIONAL LAW (§IA—3)—CANADA GRAIN ACT 1912 (CAN.) CH. 27, SEC. 215—VALIDITY—REGULATION OF TRADE AND COMMERCE—NECESSITY OF GRAIN CO. OBTAINING LICENSE FROM BOARD OF GRAIN COMMISSIONERS.

Section 215 of The Canada Grain Act 1912 (Can.) ch. 27, which enacts that "no person shall engage in the business of selling grain on commission, or receive or solicit consignments of grain for sale on commission, in the Western Inspection Division, without first obtaining such annual license from the Board," is *ultra vires* the Parliament of Canada, the added powers given by sec. 95 of the B.N.A. Act when read with those of sec. 91, not being sufficient to bring it within the enumerated heads which confer specific jurisdiction on the Dominion Legislature, and the residuary powers of the Dominion not being sufficient to validate the section.

[*Att'y-Gen'l for Canada* v. *Att'y-Gen'l of Alberta* (The *Insurance* case, 26 D.L.R. 288, [1916] 1 A.C. 588, followed; *John Deere Plow Co.* v. *Wharton* (annotated), 18 D.L.R. 353, [1915] A.C. 330; *Bonanza Creek Gold Mining Co.* v. *The King*, 26 D.L.R. 273, [1916] 1 A.C. 566; *Att'y-Gen'l of Canada* v. *Att'y-Gen'l of Alberta* (*The Combines and Fair Prices Act* case) 60 D.L.R. 513, [1922] 1 A.C. 191 referred to.]

Stated Cases by a Police Magistrate after convictions of a company for unlawfully selling grain on commission and soliciting consignments of grain for sale on commission without a

license from the Board of Grain Commissioners for Canada, contrary to the provisions of the Canada Grain Act, 1912, ch. 27. Convictions quashed.

T. A. Hunt, K.C., and *J. Auld*, for the company.

E. L. Taylor, K.C., for the Board of Grain Commissioners and the Minister of Justice.

Case No. 1.

PERDUE, C.J.M.:—This is a case stated for the opinion of the Court of Appeal by R. M. Noble, Police Magistrate, under the provisions of sec. 761 of the Criminal Code.

The information, as amended, charges that the Manitoba Grain Co., on or about September 30, 1921, at Winnipeg in Manitoba, did unlawfully engage in the business of selling grain on commission and of soliciting consignments of grain for sale on commission in the western inspection division without a license from the Board of Grain Commissioners for Canada to engage in such business or businesses and did unlawfully engage in the business of soliciting consignments of grain for sale on commission in the western inspection division without having a license from the Board of Grain Commissioners for Canada to engage in such business, and contrary to the form of the statute made and provided.

The Police Magistrate found the defendant guilty of an infraction of sec. 215 of the Canada Grain Act, being 1912, ch. 27, by selling grain on commission without having first secured a license from the Board of Grain Commissioners for Canada, as provided in the Act, and a fine was imposed on defendant of $500 and costs, following the provisions of sec. 119 of the Canada Grain Act as re-enacted by 1919, ch. 40, sec. 10.

At the request of counsel for defendant, the magistrate stated the following case for the opinion of this Court:—

"(a) It was shewn before me that the said Manitoba Grain Co. did voluntarily receive, handle and sell grain on commission for one Regnier at the City of Winnipeg aforesaid.

(b) The counsel for the Manitoba Grain Co. desires to question the validity of the said conviction on the ground that the said the Canada Grain Act is *ultra vires* of the Parliament of Canada, and that, therefore, I had no jurisdiction to impose the said penalty.

(c) The questions submitted for the opinion of this Honourable Court being the following:—

1. Has the Parliament of Canada jurisdiction to enact sec. 210 of the Canada Grain Act?

2. Has the Parliament of Canada jurisdiction to enact secs. 215, 216 and 217 of the said Act?

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3. Has the Parliament of Canada jurisdiction to enact sec. 119 of the said Act as enacted by sec. 10 of ch. 40 of the Statutes of Canada, 9-10 George V?

4. Has the Parliament of Canada jurisdiction to enact the said Canada Grain Act?"

Case No. 2.

The information in this case charges that the defendant on or about September 24, 1921, did unlawfully engage in the business of selling grain on commission by selling on commission Canadian Pacific Railway Car No. 103962 of wheat consigned to defendant by Haddington Farms Elevator, Ltd., for one Decker of Sovereign in Saskatchewan, without having a license to engage in such business and make such sale on commission as provided by the Canada Grain Act. The defendant was found guilty of an infraction of sec. 215 of the Act and a fine of $500 and costs was imposed.

At the request of counsel for defendant, the magistrate stated the following case for the opinion of this Court:—

"(a) It was shewn before me that the said Manitoba Grain Co. did voluntarily receive, handle and sell grain on commission for Haddington Farms Elevator Ltd. of Sovereign in the Province of Saskatchewan, said grain being the property of one W. H. Decker of the same place. The said grain was shipped from Sovereign aforesaid and sold in the City of Winnipeg in Manitoba by said Manitoba Grain Company, Limited, through Ostrander & Co., grain dealers at the said City of Winnipeg, and the said Manitoba Grain Co. charged Haddington Farms Elevator Co. a commission for selling the said grain.

(b) Counsel for the Manitoba Grain Co. desires to question the validity of the said conviction on the ground that the said the Canada Grain Act is *ultra vires* of the Parliament of Canada and that, therefore, I had no jurisdiction to impose the said penalty."

The first four questions submitted are the same as those similarly numbered in case No. 1. To these is added the following question:—

"5. Have I authority to impose the said fine?"

Since the early years of Confederation there has been much legislation by the Parliament of Canada dealing with (1) the inspection and grading of grain, and (2) the storing, transportation and marketing of it. In 1874, the General Inspection Act was passed: 37 Vict., ch. 45 (Dom.). The Act was intituled "An Act to make better provision, extending to the whole of the Dominion of Canada, respecting the Inspection of certain Staple Articles of Canadian produce." The Act contained pro-

visions for inspecting and grading flour, wheat and other grain, beef, pork, butter and other products. Section 36 prescribed the grades of wheat and other grain to be adopted. This Act is found in R.S.C. 1886, ch. 99. Up to that time there was little export of grain from the portion of the Dominion lying west of Port Arthur. In 1889 the amending Act, 52 Vict., ch. 16 (Dom.) was passed, and provision was made for fixing the standards in respect of grain in each year, (1) as to grain grown east of Port Arthur, and (2) as to grain grown west of Port Arthur. In 1899, by 62 & 63 Vict., ch. 25, the whole of Manitoba and the Northwest Territories and that portion of Ontario west of and including the existing district of Port Arthur were named as the inspection district of Manitoba. The Act prescribed the grades of wheat and other grain and the duties of the inspectors.

In the following year the Parliament of Canada passed the Manitoba Grain Act, 1900, ch. 39. By sec. 2 the Act only applied to the inspection district of Manitoba as defined in ch. 25 of the statutes of 1899. This Act, as revised with the amendments, is found in R.S.C. 1906, ch. 83.

The last-mentioned Act was superseded by the statute now in force, the Canada Grain Act, 1912, ch. 27. This Act creates a commission to be known as "The Board of Grain Commissioners for Canada," consisting of three commissioners. The Board may, with the approval of the Governor-in-Council, establish inspection divisions in Canada for which chief inspectors of grain may be appointed (sec. 18), and these shall, as provided, have control of inspectors and deputy inspectors (sec. 19). The Board may, with the consent of the Governor-in-Council, make rules and regulations for the government, control, licensing and bounding of terminal and other elevators (sec. 20). By sec. 21 the Western Inspection Division comprises Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories and that portion of Ontario lying west of Port Arthur; the Eastern Inspection Division comprising the rest of Ontario and all of the provinces of Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Sections 27-39 deal with the duties of inspectors.

Sections 40-47 empower the Board to appoint skilled persons as examiners to test the fitness of candidates for the position of inspectors. Sections 48-51 provide for the appointment of a grain standards board.

Section 58 provides that in the sale or delivery of grain the bushel shall be determined by weighing unless a bushel by measure is specially agreed upon, and the weight equivalent to a bushel is declared for each kind of grain.

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Sections 62-69 provide for the appointment of weighmasters and define their duties.

Sections 70-77 deal with offences and penalties for interference with weighmasters, for dereliction of duty by inspectors, and for fraud, bribery, etc.

Sections 80-84 apply to the Eastern Inspection Division, and to grain grown in that division.

Sections 86-104 relate to the Western Inspection Division and apply to all grain grown in that Division. These sections deal with the selection of grades by the inspecting officers, the making of standard samples in each year for the purpose of grading and surveys and the fixing of the official standards of grades. By sec. 91 all grain produced in the provinces of Manitoba, Saskatchewan and Alberta and in the Northwest Territories, passing through the Winnipeg district shall be inspected at Winnipeg or at a point in that district; and, on all grain so inspected, the inspection shall be final.

Sections 105-106 state the grades of grain generally, except that grown in the Western Inspection Division, the grades for the latter being prescribed by sec. 107.

Sections 108-114 provide for the inspection of grain produced in the United States and passing through Canada in transit to the United Kingdom or to a foreign country.

Sections 115-117 deal with grain which is damp, wet or otherwise unfit for warehousing, grain that is heated, unsound, musty, dirty, smutty, sprouted, or which contains a large ad-mixture of other kinds of grain, seeds or wild oats.

Section 119, as amended by 1919, ch. 40, sec. 10, directs the Board to require all track buyers and owners and operators of elevators, warehouses and mills, and all grain commission merchants and primary grain dealers to take out annual licenses, to fix the amount of bonds to be given by these persons, to require licensed persons to keep books, for supervision by the Board of the handling of grain in and out of elevators, etc., and to enforce rules and regulations made under the Act. By sub-sec. 4 of sec. 119, any person who engages in any business for which a license is required under the Act without first obtaining such license shall be guilty of an offence and liable to a penalty of not less than $500 and costs.

Section 120 enables the Board to receive and investigate complaints: (1) Of undue dockage, improper weights or grading; (2) Refusal or neglect to furnish cars; (3) Of fraud or oppression by any person, firm or corporation owning or operating any elevator, warehouse, mill or railroad, or by any grain commission merchant or track-buyer. Full powers of investigation are given

to the Board and it shall institute proceedings at government expense whenever it considers a case proper therefor.

Sections 122-139 deal with terminal, public and hospital elevators. Every person operating an elevator coming under one of these classes is required to procure a license to transact business as a public warehouseman (sec. 122). No person owning, managing, operating or interested in a terminal elevator shall buy or sell grain at any point in the Eastern or Western Inspection Divisions (sec. 123). The person so licensed shall furnish security for the faithful performance of his duties and his compliance with the laws (sec. 125).

Section 126 imposes certain duties on terminal elevator warehousemen. Grain in suitable condition for warehousing must be received for storing (sub-sec. 2). Such grain shall in all cases be inspected and stored with grain of a similar grade (sub-sec. 3). No grain shall leave a terminal elevator without being officially weighed (sub-sec. 4). Every public warehouseman of a public elevator in the Eastern Inspection Division shall receive for storage western grain tendered him through the ordinary channels of transportation (sub-sec. 5). Records are to be kept by such last-mentioned person, noting the names of boat and hold, or the number of the car, the weight, the number of the bin in which it is stored, the certificate of grade, name of shipper, etc. (sub-sec. 6). The identity of each lot of western grain shipped to a public elevator in the Eastern Inspection District shall be preserved; different lots of same grades may be binned together when there is not sufficient space to keep them separate (sub-sec. 7). But in no case shall different grades be mixed together while in store (sub-sec. 8). The section also makes provision for allowance to owner for screenings and imposes on terminal warehousemen the duty of insuring against fire.

Sections 127-130: Shipping receipts or bills of lading on being endorsed and all charges paid, may be exchanged for warehouse receipts; provisions are made governing duties of warehouse men and rights of owners.

Sections 140-149 deal with grain out of condition, for disposing of it in certain cases or sending it to an hospital elevator for treatment.

Sections 151-171 regulate "country elevators." These include all elevators, warehouses or flat warehouses which receive grain before it has been inspected and which are situated on the right-of-way, on any siding or spur track connected therewith, or on depot grounds or lands acquired or reserved by

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any railway company to be used in connection with its line of railway at any station or siding.

Sections 189-194 relate to "loading platforms." On application to the Board by 10 farmers resident within 20 miles of the nearest shipping point the railway company shall erect and maintain a loading platform in the station yard, or on a siding if there is no station, for the purpose of loading cars. If there is no platform the railway company shall furnish cars at convenient places on a siding for the purpose of being loaded direct from vehicles.

Sections 195-207 provide for the furnishing of cars by the railway company to shippers, the keeping of an order book in which applications for cars are entered and the awarding of them to applicants according to the order in time in which the applications appear.

Section 208 permits carloads offered for shipment to points in Canada to be consigned "to be held at Winnipeg for orders" en route to its destination on the direct line of transit, subject to prescribed conditions.

Section 210 enacts that any person desiring to carry on the business of grain commission merchant in the Western Inspection Division shall apply to the Board for a license to sell grain on commission stating the locality where he intends to carry on such business and the probable amount of business he will do monthly.

Sections 211-212: The Board shall fix the amount of the bond to be given to His Majesty with sufficient surety, for the benefit of persons entrusting such commission merchants with consignments of grain to be sold on commission, such bond being conditioned for the faithful accounting to such persons entrusting the commission merchant with grain for sale on commission and the payment of the proceeds, or for the faithful performance of his duties as commission merchant if he does not receive the grain for sale on commission.

Section 213: Upon giving such bond and paying a license fee of $5 the Board shall issue a license to the applicant for the current license year.

Section 215: "No person shall engage in the business of selling grain on commission, or receive or solicit consignments of grain for sale on commission, in the Western Inspection Division, without first obtaining such annual license from the Board.

(2) No person, firm or corporation, licensed as a grain commission merchant, shall directly or indirectly buy for their own

account any grain consigned to them for sale on commission," [added by amendment, 9 & 19 Geo. V., ch. 40, sec. 18].

Sections 243-244 provide the penalties for infractions of, or failures to comply with, the requirements of the Act, where a penalty is not elsewhere provided.

The remainder of the Act deals with "track buyers," "primary grain dealers," pooling by operators of country elevators, charges for receiving and storing grain and with condition of grain cars, special storing, etc.

Grain growing is one of the most important industries, if not the very most important, in Canada, and the product is probably the most valuable article of Canadian trade and commerce. It is of vital importance to the whole Dominion. According to the official statistics published in the Canada Year Book for 1920, p. 191, the values of the three most important Canadian grain crops in that year were as follows:—Wheat, $427,357,300; oats, $280,115,400; barley, $52,821.40. Of these crops, 88% of the wheat and about 60% of the oats and barley were grown in the three prairie provinces: See Canada Year Book, 1920, pp. 191 and 213.

No doubt, the magnitude of a business is not in itself a decisive factor in ascertaining whether it falls within sec. 91 or within sec. 92 of the B.N.A. Act, as was pointed out by Viscount Haldane in *Atty.-Gen. for Canada* v. *Atty.-Gen. of Alberta*, etc. (*The Insurance Case*), 26 D.L.R. 288, [1916] 1 A.C. 588, 85 L.J. (P.C.) 124. But it may become an element of importance when the conduct of the business involves a chain of transactions extending through several provinces, and of such a nature that the provinces could not, either singly or concurrently, exercise efficient legislative control over it.

There is great variety in the quality of the various kinds of grain and the price largely depends upon the quality. The greater part of the crop grown in the Western Inspection Division is exported to eastern Canada or to countries outside of Canada. Grain for export from one of the prairie provinces has to be carried by railways through the parts of these provinces lying east of the point of shipment, through a part of Ontario to Fort William or Port Arthur at the head of Lake Superior where it is placed in terminal elevators at these ports and thence shipped over the great lakes to an eastern Canadian or United States port; or, after the close of navigation, part of the crop may be sent forward by railway to Eastern Canada. A large part of the crop usually remains stored over winter in the elevators at the lake ports or in elevators at various points upon the railway

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lines. These railways are under the legislative jurisdiction of the Parliament of Canada.

It is of great importance to persons dealing with this grain that standards of quality should be set by skilled inspectors, that the grades should be kept separate and that mixing should be avoided. In handling such an enormous quantity of wheat and other grain it is difficult to preserve the identity of the grain grown by a single producer. But if his grain is placed in a bin with grain of the same quality belonging to other persons, he will be entitled to a warehouse receipt for the quantity of grain of that quality to which he may be entitled. The fixing of standard grades thus becomes of essential importance in the storing, transportation and selling of grain. These grades must be recognised and be binding throughout Canada. If each province attempted to legislate separately on the subject it would, at best, be productive of great confusion and loss, and the authority to enact such legislation would be questionable. In fixing the grades of wheat, oats or other grain, the weight of the measured bushel is a most important element, the higher grades having more pounds to the bushel measure than those of lower quality. Under the B.N.A. Act, sec. 91 (17), only the Parliament of Canada can enact what shall be the standard capacity of the bushel (R.S.C. 1906, ch. 52, sec. 20), and how much a bushel of wheat shall weigh where the bushel shall be determined by weighing (see the Canada Grain Act, sec. 58). It is doubtful whether a Provincial Legislature could establish a grade of grain in which the weight per bushel would be an element of importance. Taking the introductory part of sec. 91 of the B.N.A. Act, coupled with heads No. 2 and No. 17, I would venture to express the view that the grading of grain falls within the powers of the Dominion. I would refer to the judgment of the Privy Council in *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, (annotated), [1915] A.C. 330, 84 L.J. (P.C.) 64.

Grain produced in the western provinces is carried by railways which are subject to the exclusive legislative powers of the Dominion. The elevators and warehouses through which grain intended for export must pass are of necessity either erected on land belonging to a railway or connected with a railway by a spur track. The compulsory provisions for the furnishing of sites for elevators on railway lands, the erection of loading platforms, the furnishing of cars to be loaded with grain all come within the powers exercisable by Parliament in respect of railways connecting two or more provinces, under sec. 91 (29), and are excluded from the operation of sec. 92 by No. 10 of that section. The issue of negotiable warehouse receipts for

grain stored in elevators or warehouses and the regulations in respect of such transactions would come under sec. 91 (15), "Banking"; see the Bank Act, 1913, ch. 9, sec. 2, sub-sec. (p); secs. 86-88; *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, 63 L.J. (P.C.) 25. The transportation of grain by ships from the elevators at the lake ports or from an ocean port would come under head 10 of sec. 91, "Navigation and Shipping."

Regarding the Canada Grain Act as a whole, it is a most beneficial and indeed essential measure. It deals with matters of the very greatest importance to the whole of Canada. The great grain producing provinces lie far away from the ocean and are separated from the older and more populous provinces by a wide region which is largely uninhabited. Grain grown in the prairie provinces and intended for export must be carried by railway, or by railway and lake vessels to ocean ports in Canada or the United States. It is a commodity that must be handled with great care to prevent deterioration, the mixing of grades and the substitution of inferior grain for grain of higher quality. It is only under Dominion Powers that legislation competently dealing with the transactions involved can be provided.

But secs. 210, 215, 216 and 217 appear to stand upon a different plane. They deal with the business of selling grain upon commission. The expression "commission merchant," as defined in the Act, means "any person who sells grain on commission"; (sec. 2 (t)). The meaning attached to the expression is wide enough to include persons who engage in transactions which are completely local in character and which naturally come within the class of "property and civil rights in the Province," under sec. 92 (13) of the B.N.A. Act, and would not fall within any of the enumerated powers conferred on the Dominion Parliament by sec. 91 of that Act. I would refer to the judgment of Viscount Haldane in *Att'y.-Gen'l. for Canada* v. *Att'y.-Gen'l of Alberta, etc., supra* at pp. 289-293 (26 D.L.R.), and in *Re Board of Commerce Act and Combines and Fair Prices Act; Att'y.-Gen'l. of Canada* v. *Att'y.-Gen'l. of Alberta*, 60 D.L.R. 513, [1922] 1 A.C. 191.

In the stated case No. 1, the only fact we have is that the appellant "did voluntarily receive, handle and sell grain on commission for one Regnier at the City of Winnipeg." This discloses a simple sale of property within Manitoba. Case No. 2 shews that a carload of wheat had been shipped by an elevator company in Saskatchewan for one Decker and that the appellants sold the wheat on commission in Winnipeg through a firm of grain dealers and charged the shipper a commission for making

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the sale. This, also, seems to fall within property and civil rights.

I do not think that sec. 215 can be supported by the powers conferred on the Dominion Parliament by sec. 95 of the B.N.A. Act. No doubt, the term "Agriculture" must be given as wide a meaning as the word will naturally convey. It would, no doubt, cover practical husbandry and tillage, the growing of crops, the planting and care of fruit trees, the rearing of domestic animals, the sciences applied to or bearing upon these subjects and perhaps the disposition of the products by the producer; but I do not think it would apply to these products when they have left his hands and become articles of ordinary merchandise.

I would answer question No. 2 in each case, in so far as it relates to sec. 215, in the negative.

It is unnecessary to answer questions 1, 3 and 4 in either of the stated cases.

It is unnecessary to answer question No. 5 in case No. 2.

The conviction in each case should be quashed.

CAMERON, J.A.:—These are cases stated by R. M. Noble, Police Magistrate, for the opinion of the Court under sec. 761 of the Criminal Code. In each case the accused was found guilty of an infraction of sec. 215 of the Canada Grain Act, ch. 27, 1912, for having sold grain on commission without having first secured a license as provided by said Act. The circumstances of the two cases differ in this respect: in case No. 1 (the *Regnier* case) the transaction involved in the sale of grain occurred wholly at Winnipeg in this province, while in case No. 2 (the *Decker* case) the grain in question was consigned to the accused company from a point in the province of Saskatchewan. This difference is not material in view of the wording of sec. 215, which in general terms prohibits persons and corporations from engaging in the business of grain commission merchants without taking out a license as thereby prescribed. The questions submitted by the magistrate raise the issue of the jurisdiction of the Parliament of Canada to enact said sec. 215 of the Canada Grain Act and other sections connected therewith, as well as its jurisdiction to enact the Act.

Notwithstanding the considerations pressed on our attention by counsel for the Minister of Justice, I am unable to see how this case can be distinguished from that before the Judicial Committee of the Privy Council in *Att'y.-Gen'l. for Canada* v. *Att'y.-Gen'l. of Alberta, etc.* (*The Insurance Case*), *supra*. There, as here, it was sought to uphold the provisions of the Dominion Insurance Act, 1910, ch. 32, in question as within the

authority conferred on Parliament by the B.N.A. Act, sec. 91, head (2) to legislate for the "regulation of trade and commerce," and under the general power conferred by sec. 91, to legislate for the peace, order and good government of Canada. Against these contentions it was argued that the provisions in question went far beyond the regulation of trade and commerce and vitally affected civil rights in the provinces, and that they were not authorised under the general power given to Parliament to legislate for the peace, order and good government of Canada because they affected such civil rights. In the *Insurance* case also the importance of the trade was insisted on as an important element affecting the interpretation of the constitutional Act.

Lord Haldane, at pp. 290-291, thus deals with the effect of sec. 4 of the Insurance Act:—

"It will be observed that sec. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the license of the Dominion Minister. In other words, the capacity in interfering with which, according to the judgment just delivered by their Lordships in the case of the *Bonanza Company*, 26 D.L.R. 273, [1916] 1 A.C. 566, 85 L.J. (P.C.) 114, such a company possesses to take advantage of powers and rights profferred to it by authorities outside the provincial limits. Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of sec. 91 of the B.N.A. Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislature by the enumeration in sec. 92."

His Lordship then goes on to point out that there is only one case outside the heads enumerated in sec. 91 in which the Dominion Parliament can effectively legislate as regards a province, and that is where the subject-matter is outside of those assigned to the provinces by sec. 92. *Russell* v. *The Queen*

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(1882), 7 App. Cas. 829, 51 L.J. (P.C.) 77, is an instance in point, but that decision is to be applied with great caution in view of the subsequent decision in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, 53 L.J. (P.C.) 1, and the decision of the Board holding the McCarthy Act *ultra vires* of the Dominion Parliament. He says, at p. 292 (26 D.L.R.):—

"Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system or a particular trade in which Canadians would otherwise be free to engage in the provinces. Section 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell* v. *The Queen, supra.* No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the B.N.A. Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded."

This illuminating decision further clarifies the meaning to be attached to the words "civil rights." It was contended in *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, 51 L.J. (P.C.) 11, that these words meant only such rights as flowed frow the law, as for example, the status of persons. But that interpretation was not accepted and it was held that they included "rights arising from contracts," and that the words "property" and "civil rights" are used in their largest sense, an interpretation that it exemplified in Lord Haldane's instructive judgment.

It is obvious that the licensing authorised by the provisions of the Canada Grain Act has as its object the control of the grain trade by the Grain Board. But, whatever the object, it cannot be within the powers of the Dominion Parliament to deprive individuals of their civil rights within their provinces or to limit their freedom in engaging in a particular trade. To attempt to do that is distinctly to trench upon the subject-matters entrusted to the provincial legislatures by sec. 92.

In *Re Board of Commerce Act and Combines and Fair Prices Act; Att'y.-Gen'l. of Canada* v. *Att'y.-Gen'l. of Alberta, supra,* Lord Haldane holds, at p. 517: "It is to the Legislatures of

the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the provincial Legislatures possess quasi-sovereign authority."

Consequently, it can only be in highly exceptional circumstances that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada.

"Where there was no such power in that Parliament, as in the case of the Dominion Insurance Act, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the Provinces."

It appears to me that the questions raised with reference to the validity of sec. 215 of the Canada Grain Act are fully disposed of by these two recent decisions of the Judicial Committee.

The attention of the Court was directed to sec. 95 of the B.N.A. Act giving the Parliament of Canada power to make laws in relation to agriculture in all or any of the provinces. I cannot see that the power so conferred authorises such an enactment as sec. 215, and I agree with the remarks of Dennistoun, J., on this subject and with his view and that of the Chief Justice as to the answers to be made to the questions submitted.

FULLERTON, J.A.:—The stated cases submit a number of questions for the opinion of this Court.

In the view I take, it is only necessary to answer that portion of the second question which asks whether the Parliament of Canada has jurisdiction to enact sec. 215 of the Canada Grain Act. That section is in these terms:—

"No person shall engage in the business of selling grain on commission, or receive or solicit consignments of grain for sale on commission, in the Western Inspection Division, without first obtaining such annual licensę from the Board."

Section 21 provides that the Western Inspection Division shall consist of Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories and that portion of Ontario lying west of and including the City of Port Arthur. The convictions are founded on a breach of sec. 215.

Counsel for the defendant contends that sec. 215 is *ultra vires* of the Parliament of Canada inasmuch as it deals with the subject-matter of "civil rights" which by sec. 92, subsec. 13, of the B.N.A. Act, is assigned exclusively to the Provinces. Counsel for the Crown, on the other hand, contends that this legislation comes either under the general authority to make laws for the peace, order, and good government of Canada, which the initial

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part of sec. 91 of the B.N.A. Act confers or under the specific authority given by sec. 91, subsec. 2, to legislate for the regulation of trade and commerce.

Counsel for the defendant relies, and I think rightly, upon the decision of the Privy Council in the case of *Att'y.-Gen'l. for Canada* v. *Att'y.-Gen'l. for Alberta*, (the *Insurance* case), *supra*. In that case the validity of sec. 4 of the Insurance Act, 1910, ch. 32, was in question. This section prohibits anyone carrying on the business of insurance in Canada without a license from the Minister of Finance. The contentions of counsel for and against the validity of this section were practically the same as in the present case. The Judicial Committee held the legislation beyond the competence of the Dominion Parliament as an attempted "regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the province," and, in consequence, an interference with the civil rights of individuals within the provinces.

Upon the authority of this case, I hold that sec. 215 of the Canada Grain Act is *ultra vires* of the Parliament of Canada.

DENNISTOUN, J.A.:—These are cases stated by R. M. Noble, one of His Majesty's Police Magistrates in and for the province of Manitoba under the provisions of sec. 761 of the Criminal Code.

The Manitoba Grain Co. has been found guilty of two infractions of sec. 215 of the Canada Grain Act, ch. 27, 1912, by selling grain on commission without having secured a license from the Board of Grain Commissioners for Canada, as provided by that Act, and has been fined $500 and costs in each case, following the provisions of sec. 119 of the Act as enacted by sec. 10 of ch. 40, 1919.

The facts in these two cases are similar, with this exception, that in the *Decker* case the car of wheat sold was consigned by a resident of the province of Saskatchewan, and in the *Regnier* case the consignor was a resident of the Province of Manitoba. The defendant's place of business is in this province.

The Magistrate has submitted four questions for the opinion of this Court, one of which is:—

"Has the Parliament of Canada jurisdiction to enact the said Canada Grain Act?"

In my view, it is not necessary to answer this question in order to determine the validity of the convictions under review. The Judicial Committee has, on numerous occasions declined to express any opinion upon abstract propositions of constitutional law, preferring to deal with concrete matters only, which are necessary for the determination of the points directly at issue.

This is a sound rule which it is the duty of this Court to follow.

But in view of the magnitude of the scope of the operations of the Canada Grain Act and the confidence which is placed upon it by a great trading community, it may not be out of place to say that there is undoubted jurisdiction in the Dominion Parliament to legislate in respect to many subjects which are dealt with in that Act.

The general regulation of trade and commerce, the compilation of statistics, navigation and shipping, banking, weights and measures, interest, bankruptcy, transportation by land and water and the making of laws in relation to agriculture are subjects which have been assigned wholly or in part to the Dominion by secs. 91, 92 and 95 of the B.N.A. Act, and it is safe to say that under the powers specified the provisions of the Canada Grain Act may, in the main, be supported.

For a like reason, it is not necessary to answer the Magistrate's questions in respect to secs. 210, 216 and 217 of the Act. They do not directly concern the validity of these convictions.

Coming now to the real point, we may consider the first question propounded:—

"Has the Parliament of Canada jurisdiction to enact sec. 215 of the Canada Grain Act?"

That section reads as follows:—

"215. No person shall engage in the business of selling grain on commission or receive or solicit consignments of grain for sale on commission, in the Western Inspection Division, without first obtaining such annual license from the Board."

The license referred to is one described in sec. 210 as "a license to sell grain on commission."

Section 119 as amended by the Act of 9-10 Geo. V, ch. 40, sec. 10, provides the penalties for violation of this enactment.

In my opinion, the answer which must be given to this question is governed by the decisions of the Judicial Committee in the cases of *Att'y.-Gen'l. for Canada* v. *Att'y.-Gen'l for Alberta*, known as the *Insurance* case, *supra*, and the recent case of *Re Board of Commerce Act and Combines and Fair Prices Act; Att'y.-Gen'l. of Canada* v. *Att'y.-Gen'l. of Alberta, supra.*

The *Insurance* case arose out of a prosecution before a Montreal Magistrate under sec. 4 of the Insurance Act, 1910, ch. 32, which says:—

"In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry

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on any business of insurance, or prosecute or maintain any suit, action or proceeding or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister."

The magistrate refused to convict on the ground that this section of the Insurance Act was *ultra vires* of the Dominion Legislature. Thereupon the Governor-General in Council by an order under the Supreme Court Act, R.S.C. 1906, ch. 139, referred questions to the Court as to the power of the Legislature, and in the Supreme Court of Canada (1913), 15 D.L.R. 251, 48 Can. S.C.R. 260, as well as in the Judicial Committee, *supra*, it was held that the section was *ultra vires*.

The magnitude of the trade, its Dominion-wide importance, its inter-provincial character, its regulation as part of the trade and commerce of the country, and the powers of Parliament in respect to "peace, order and good government," these and other points were pressed upon the Judicial Committee with the same insistency as upon us in the present case, and, to my mind, they were as pertinent in the insurance case as in the grain case.

The fact that the main features and objects of the Insurance Act and the Canada Grain Act were closely linked in so far as Dominion legislation was concerned, was put very clearly before their Lordships on more than one occasion during the argument.

The case was heard by the Privy Council with *Bonanza Creek Gold Mining Co.* v. *The King*, *supra*, and *Att'y.-Gen'l. for Ontario* v. *Att'y.-Gen'l. for Canada* (*Reference Re Provincial Company Legislation*), 26 D.L.R. 293, [1916] 1 A.C. 598, 85 L.J. (P.C.) 127, the argument lasting 8 days. In addition to the arguments of counsel presented at this Bar, I have perused the argument before the Judicial Committee and the remarks of their Lordships made during the course of the *Insurance* case, as set forth in book form by Mr. E. R. Cameron, Registrar of the Supreme Court of Canada, and have been much impressed by the similarity of the presentation of that case to the present one.

Every argument (save one) which was advanced in favour of the insurance license has, and to my mind with equal cogency, been advanced in favour of the grain license. The dictum of Lord Watson in *Att'y.-Gen'l. for Ontario* v. *Att'y.-Gen'l. for Canada* (*Local Prohibition* Case), [1896] A.C. 348, at p. 361, 65 L.J. (P.C.) 26, was much relied on:—

"Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the

Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

On the argument Mr. Newcombe said on this point:—

"Your Lordship mentioned the matter of the gold supply. Now perhaps a concrete example of that sort of case is better, and that is the case of the grain trade; I mentioned it in my opening. When the provinces came into the Union there were four old provinces: Ontario, Quebec, Nova Scotia, and New Brunswick. Those were wooded provinces; the agriculture of the country was in the hands of small farmers; there was no great grain producing; the country did not produce its wheat except in neighbourhoods, and the grain trade so far as it existed was a local matter, a matter of exchange, a matter of the grist mill, not a matter of export, not a matter of inter-provincial trade or concern.

Then came the surrender of the vast Western territory by the Hudson Bay Co., the establishment of the Province of Manitoba, and we had the Manitoba Grain Act. Later on, as the country developed and the grain trade became enormous, the new Provinces were added, and the whole subject of the grain trade as to combinations, elevator owners, grain dealers, commission merchants, elevation and transport, all that regulated finally in 1912, in its inter-provincial aspect, as a matter of immense magnitude, the conditions which existed at the Union having changed altogether. It would have been impossible perhaps to have sustained an Act to regulate the grain trade at the Union, because it might have had no application, except local; such an Act as the Act of 1912 would at that time have had no place, but it is a concrete example of regulation of a trade for the benefit of the whole community at the instance and at the request of the localities; there have been numerous petitions and requests to the Dominion for legislation with regard to this trade, and the Dominion alone has from the necessities of the case the power effectively to regulate this vast trade in the national interest."

It is apparent that their Lordships had clearly before their minds, when considering the Insurance Act, its general bearing

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on similar questions which might arise under the Canada Grain Act, and they expressed their views in no uncertain terms.

Viscount Haldane, at p. 292, when presenting the opinion of the Board, having reviewed *Russell* v. *The Queen, supra*, and *Hodge* v. *The Queen, supra*, says. [See judgment of Cameron, J.A., at p. 418.]

These words are so directly applicable to the case under consideration, that to my mind they are authoritative and should be followed without hesitation.

There was before the Judicial Committee very recently a reference in *Re Board of Commerce Act and Combines and Fair Prices Act; Att'y.-Gen'l. of Canada* v. *Att'y.-Gen'l. of Alberta, supra.*

Viscount Haldane, in presenting the opinion of the Board, deals in a general way with arguments similar to those presented in the case at Bar in the following words, at pp. 516-517:—

"No doubt the initial words of sec. 91 of the B.N.A. Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by way of the express heads in sec. 92, untrammelled by the enumeration of special heads in sec. 91. It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in sec. 92, and is not covered by them. The decision in *Russell* v. *The Queen* (1882), 7 App. Cas. 829, appears to recognise this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within sec. 92. Nor do the words in sec. 91, the Regula-

tion of Trade and Commerce, if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the provincial powers under sec. 92."

I feel unable to declare that the licensing of grain commission merchants, which belongs under ordinary and usual circumstances to the provincial Legislatures, has "by necessity in highly exceptional circumstances" been transferred to the Parliament of Canada, or that the undoubted right of the inhabitants of the Provinces to trade freely in the natural products of those provinces has been superseded by a valid Dominion enactment.

It was suggested, on the argument before the Court, that the authority of the Board of Grain Commissioners over grain traders was to a large extent dependent upon the issuing of a license, or the withholding of a license in the discretion of the Board, and that the licensing system went to the very root of the policy embodied in the Canada Grain Act. It is not necessary to pass any opinion upon that general point. It can be dealt with when it arises, and until it does arise, I will restrict my reasons for judgment to sec. 215 which concerns the licensing of commission merchants only.

There remains for consideration the point to which I referred above as applicable to this case, which was not available in the *Insurance* case, *supra*. It is to be found in sec. 95 of the B.N.A. Act, which provides:—

"In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

This section greatly enlarges the powers of Parliament in respect to farm products beyond the scope of its powers in respect to the business of insurance.

The question then arises—Is the business of selling grain on commission, or the receiving or soliciting consignments of grain for sale on commission covered by the word "agriculture" in the statute? I do not think it is. "Agriculture," according to the Century Dictionary, is:—

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"The cultivation of the ground; especially, cultivation with the plow and in large areas in order to raise food for man and beast; husbandry; tillage; farming.

Theoretical agriculture, is a science comprehending in its scope the nature and properties of soils, the different sorts of plants and seeds fitted for them, the composition and qualities of manures, and the rotation of crops, and involving a knowledge of chemistry, geology and kindred sciences.

Practical agriculture is an art comprehending all the labours of the field and of the farm yard, such as preparing the land for the reception of the seed or plants, sowing and planting, rearing and gathering the crops, care of fruit trees and domestic animals, disposition of products, etc."

Other well known dictionaries define "agriculture" in similar terms, but in none of them is the definition broad enough to include the operations of persons whose business is the earning of commissions on the sale of grain which has become a commodity of trade. Section 215 does not attempt to confine its application to transactions in which farmers are concerned nor does it attempt to restrict its application to grain produced on Canadian farms. It is a general restriction of civil rights in the province without regard to agriculture or the agriculturist in the slightest degree.

In my view, the added powers given by sec. 95, when read with those of sec. 91, are not sufficient to bring sec. 215 of the Canada Grain Act within the enumerated heads which confer specific jurisdiction on the Dominion Legislature, and for the reasons given above, the residuary powers of the Dominion cannot be relied on to validate this section.

I would therefore declare that sec. 215 of the Canada Grain Act is *ultra vires* of the Dominion Parliament, and that the convictions cannot be upheld.

Convictions quashed.

TRAVIS-BARKER v. REED.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, and Beck, JJ.A. December 10, 1921.

FIXTURES (§ III—15)—AGREEMENT FOR SALE AND PURCHASE OF LAND—ERECTION OF WOODEN HOUSE ON LAND PURCHASED—INTENTION OF PARTIES—FAILURE OF VENDOR TO GIVE TITLE TO LAND—RIGHT TO REMOVE.

It is not solely the fact of a chattel being annexed to the soil which determines whether or not it has become part of the soil, but the object and purpose and intention of its annexation must be looked into. The purchaser of land under an agreement of sale, erected a frame bungalow on such land, with the express intention that it should be part of the realty when he obtained title to it. The vendor made default under his agreement of purchase and the land was foreclosed, the person

erecting the building being neither made a party to or served in the foreclosure proceedings. The Court held that as between the vendor and his mortgagee the house belonged to the person erecting it. The court held that the intention was only to have the building become part of the freehold upon the builder procuring a clear title to the land, and that he was entitled to remove it when his vendor was unable to perfect title.

APPEAL by plaintiffs, and cross-appeal by defendants from the trial judgment in an action claiming damages, or in the alternative, permission to remove a certain building from one lot to another at the expense of the defendants. Plaintiffs' appeal dismissed, defendant's appeal allowed, and action dismissed.

The facts of the case are fully set out in the judgment of BECK, J.A.

F. C. Jamieson, K.C., for plaintiffs.

J. R. Boyle, K.C., and *P. G. Thomson*, for Mrs. Punt.

L. T. Barclay, for Cornelius Reed.

G. W. Archibald, for Mrs. Nettleton, mortgagee.

SCOTT, C.J., concurs with STUART, J.A.

STUART, J.A.:—The contest at the trial of this action was confined almost entirely to an enquiry into the physical facts with respect to the nature of the foundations of the building and apparently very little, if any, regard was paid to the real legal relationship existing between the parties to the suit who were contending about the fate of the building. The relative importance of the nature of the annexation on the one hand and the legal relationship of the parties on the other was not, in my opinion, given the consideration to which it was entitled.

The plaintiff, throughout both this action and, particularly, in the action wherein he foreclosed Sutherland, did not recognise the existence of any connection between himself and Punt, the sub-purchaser. He did not make him a party to the foreclosure action nor, so far as we can ascertain, did he notify him of it at all. As a matter of fact, Punt had no contractual relationship whatever with the plaintiff. Punt contracted to buy Lot 11 from Sutherland. Sutherland covenanted with Punt that when the latter paid his purchase money he would give him a good title. On the faith of that covenant and by express permission in the document, Punt went into possession. On the faith of Sutherland's covenant he constructed the house. It is true that Punt did not make his payments at the time agreed upon. But he had not forfeited his right to acquire title when Sutherland lost by the plaintiff's final foreclosure order, all power to give it. Punt was protected, so far as action by Sutherland was concerned, from the time he went overseas to the war in 1916 until he returned in 1918. The agreement was undoubtedly

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still on foot and a valid agreement enforceable by Punt when he enlisted and remained so until he returned. In 1917, Sutherland, owing to his failure to pay the plaintiff, lost his right to the land and his power to fulfil the covenant on the faith of which Punt built the house. Sutherland's covenant was, as the agreement shews, a stringent one. He covenanted to produce a certificate of title *in his own name* at the land titles office. Punt was never obliged to take a transfer from the plaintiff. He had a right to insist on receiving a transfer from Sutherland and on having a certificate of title in Sutherland's name in the land titles office so that such transfer could be registered. It is true that Punt covenanted not to remove any buildings erected on the land until the land was paid for. But that clearly implied that his legal right to a registered title obtained directly from Sutherland and from no one else should continue to exist and be possible of exercise and fulfilment by Sutherland whenever he paid in full. While his right to this still was on foot, Sutherland lost all power of fulfilling his covenant. Punt was never bound as between him and Sutherland to depend upon the grace of the plaintiff. Could it be said that Sutherland, with whom alone Punt had contracted but who had lost the power to fulfil the contract on his part, could have prevented Punt from removing the house? Obviously not. There is no evidence to shew that Punt knew anything about the state of the title when he put his house on the lot or that he had any reason to suppose otherwise than that Sutherland had the title in his own name. So far as appears he knew Sutherland only and relied upon Sutherland's covenant alone. Very clearly a vendor in the position of Sutherland who, obviously, could not give title upon payment, could not insist that his vendee must not remove a building which had been put there on the faith of the covenant for title. The agreement between Sutherland and the plaintiff was not produced as an exhibit. There is nothing to shew that, even if Punt had paid promptly, Sutherland could have fulfilled his covenant and given the title in the manner in which it had been agreed to be given. The plain inference from the evidence is that Sutherland had purchased a larger tract from the plaintiff under the instalment plan, that this had been subdivided and, as the plaintiff was still the registered owner, that he had joined in the scheme and plan of subdivision.

Could, then, the plaintiff intervene from above or from the side, and stop the removal by Punt?

Supposing a man who had only a life estate, but thought he had the fee, had agreed as Sutherland agreed, and supposing his vendee had done what Punt did here. When the vendee

found that he could not get the fee agreed to be conveyed could he be laid hold of by the remainderman owning the fee whom he knew nothing about, and had not contracted with, and be told by him that the building was now part of the realty and the property of the remainderman?—And that, moreover, a building which he had constructed on the faith of being granted the fee?

For my part I have no doubt whatever, if there had been in England during the eighteenth and early nineteenth centuries such a method in vogue of dealing with land as has grown up in this new rapidly growing country, whereby agreements of sale are made on the instalment plan and the vendor and vendee join in a plan of subdivision and the individual lots are, as the head vendor must have known, to be resold at once also upon the instalment plan, the Judges in England would not have hesitated at all to apply a special rule to the case and would have decided the question of fixture or no fixture as between the original vendor and the sub-vendees, disappointed in their title, upon some just principle which would have been quite a modification of the principle applied in the cases to which alone they actually did have to apply their minds.

So far as appears, the head vendor here, the plaintiff, although he joined in the subdivision and must have known the intention of Sutherland to re-sell, neither made any covenant to convey individual lots to the sub-purchasers nor did he take any precaution even to bind Sutherland to deposit the moneys received from them in a trust fund to be applied in meeting Sutherland's obligations to him. Through the vendor's assistance, Sutherland was placed in a position to receive money from subpurchasers to do what he pleased with. Punt was never bound to deal with the plaintiff at all. He was entitled to look to Sutherland alone. And when the plaintiff intervenes to claim the building in question as part of his realty, is not Punt entitled to say that all these considerations to which I have referred, ought to be taken into account in deciding the question whether as between him, Punt, and the plaintiff, the building should or should not be considered in law and in justice as having become part of the freehold and so the property of the plaintiff?

It is not a question whether the plaintiff offered to deal justly with Punt. It seems probable from the evidence that Mr. Rutherford, who represented the plaintiffs' mortgagees, the co-plaintiffs and also the plaintiff, did offer to convey on receipt of the balance due to date and interest. But that is not the point. The point is, what position Punt should, in justice, occupy when he came to negotiate with the plaintiff. He was already absolutely at the plaintiffs' mercy, so far as the lot itself was

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concerned. The plaintiff could give it to him or not, just as he pleased. He could, if he pleased, demand a bonus before conveying even the lot, because he was not obliged to convey at all. Then should Punt also, in all the circumstances, be considered as having given further hostages, as bound to come to the plaintiff with his hands tied, with a house, said by the plaintiff himself, to be worth $2,500, though the trial Judge valued it at $800, absolutely at the plaintiffs' mercy as well? Or is not the justice of the matter this, that Punt should be considered as free to deal at arm's length, with the plaintiff so far as the house was concerned?

No doubt, if a first vendee spends, in building a house on the land purchased, money which might have gone to pay the purchase price, the vendor will have a very just reason to claim that the house should be considered as part of the realty yet not paid for and as part of his security. But that is not this case. Here we have a sub-vendee, with no duty or obligation to the head vendor at all, with no connection or relationship with him. As I have pointed out, there is nothing to shew that even if Punt had paid Sutherland promptly he would have got his title. There is nothing to shew that, by Punt's failure to pay Sutherland promptly, any money was withheld from the plaintiff that he would otherwise have received.

The simple fact of the matter is, that the plaintiff without any right whatever in real justice, as against Punt, claims that by some strict and invariable rule of law the house had become part of the realty and, therefore, belonged to him and that Punt had by foreclosure order to which he was no party, lost all property or interest in his house.

According to the course the evidence took at the trial, it would seem that the plaintiffs' contention is that by virtue of the mere nature of the annexation, which was indeed a matter of much dispute, and by that alone the law will declare that the house has become part of the realty and so lost to Punt. To quote the words of Hagarty, J., in *Pim* v. *Municipal Council of Ontario* (1860), 9 U.C.C.P., at p. 311, "I hope and believe the law will not be found so rigid in its application."

There can be no doubt that the intention of the builder is also an important consideration. And, no doubt, also the mere statement on oath of the builder as to the secret intentions of his mind must give way to the inference of intention to be gathered from all the surrounding circumstances including his conduct and the nature of the annexation. But I think this matter of intention must be examined a little more critically. We must not infer his intention from the facts which we now

know to have existed if those facts were not all known to him at the time. Punt very probably intended to pay for the house and to get his title from Sutherland and in anticipation of this he, no doubt, intended that the house should be part of his realty when he got it. But did he ever intend that the house should become part of the realty of a man whose existence and whose rights and title he knew nothing of? I cannot help thinking that there is a serious fallacy involved in looking in such a case upon the realty as the mere objective physical substance, viz., the soil, without reference to the title thereto or the estate therein. It is absurd to say that a house becomes part of the mere physical soil. That is not what is meant by a building becoming part of the realty. Nor does it mean that the house is physically annexed to the soil because annexation is used as a basis of inference to decide whether or not it has become part of the realty. Obviously, what is meant is that the building becomes subject to the same legal ownership or estate as the soil is the subject to. Certainly Punt never "intended" to make the house belong to and become part of a fee simple interest or estate in the soil then outstanding, not even in Sutherland, but in another party whose rights or even existence he knew nothing of. What he intended, without any doubt, was that the building should be the subject of his expected fee simple estate in the land when he obtained it.

What might be the result in the case between a vendor and his own vendee we do not here need to discuss. Other considerations, as I have already suggested, might then arise. A vendor might remain quiescent and refrain from action when he saw his security being largely increased by the action of his vendee in spending money, otherwise payable to him, in erecting a valuable building on the land. If the vendor had title in his own name and was able to give it upon payment it would only be the vendee's own fault if he did not acquire title. But we have here an example of something quite different.

We have a case which, with the revival of real estate speculation, might and probably will occur again in the future. We have moreover a set of facts which, while they may occur in this Province again, have certainly never yet, so far as I can find, been presented to either an English or Canadian Court as a subject for the application of a rule of law as to fixtures. I see nothing whatever to prevent us from applying general principles of justice to those facts and making a precedent as a guide for the future. As was said by Spragge, C., at p. 311, in *Pim* v. *Municipal Council of Ontario, ubi supra*, "I do not disguise from myself that this opinion is opposed to many cases

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in the Exchequer and to much that is to be found elsewhere; but when these decisions are in such manifest and painful conflict, it becomes the duty of the court to adopt that conclusion which appears upon the whole most consistent with the principles of justice."

Here, every principle of justice surely supports the right of Punt, when he found Sutherland foreclosed and unable to give him title, to deal with the plaintiff with a free hand so far as his house was concerned, and, to be in that position, he clearly needed to be able to say "the house is still mine and I propose to remove it if it pleases me to do so."

With respect to the position of the plaintiff mortgagees, it seems to me that they can have no higher rights than the plaintiff Travis-Barker. The deceased Eamer, whose estate they represent, became mortgagee before the sale to Sutherland, and must have also joined in the subdivision plan. I see, therefore, no greater argument in their favour than in favour of Travis-Barker.

I realise that it may be said that this decision will make the rule as to fixtures more uncertain than ever. But I do not think this is so. It will, I venture to hope, direct attention more to the real relationship of the parties interested and less to some rule of thumb impossible of general application consistently with justice.

I think, therefore, the defendants' appeals should be allowed with costs, the plaintiffs' appeals dismissed with costs, and the action dismissed with costs.

BECK, J.A:—This case was tried by Hyndman, J. The statement of claim set out that the plaintiff, Travis-Barker, was "the owner" of lot 11, block 3, Richmond Heights; that the plaintiff, the Imperial Canadian Trust Co., was the administrator *de bonis non* of the estate of Sarah Eamer, deceased, mortgagee of the lot; that the defendant, Mrs. Lotta May Punt, was the registered owner of lot 13, block 11, Brackman-Kerr subdivision; that the plaintiffs had suffered damage by the defendants (Cornelius Reed, Elizabeth Reed, Lotta May Punt and Jennie W. Nettleton) and each of them converting to their own use and wrongfully depriving the plaintiffs of the plaintiffs' goods (*sic*), that is to say, the dwelling house formerly situated on lot 11, block 3, Richmond Heights, by removing it from said lot 11 to lot 13, block 11, Brackman-Kerr subdivision, of which latter lot the defendant Elizabeth Reed is the owner; (it subsequently was transferred to the defendant Mrs. Punt), that the defendant Nettleton is the mortgagee of lot 13, the mortgage to her having been given subsequently to the removal of the house to lot 13. The value of the house is stated to be $2,000.

The plaintiffs claim:—(1) damages in the $2,000; (2) a declaration that the plaintiffs are entitled to remove the house from lot 13 at the defendants' expense or alternatively are entitled to a charge on lot 13 to the amount of their damages in priority to the mortgage of the defendant Nettleton.

As a result of the trial, judgment was given as follows:—(1) Damages against Cornelius R. Reed in $800 with costs. (2) Action dismissed against Elizabeth Reed without costs. (3) The title of Mrs. Punt to lot 13 was charged in favour of the plaintiffs with the $800 damages and costs, this charge to rank subsequent to Mrs. Nettleton's mortgage. (4) Action dismissed against Mrs. Nettleton with costs.

The plaintiffs appeal from the judgment insofar as it gives priority to Mrs. Nettleton's mortgage and dismisses the action against her with costs.

The defendant, Cornelius R. Reed and Mrs. Punt, also appeal against the judgment.

The plaintiff, Travis-Barker, was the registered owner of an unsubdivided parcel of land containing about 17 acres.

On May 27, 1912, Travis-Barker mortgaged the above mentioned land to one, James, Eamer, for $15,000. This mortgage was registered June 12, 1912.

By agreement dated May 28, 1912, Travis-Barker agreed to sell the above described lands to William Sutherland for $25,000, of which $5,000 was paid down. Interest ran at 8% per annum.

On October 1, 1912, a plan of subdivision of the above described lands was registered. The plan was signed by Travis-Barker (owner), James Eamer (mortgagee), and William Sutherland (purchaser). The subdivision plan showed streets and six blocks containing altogether 119 lots and designated the property as Richmond Heights.

By agreement dated January 30, 1913, Sutherland agreed to sell to H. W. Punt, lot 11, block 3, Richmond Heights, for $475, of which $120 was paid down.

On August 1, 1914, Travis-Barker brought an action against Sutherland only for specific performance of his agreement.

On November 10, 1914, it was ordered (by what is really the judgment but is popularly called by solicitors the order *nisi*) that the agreement should be specifically performed. The order fixed the amount owing by Sutherland at a total of $6,533.48, and fixed a period of 4 months for redemption. On September 18, 1917, a final order cancelling and determining the agreement was taken out. Neither this order *nisi* nor the final order was served upon any person other than Sutherland, who was the

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only defendant, although by a reference to the file in the case of Travis-Barker—Sutherland, it appears that 47 lots of the subdivision had been sold, and it was made a condition of the order that one Smith, a sub-purchaser of 2 lots, was given a clear transfer.

Rule 47 says:—

"A vendor suing for specific performance, with or without other relief, shall not make any encumbrancer, whose claim arose subsequently to the making of the agreement, a party to the action, unless special relief is claimed against him; but all subsequent encumbrancers shall be served with notice of the judgment or order directed or made in the action."

This rule was considered in *Canadian Pacific R. Co.* v. *Canadian Wheat Growing Co.* (1919), 47 D.L.R. 102, 14 Alta. L.R. 452. It was there held, by implication if not directly, that "encumbrancers" means persons who have some kind of *charge* upon the land securing the payment of money and does not mean or include persons who have a property interest in the land. This is quite clearly the correct interpretation of the rule.

Furthermore, it is quite clear that in the case of there being encumbrancers who are to be served with the judgment or order, what is called the order *nisi*, is what must be served; that is the *judgment* in the case, whether made by order of a Judge in Chambers or by the Court; it is a judgment which contains a condition subsequent, of which the defendant and those interested subsequently to him may take advantage; in default of their doing so the condition is extinguished by the final order.

The plaintiff is clearly shewn by the evidence to have been fully aware of Punt's interest in the lot.

It is clear, therefore, that Punt's interest in the land was in no way affected by the proceedings in the action of Travis-Barker against Sutherland (1 Dan. Chcy. Prac., 8th ed. 197), and as a consequence that Travis-Barker's right against lot 11 and against Punt and his successors in title was, and still is, not greater than that of an unpaid vendor. The statement of claim, as I have mentioned, puts the plaintiff's title baldly *as owner*. It is questioned whether inasmuch as, although he was registered owner, he was in the position of an unpaid vendor, this was a sufficient statement of his title; but I think it is not necessary to consider this as the real facts were undoubtedly known to all parties to the proceedings.

Naturally, the argument before us was devoted to the subject of "fixtures."

Fixtures are chattels affixed to the soil. According to the character of the chattels, the method and nature of the affixing, the intention of the party affixing, the relationship of the respective claimants and the purpose and object of the affixing, the Court may decide that the chattels (1) either have become part of the soil with nevertheless a right of removal by the person affixing or (2) have become part of the soil irrevocably. The intervention of the rights of third parties may affect the right of removal and consequently the rights of the respective claimants. The Appellate Division of this Court, in *Sewell* v. *Doth*, [1921] 2 W.W.R. 627, reversed the decision of the trial Judge who had held that a cottage built by a tenant was not removable. The tenancy was for 5 years; the cottage was frame, 18 x 24, resting on sills, which rested on and were nailed to posts, of which there were 10 or 12, sunk from 6 to 9 inches into the ground towards the rear of the building, owing to the land sloping upward in that direction, there was an excavation made to provide a level for the foundation.

No reasons for the judgment of the Appellate Division are reported, but the Court was unanimous. I made a general observation to the effect that we must be careful in adopting the decisions of the English Courts on the question of fixtures in view of the very different conditions of this new country and the very different manners and methods of construction of buildings and the very different customs and habits of the people living here, especially their readiness to move from one place to another, and the not infrequent removal even of large buildings, pointing out that what might be considered a very serious injury to the soil in England might well be regarded here as quite trivial and negligible.

Even in England the Courts fully recognise that the general principles of the law relating to fixtures from time to time have been, and must continue to be, applied by way of judicial decision with full regard to new conditions and new relations; and it must be obvious, as I have already pointed out, that the Courts of this country must have a greater latitude of decision.

In *Leigh* v. *Taylor*, [1902] A.C. 157, 71 L.J. (Ch.) 272, valuable tapestries affixed by a tenant for life to the walls of a house were held, affirming the Court of Appeal, to be removable by the executor of the tenant for life and not to pass to the remainderman.

Lord Halsbury, L.C., after stating certain principles, said, at pp. 158, 159:—"We have heard something about a suggested alteration of the law; but those two principles appear to have been established from the earliest times, and they are principles

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still in force. But the moment one comes to deal with the facts of each particular case, I quite agree that something has changed very much; I suspect it is not the law or any principle of law, but it is a change in the mode of life, the degree in which certain things have seemed susceptible of being put up as mere ornament, whereas at an earlier period the ruder constructions rendered it impossible sometimes to sever the thing which was put up from the realty. If that is true, it is manifest that you can lay down no rule which will in itself solve the question; you must apply yourself to the facts of each particular case."

Lord Macnaghten said, at p. 162:—"I do not think the law has changed. The change I should say is rather in our habits and mode of life. The question is still as it always was, has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case and not always the most important—and its relative importance is probably not what it was in ruder or simpler times."

In the Court of Appeal in *Re De Falbe; Ward* v. *Taylor*, [1901] 1 Ch. 523, 70 L.J. (Ch.) 286, Vaughan Williams, L.J., said, at pp. 534, 535:—"Starting with the absolutely rigid rule, 'quicquid plantatur solo, solo cedit', there has been a consistent progress towards relaxation of that rule, and, in my view, there has never been any substantial intermission of that relaxation."

The progress of the continuous relaxation of the old rule to meet changed conditions had long before been expressed for example by Martin B., *Elliott* v. *Bishop* (1854), 10 Exch. 495, at p. 508, 24 L.J. (Ex.) 33:—"The injustice . . . . of deeming such things practically forfeited to the owner of the fee simple by the mere act of annexation became apparent to all," quoted in Broom's Leg. Max., 8th ed., p. 325.

In *Wake* v. *Hall* (1883), 8 App. Cas. 195, Lord Fitzgerald said, at p. 211:

"I do not know that much advantage can be derived from a minute examination of those authorities, or any further endeavour to trace the origin of the maxim to its foundation in the Roman law, or its adoption into the law of England in a more stringent form at a time when little heed was paid to rights other than those of the owners of land. Like all other rules it has

received from time to time judicial modification to suit the exigencies of modern life and modern progress, and numerous exceptions and qualifications have been grafted on it in favour of trade, manufacture and agriculture, and in furtherance of the rights of creditors. It seems to me that what we have first to do is to ascertain as nearly and as accurately as we can the true relationship of the plaintiffs and the defendants to each other."

In *Elwes* v. *Maw* (1802), 3 East. 38, 102 E.R. 510, Lord Ellenborough said that questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons, namely (1) heir and personal representative of the same owner of the freehold; (2) personal representative of a tenant for life or in tail and the remainderman or reversioner; and (3) landlord and tenant; saying that the last case is that in which the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claimant in respect of freehold or inheritance. In *Wake* v. *Hall* (1883), 8 App. Cas. 195, at p. 207, Lord Watson referring to the foregoing observations of Lord Ellenborough, says:—

"I assume that the doctrine would receive a similar application in cases analogous to these."

That was a case of large and valuable buildings and machinery attached to the soil, of which miners were entitled to the exclusive use for mining purposes; the buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance which would not amount to a destruction of the soil. The buildings were intended to be accessory to the mining, and there was nothing to show that the property on them was intended to be irrevocably annexed to the soil. It was held that the miners were entitled to remove the buildings and machinery.

In *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 Can. S.C.R. 539, at p. 541, Davies, J., now C.J., says:—"The authorities all seem to show that it is not solely the fact of the chattels being annexed to the soil which determines whether or not they have become part of the soil, but that the *object* and *purpose* and *intention* of their annexation must be looked to."

In 14 L.R.A. (N.S.), p. 439, the case of *King* v. *Morris* (1907), (New Jersey Court of Errors & Appeals) is reported. In the head note it is stated that:

"Where a person placed a frame factory upon the land of another with the land owner's license, with no agreement respecting the subsequent ownership of the factory, the presumption

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is that the building remains the property of the party annexing it and is removable by him"; and in the head note to a long note of decisions it is set down that: "It is the general rule that where the land owner consents to the placing of a building on his land by another without an express agreement as to whether it shall become part of the realty or remain personalty, an agreement will be implied that it is to continue personal property."

The case of vendor and purchaser under an agreement for sale and purchase, in which payment of the purchase money is deferred and the purchaser is entitled to possession meanwhile, is practically a case unknown in England, while of very common occurrence here. As far as I know there are no decisions within the Empire dealing with such a case, which, therefore, is to be decided by this Court on considerations of justice and equity, good sense and reason, having regard to the fundamental principles of the law.

The case is somewhat analogous to the case of mortgagor and mortgagee. It may be accepted as sound law as set down in Broom's Legal Max., p. 330, that:

"The maxim *quicquid plantatur solo, solo cedit* applies in favour of a legal mortgage of freeholds or leaseholds; and in the absence of a stipulation to the contrary all fixtures, whether annexed before *or after* the date of the mortgage, including trade fixtures, form part of the mortgagee's security and may not be removed without his consent, express or implied."

But it has been expressly decided that where the fixtures have been placed upon the land not by the mortgagor himself, but by his tenant—at least if the mortgagee has assented to the tenancy—the tenant has the right of removal as against the mortgagee if he had had right against the mortgagor.

The tenant's right has been allowed between a mortgagee of the landlord and a tenant of the mortgagor, who without interference by the mortgagee has entered and put up fixtures. *Sanders* v. *Davis* (1885), 15 Q.B.D. 218, 54 L.J. (Q.B.) 576, 33 W.R. 655, followed in *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.*, [1892] 1 Ch. 415, 61 L.J. (Ch.) 227, 40 W.R. 280, and in *Gough* v. *Wood*, [1894] 1 Q.B. 713, 63 L.J. (Q.B.) 564, 42 W.R. 469. In *Cumberland, etc.*, v. *Maryport, etc.*, North, J., said, at p. 425:—"The mortgage deed provided that, not only the existing machinery and chattels, but also all the machinery and chattels to be thereafter brought upon the premises, should be included in the security. That, in my opinion, was a perfectly good bargain as between the parties to it. But I think it was not in the power of the mortgagor to confer on

their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them."

See also *Re Samuel Allen & Sons*, [1907] 1 Ch. 575, 76 L.J. (Ch.) 362, approved in *Re Morrison, Jones & Taylor*, [1914] 1 Ch. 50, where the right of removal as against an equitable mortgagee was allowed. See also 19 Cyc. tit. Fixtures, p. 1062, where the opinion is expressed that where as with us a mortgage is a mere charge, the rule in favour of the mortgagee's right to fixtures is to be qualified.

The fact that Travis-Barker (the registered owner), Eamer (his mortgagee) and Sutherland (the purchaser under agreement of the unsubdivided parcel from Travis-Barker), joined in the subdivision of the parcel into lots and blocks, and in the registration of a plan of the subdivision, fully justifies the inference that the owner and the mortgagee authorised the purchaser to make sales of the subdivision lots, and consequently that sub-purchasers going into possession did so with at least their implied consent.

Sutherland, the original purchaser, was never, in fact, legally in a position to give a clear title to lot 11. He had not the legal title himself. His rights under his own agreement were subject to a large liability to his vendor and also to the Eamer mortgage. He was in default and was, therefore, not in strictness entitled to the benefit of the clause entitling him otherwise to a discharge of lot 11 upon paying the whole sub-purchase price of it to Travis-Barker, and even if he had been, there remained the obstacle of the Eamer mortgage. Under these circumstances, it seems clear to me that as against Sutherland his immediate vendor, he could have removed the improvements he had placed upon the lot, doing no unnecessary injury to the soil. To adopt the language of Manisty, J., quoted in *Gough* v. *Wood*, *supra*, at p. 723, I cannot see why Travis-Barker should be in a better position in this respect when he permitted Sutherland to deal with the property and with sub-purchasers as he did. This was, in my opinion, the position quite apart from the protection afforded to Punt under the Soldiers' Relief Act, which had the effect of preserving his rights and preventing his being legally in default himself, till after Sutherland's title had been extinguished.

Throughout the decisions it is made to appear that the *intention* of the affixer is of great and, in some cases, especially where the facts are known to both claimants, of the greatest importance. In very few cases is there an explicitly expressed, or even definitely formed, intention. Hence the cases commonly say, in effect, that the intention is to be implied from the surrounding

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acts, facts and circumstances, including the nature of the chattel, the manner in which it is affixed and its apparent purpose and object. Thus, as between a tenant for life and a remainderman a primary question is, is it in the absence of an explicitly formed intention to be inferred that the tenant for life intended to benefit the life estate or the estate in remainder? In such a case as the present, it seems to me that the only intention to be imputed to the sub-purchaser of a lot is that of benefiting—not the head-vendor of the whole tract, not the mortgagee of the whole tract, not even his own immediate vendor, but—only his own individual interest in the particular lot, and that only conditionally upon the event of his procuring a clear title to it; and that consequently as between him and the head-vendor or the mortgagee from him, it would be against reason, good sense and justice to impute to the sub-purchaser an intention to annex the chattel irrevocably to the soil; and as between him and his immediate vendor, the intention surely must always be presumed to be conditional upon the vendor perfecting title.

Having set forth at some length the principles of law applicable, in my opinion, to the facts of the case, I set down a description of the building in question.

The house was entirely of wood. It was a bungalow 20 x 20 ft. It was built in June, 1913, on the back of the lot. In August, 1913, it was moved 20 feet towards front of the lot. Punt says: "I wanted to move it forward so that when I got the lot paid for I wanted to go ahead and build on it so as to accommodate my family and make it permanent; as it was I was just doing that temporary until I got the lot cleared up."

Before the building was moved, an independent wooden frame work was constructed about 3 feet in height, made of 2 x 4's standing upright and spiked to 2 x 4's laid horizontally top and bottom. This framework rested on poplar blocks about 6 x 8 x 16 inches lying on the ground, a block at each corner and two in between. The building was raised up and placed upon this framework. In 1914 it was found that the building had settled to some extent. Reid says that, consequently, Punt and he took a small tree and (using it as a lever) raised the building, where it had sagged in any particular places, and dug holes on the outside so as to allow them to put cement in under the shoe as it is called. They poured in cement into the holes and substituted new timbers for any that were decayed. These holes were dug and the cement filled in apparently under the blocks, the blocks being removed during the operation. These holes were approximately 8 to 10 inches deep.

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There was a chimney 16 inches square, which was built up from a cement footing made in the surface of the ground under the house. There is a dispute about the foundation for the chimney. It appears to have had a concrete base very slightly let into the ground.

Some length of time after the house was set on the frame there was a "cellar" dug, which was only a hole in the ground under the centre of the house, about 8 or 10 feet square; and perhaps a little more than 2 feet deep. There was nothing in it except a post in the middle standing on the ground and supporting the house.

In moving the house the contractor knocked out a brick here and there and ran an oak plank through on which the chimney then rested. Then knocking out parts of the framework on which the house rested the contractor put two wagons under it and drew it away. The loose material in the ground was subsequently taken away. There remained apparently some of the cement footings. Those could easily be removed, and but little work would undoubtedly leave the soil in as good condition for building or gardening purposes as before the building was constructed. There was a cement walk from the front door of the house to the street. This was no part of the house, of course, and, in my opinion, its existence had no bearing on the question of the temporary or permanent character of the building. It was not removed but could, doubtless, easily be removed without serious damage to the soil.

In conclusion then, applying what is my view of the law to the facts of the case—the relationship of the plaintiffs to the defendant whose title rests upon Punt, their predecessor in title, the character and mode of construction of the building, the purpose and object with which it was built, the clearly to be inferred intention with which it was built—I confidently hold that Reed, acting for Punt, had the right to remove the building in question.

In the result, the appeal of the plaintiffs should be dismissed with costs; the appeal of the defendants, Reed and Lottie M. Punt, should be allowed with costs and the action wholly dismissed with costs.

Judgment accordingly.

BRADLEY v. BAILEY.

Ontario Supreme Court, Orde, J. June 1, 1922.

DAMAGES (§ IIIA—75)—SALE OF GOODS—PASSING OF PROPERTY—REFUSAL OF PURCHASER TO TAKE DELIVERY—DETERIORATION—RE-SALE—BEST PRICE—INEVITABLE LOSS—LIABILITY.

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Where a purchaser in breach of his contract refuses to take delivery of goods sold, for which there is no ready available market, and the vendor does all that is reasonably possible to sell the goods at the best price he can get, the Court will not give effect to what is a mere presumption that he might have obtained a better price, and the purchaser is liable for the damages which the vendor has in fact sustained from his default. But, held that travelling expenses incurred in connection with the re-sale could not be recovered, and also that interest upon the damages from the date of the purchaser's default could not be recovered, the amount of such damages not having been finally determined until the Master made his report nearly 3 years after the default.

APPEAL by defendants from the report of a Local Master upon a reference as to damages under the judgment of the Supreme Court of Canada (1921), 62 D.L.R. 397. Varied.

J. H. Rodd, K.C., for defendants.

O. L. Lewis, K.C., and *J. M. Pike*, K.C., for plaintiff.

ORDE, J.:—Upon the reference as to damages under the judgment of the Supreme Court of Canada (1921), 62 D.L.R. 397, in this action, the Local Master at Chatham has made a report, whereby he finds the defendants liable to the plaintiff in damages to the amount of $4,870.69. From that report the defendants now appeal.

The chief ground of appeal was that the plaintiff, upon the refusal of the defendants to take the tobacco which he was tendering for delivery under the contract, had not resold at as high a price as he ought to have obtained. I have read the evidence taken before the Master, and without reviewing it in detail, I see no reason for differing from his findings in this regard. Having regard to the time of year and the absence of any readily available market, the plaintiff in my judgment did all that was reasonably possible to sell the tobacco at the best price he could get. It is beside the mark for the defendants to shew that some isolated crops were sold during the period in question at higher prices. It is conceivable that the plaintiff might have been lucky enough to come into contact with some one who might have given him a higher price than he succeeded in getting, but that is mere surmise. Had it been shewn that the plaintiff had been offered and refused a higher price, the case would be different, but in the absence of a regular market, if the plaintiff had done what a reasonably prudent man would do to make the best possible sale, the Court is not to give effect to what is a mere presumption that he might have got a better price, in order to relieve a party in default from the damages which the plaintiff has in fact sustained from that default.

In the items making up the total amounts fixed by the Master as damages are one of $45 for "time lost and expenses on three

trips to Kingsville to urge defendants to take delivery," and one of $630.19 for interest at 5% from the date of default, March 18, 1919, to both of which the defendants take exception.

I do not think the item of $45 can stand. Travelling expenses in and about the resale might perhaps be allowed as an expense necessarily incurred in selling and consequently allowable either as damages directly flowing from the breach or as an item of expense which reduced the gross proceeds of the resale. But if, as a result of the three trips, the defendants had been persuaded to take delivery notwithstanding their previous refusal, how could the defendants have been called upon to pay the expenses incurred? If, after a breach had occurred, the injured party persists in endeavouring to induce the other to carry out the contract, any loss sustained in that effort cannot, on any principle that I know of, be recovered as damages resulting from the breach, merely because the effort to effect a settlement (for that is what it really is) had failed. The item of $45 must therefore be disallowed.

The item of $630.19 as interest upon the damages from the date of the defendants' fault must also in my judgment be disallowed. The question whether or not interest may be allowed upon damages for breach of contract is not always easy of solution. See for example, the elaborate discussion in *London, Chatham & Dover R. Co.* v. *South Eastern R. Co.*, [1892] 1 Ch. 120, 61 L.J. (Ch.) 294, 40 W.R. 194; [1893] A.C. 429, 63 L.J. (Ch.) 93, and in *McCullough* v. *Clemow* (1895), 26 O.R. 467. Does the claim for interest come within the scope either of sec. 34 or of sec. 35 of the Ontario Judicature Act, R.S.O. 1914, ch. 56? If not, the interest cannot be allowed. It is not payable by law within the meaning of sec. 34, nor are the damages a liquidated demand such as according to the judgment of Osler, J., in *McCullough* v. *Clemow*, *supra*, at pp. 475 and 476, is necessary to enable a jury to allow interest thereon within the provisions of that section. Nor are the damages "a debt or sum certain, payable . . . at a time certain" within the meaning of sec. 35. This is not a case where the amount payable by the defendant was a mere matter of calculation. The amount was not ascertained until the Master made his report. *Beam* v. *Beatty* (1902), 3 O.L.R. 345, at p. 349; *Sinclair* v. *Preston* (1901), 31 Can. S.C.R. 408. It is admittedly a hardship upon the plaintiff that by reason of the resistance of the defendants to his claim for damages and the protracted litigation through the Appellate Division (1920), 57 D.L.R. 673, 48 O.L.R. 612, to the Supreme Court of Canada, 62 D.L.R. 397, and the reference consequent thereon, the amount payable to him was not

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ascertained until 3 years after the defendants' default. But if my view of the existing law on this point is correct, there is no help for it. That the law governing this question frequently works injustice is pointed out in the *London, Chatham & Dover* case, *supra*, and especially by Lord Herschell, L.C., in [1893] A.C. 429, at pp. 440-441.

I am not overlooking the judgments of the Court of Appeal in *City of Toronto* v. *Toronto R. Co.* (1905), 5 O.W.R. 130, and of the Judicial Committee in the same case in appeal *Toronto R. Co.* v. *City of Toronto*, [1906] A.C. 117, 75 L.J. (P.C.) 36, or the recent judgment of the Appellate Division in *Hurst* v. *Downard* (1921), 64 D.L.R. 279, 50 O.L.R. 35. As pointed out by the Judicial Committee in the *Toronto Ry.* case, [1906] A.C. 117, at pp. 120-121, the provisions of sec. 34 of the Ontario Judicature Act are wider than those of Lord Tenterden's Act, 1833 (Imp.), ch. 42, secs. 28 and 29, but the case must be one where "the payment of a just debt has been improperly withheld" (p. 121). If the amount payable is in the nature of damages which require an investigation in order to fix the amount, then until the amount to be paid by the party in default has been so fixed there has been no sum withheld by him upon which interest will be calculated. Nor is there anything in the judgment in *Hurst v. Downard, supra*, to disturb this principle.

The report of the Local Master will therefore be varied by deducting from the $4,870.69 allowed for damages the two sums of $45 and $630.19, leaving the amount payable by the defendants to the plaintiff $4,195.50 as of the date of the report, viz., March 10, 1922. Subject to that variation the report will be confirmed, and the amount so fixed will carry interest from March 10, 1922. As success on this motion has been divided, there will be no order as to the costs of the motion, but the plaintiff should have the costs of the reference.

Judgment accordingly.

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Saskatchewan King's Bench, Doak, Local Master. February, 1921.

COURTS (§ IB—10)—"CAUSE OF ACTION"—WHERE ARISING—KING'S BENCH ACT, SASK. R.S.S. 1920, CH. 39, SEC. 35—CONSTRUCTION.

The "Cause of Action" as applied to actions in the Court of King's Bench (Sask.) arises when and where the person who has entered into the contract does or omits to do that which gives rise to the right to bring the action.

APPLICATION by defendant to have an action transferred from one Judicial District to another. Application dismissed.

T. C. Davis, for plaintiff; *J. H. Lindsay*, K.C., for defendant.

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DOAK, L.M.:—This is an application by defendant under sec. 35 of the King's Bench Act, R.S.S. 1920, ch. 39, to have the action transferred from the Judicial District of Prince Albert to the Judicial District of Regina, on the ground that the defendant lives in the latter district, and that the cause of action did not arise in the former district.

The facts alleged in the pleadings are that in the month of May, 1920, the plaintiff purchased a carload of hay from defendant and that plaintiff was obliged to pay the price and freight in order to get possession of the bill of lading; that upon inspection the hay proved rotten and was rejected by plaintiff and that the parties thereafter agreed that defendant should take back the hay and return the amount paid by the plaintiff. The defendant in his defence denies all these allegations except the sale and delivery of the hay and the payment of the purchase-price.

The question which I am now called upon to decide is whether or not the cause of action arose in the Judicial District of Prince Albert so as to entitle the plaintiff to bring its action there.

The pleadings do not disclose where the original contract for the sale of the hay was made, nor where the hay was shipped from, but I infer from the allegation that plaintiff had to pay the purchase-price before obtaining the documents of title that the defendant in shipping reserved the right of disposal or consigned the hay to himself or his agent at the place of destination. It would therefore appear that wherever the original contract was made the performance both by plaintiff and defendant was to take place within the Judicial District of Prince Albert. The plaintiff's action, however, is not founded upon a breach of the original contract, but upon an alleged subsequent agreement for a return of the hay on the one hand, and a return of the purchase-price and freight on the other.

The pleadings do not disclose where this agreement was entered into, where it was to be performed by the plaintiff, nor indeed that the plaintiff has ever performed its part of the agreement; nor where the defendant was to perform his part.

The ground of plaintiff's complaint, however, is the failure of defendant to return the money, and since the sufficiency of plaintiff's pleadings is not here called into question, I have to assume for the purposes of the present motion that there was an agreement entered into as alleged by the plaintiff, and that plaintiff has performed its part of that agreement. If this alleged agreement is silent as to the place of payment the plaintiff would then be entitled to invoke the rule that the debtor must seek the creditor and require the defendant to make pay-

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ment at Hoey in the Judicial District of Prince Albert. It is unnecessary upon this point to do more than refer to the decision of Lord Esher in *The "Eider,"* [1893] P. 119, at p. 131, 62 L.J. (P.) 65, and the decisions in *Sask. & Battle River Land & Devel. Co.* v. *Hunter* (1907), 1 S.L.R. 27, and *Gullivan* v. *Cantelon* (1907), 16 Man. L.R. 644.

The result is that wherever the agreement relied upon by plaintiff was made and wherever it was to be performed by plaintiff, the performance by defendant in the absence of any express agreement to the contrary would be at the domicile or place of business of the plaintiff. It is undoubtedly the failure of the defendant to perform which has given rise to the present action.

The defendant, however, says that alone is not sufficient to justify the plaintiff in bringing the action in the Judicial District of Prince Albert since the expression "cause of action" does not mean merely the particular act or omission of the defendant which gives the plaintiff its cause of complaint, but means and includes every material fact and circumstance which the plaintiff must aver and prove to give it a cause of action; and that since some of these necessary ingredients are material facts which did not arise or take place within the Judicial District of Prince Albert the plaintiff is not entitled to bring its action there but must bring it in the district where the defendant resides.

This particular point is one which has been the subject of a great deal of judicial controversy, both in England and in the other Provinces, but so far as Saskatchewan is concerned there appears to be but one pronouncement upon the subject, viz., *Western Canada Auto Tractor Co.* v. *Bjarnason*, [1920] 1 W.W. R. 621. In that case Ouseley, L.M., held, following the Ontario decisions, particularly that of *Noxon* v. *Holmes* (1875), 24 U.C.C.P. 541, that the expression "cause of action" meant the "whole cause of the action," and that unless all the material facts arose within the particular district, the action must be brought in the district where the defendant resides.

An examination of the authority referred to and of those upon which it is founded shews that the expression in question has been interpreted differently where the jurisdiction of a Superior Court is under consideration, and that it is given the wider meaning only in cases involving the jurisdiction of inferior Courts.

In *Buckley* v. *Hann* (1850), 5 Exch. 43, 155 E.R. 19, 19 L.J. (Ex.) 151, a section of the London Small Debts Act which provided that the summons might issue, "if the cause of action

arose therein," was held by Parke, B., to mean "whole cause of action."

In *Cooke* v. *Gill* (1873), L.R. 8 C.P. 107, 42 L.J. (C.P.) 98, 21 W.R. 334, the jurisdiction of the Lord Mayor's Court of London was in question. In that decision Brett, J., says, at p. 116:—

"Beyond question the Mayor's Court is a court of inferior jurisdiction. . . . . That being so, independently of the Act, every material fact must have arisen within the jurisdiction to entitle the Mayor's Court to entertain the suit. 'Cause of action,' has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed."

In *Payne* v. *Hogg*, [1900] 2 Q.B. 43, at p. 51, 69 L.J. (Q.B.) 579, 48 W.R. 417, a case involving the jurisdiction of the Salford Court, Smith, L.J., says:—

"In my opinion it is now well settled by authority that in the case of a Court whose jurisdiction is limited to a certain area an expression of this kind means that all the matters which go to make up the cause of action must have arisen within that area."

The leading case in Ontario is that of *Noxon* v. *Holmes*, 24 U.C.C.P. 541, in which the jurisdiction of the Division Court of that Province was called in question.

The authorities are extensively reviewed in that case, and the conclusion given by Hagarty, C.J., at pp. 547, 548, is as follows:—

"We must look on this as the case of a limited jurisdiction given by statute to an Inferior Court, and that is confined to cases where the cause of action arises in the jurisdiction. In such cases, it seems to me, that 'cause of action' means the 'whole cause of action' according to the authorities."

This decision has been followed in Ontario ever since and may be looked upon as settled there. *King* v. *Farrell* (1879), 8 P.R. (Ont.) 119. *Garland* v. *Omnium Securities Co.* (1883), 10 P.R. (Ont.) 135.

In Manitoba the same question arose in connection with the Country Courts Act of that Province in *Wright* v. *Arnold* (1889), 6 Man. L.R. 1, and the decision in *Noxon* v. *Holmes*, *supra*, was followed.

The remark of Killam, J., in that case is rather in point. He says, at p. 5:—

"Under the English County Courts Acts and the Ontario Division Courts Acts, upon which, clearly, our County Courts Act is modelled, the expression 'cause of action' had a well defined meaning, when it was first adopted in our County Courts Act. A different meaning had been given to the same expression

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in the Common Law Procedure Acts of England and Ontario. This less limited meaning might well be justified by the consideration that the Acts applied to Superior Courts, and by reference to the context and to the previous jurisdictions of those Courts."

It will be clearly seen from the above authorities that in every case where the expression "cause of action" has been given, the meaning which the defendant now seeks to attribute to it, the decision has turned upon the fact that the Court in which the action has been brought was an Inferior Court having jurisdiction confined to a certain local area.

A further examination of the authorities shews it to have been otherwise in the case of Courts of superior jurisdiction.

The law in England upon the point was finally settled by *Vaughan* v. *Weldon* (1874), L.R. 10 C.P. 47, 44 L.J. (C.P.) 64, 23 W.R. 138, which adopted the result of the decision in *Jackson* v. *Spittall* (1870), L.R. 5 C.P. 542, 39 L.J. (C.P.) 321, 18 W.R. 1162. In this decision the provisions of the English Common Law Procedure Act of 1852, ch. 76, were under consideration. Section 18 of that Act in dealing with personal actions against British subjects residing out of the jurisdiction provided:—

"It shall be lawful for the Court or Judge, upon being satisfied by Affidavit that there is a Cause of Action which arose within the Jurisdiction or in respect of the Breach of a Contract made within the Jurisdiction . . . to direct . . . that the Plaintiff shall be at liberty to proceed in the Action."

This, as I have said, is the case which settled the law in England. Some of the observations of Brett, J., L.R. 5 C.P., at p. 550, are in point:—

"It does not, therefore affect to give or to take away jurisdiction, but only to regulate process and practice and pleading *in cases already within the jurisdiction.*"

At p. 552:—"If the phrase 'a cause of action,' when applied to the second subsidiary phrase, does not mean the whole cause of action in the sense contended for, can it be properly said to have that sense when applied to the first subsidiary phrase? . . . Is not the natural reading rather this, that it means the same thing when applied to both? It is that which in popular meaning, —for many purposes in legal meaning,—is 'the cause of action,' viz., the act on the part of the defendant which gives the plaintiff his cause of complaint."

Again on the same page:—

"If the construction contended for by the defendant be admitted, the statute which is intended to apply only to the

simplification of process and practice, is made to apply to jurisdiction."

An interesting decision upon this very vexed question is found in *Durham* v. *Spence* (1870), L.R. 6 Ex. 46, 40 L.J. (Ex.) 3, 19 W.R. 162. In that case the Court divided, two of the Judges holding that "cause of action" meant the act or omission constituting the violation of duty complained of and not the whole cause of action; and two that it meant "the whole cause of action." This decision is prior to that of *Vaughan* v. *Weldon* L.R. 10 C.P. 47, but it is instructive upon the interpretation of the phrase in question. Kelly, C.B., L.R. 6 Ex., at p. 50, says:—

"Of itself, the act or omission, the non-payment, non-acceptance, or non-delivery, does not constitute a cause of action; what makes it such, that without which it would have no legal quality at all, is the contract that the person whose default is complained of, should pay, accept, or deliver. To make up a cause of action, therefore, it is necessary to import the preceding contract; and the cause of action can only be said, to arise where both parts of it take place."

Cleasby, B., at p. 52, takes the opposite view, where he says:—

"The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises. I cannot avoid the conclusion that a cause of action arises where that takes place which first makes a cause of action; the contract does not make a cause of action; but a cause of action does arise when and where the person who has entered into the contract does or omits to do that which gives a cause of action. But the whole cause of action in the sense which makes it include both the contract and the breach arises nowhere."

The words of the English Common Law Procedure Act referred to were reproduced in the Ontario Common Law Procedure Act and the question came up for decision in *O'Donohoe* v. *Wiley* (1878), 43 U.C.Q.B. 350, in which *Vaughan* v. *Weldon, supra,* was followed.

In Manitoba the same result was arrived at in *Bradley* v. *McLeish* (1883), 1 Man. L.R. 103.

It will be observed that in none of the cases last referred to was there any question of the local jurisdiction of a Court as in the former line of decisions.

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Section 34 of the King's Bench Act, 1915, ch. 10 (now R.S.S. 1920, ch. 39, sec. 35) provides that:—

"Actions shall be entered and unless otherwise ordered tried in the judicial district where the cause of action arose or in which the defendant or one of several defendants resides or carries on business at the time the action is brought."

This section is a re-enactment of the Supreme Court Act, R.S.S. 1909, ch. 52, sec. 41, which in turn re-enacted an exactly similar provision of the old Judicature Ordinance, Con.Ord., 1898, ch. 21, sec. 4.

The District Courts Act, R.S.S. 1909, ch. 53, sec. 29 (now R.S.S. 1920, ch. 40, sec. 29) contains an exactly similar provision as regards actions in the District Court.

The wording of these sections is for all practical purposes identical with that of the Ontario Division Court Act under which *Noxon* v. *Holmes*, 24 U.C.C.P. 541, was decided. See the decision of Hagarty, C.J., at p. 542.

The difficulty which arises in construing the words of the section now in question with reference to other Acts *in pari materia* is that these other Acts although dealing with a similar subject are themselves much less wide in scope than the Act under consideration.

Thus the District Courts Act, R.S.S. 1909, ch. 53, sec. 5, provides that "There is hereby constituted and established in and for each . . judicial district a court . . to be called 'The District Court . . '"

The jurisdiction of the Court so established is limited territorially by the boundaries of the particular district for which it is established.

No such limitation exists in the case of the Court of King's Bench. The King's Bench Act, 1915 (Sask.), ch. 10, sec. 4 (now R.S.S. 1920, ch. 39, sec. 3) provides that "there is hereby established in and for the Province of Saskatchewan a superior court of record, etc."

The jurisdiction of the Court of King's Bench therefore extends to every part of Saskatchewan and by sec. 15 of the Act the Judges of that Court are expressly given jurisdiction throughout the Province.

It is evident then that the case of *Noxon* v. *Holmes, supra*, and the other decisions to the like effect, all of which define the expression "cause of action" with reference solely to its use in connection with Courts of inferior jurisdiction, and which give it the particular meaning assigned to it expressly by reason of the limited authority of such Courts, are not safe

guides to follow in cases where the question of jurisdiction does not arise.

So far as the Court of King's Bench is concerned, the question is palpably one merely of procedure and not of jurisdiction.

While some stress might be laid upon the analogy between the wording of this section and the section of the District Courts Act, I think we must look rather to the history of the section in question.

At the time this action was incorporated into the old Judicature Ordinance the meaning of the expression had been definitely fixed by the Courts of England and the other Provinces both as to superior as well as to inferior jurisdictions. The old Supreme Court of the North-West Territories which was the Court having jurisdiction under this ordinance was a Court possessing superior jurisdiction and there is no reason to believe that notwithstanding the similarity between the section of the Ordinance and the Ontario Division Court Act, the expression in question as applied to the former Court would not have been given the same meaning as had been finally decided upon in the Superior Courts of England and Ontario under the Common Law Procedure Acts.

Since the question is merely one of procedure and not one affecting the jurisdiction of the Court, it appears to me that the construction to be placed upon the expression is that adopted in *Vaughan* v. *Weldon*, L.R. 10 C.P. 47.

The words of Cleasby, B., in *Durham* v. *Spence*, L.R. 6 Ex. 46, seem appropriate. He says, at p. 52.

"I agree . . that some inconvenient consequences may arise from our so holding; but, on the other hand, if a man enters into a contract which is to be performed in England, he by his own act subjects himself to the difficulty, and can scarcely complain if he is sued for his default in the place where he has said performance shall be made."

I very much question whether in any event the defendant would be entitled to bring the present motion after having appeared and pleaded in the action; *Pinki* v. *Western Pkg. Co.* (1904), 7 Terr. L.R. 200.

I prefer to rest my decision upon what I believe to be the true meaning of the expression "cause of action" as applied to actions in the Court of King's Bench, viz., that the cause of action arises when and where the person who has entered into the contract does or omits to do that which gives rise to the right to bring the action.

For this reason I hold that the action was properly brought in this Judicial District, and the defendant's motion will therefore be dismissed. Costs to be costs to plaintiff in any event.

Motion dismissed.

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STEFFES v. SMITH.

Alberta Supreme Court, Appellate Division, Stuart, Hyndman and Clarke, JJ.A. December 21, 1921.

LANDLORD AND TENANT (§IIB—10)—LEASE OF FARM LAND—COVENANT TO PUT INTO CROP OR SUMMER-FALLOW—"CROP" INCLUDING "GREEN CROP"—BREACH OF COVENANT—LIABILITY.

Under the terms of a lease the lessee agreed that he would in each year of the term "either put to crop or summer-fallow . . . . every portion of the demised premises which has been or shall hereafter be brought under cultivation . . . ." There were 30 acres which were brought under cultivation which the defendant failed to crop or summer-fallow. According to the evidence of the lessor a crop of green feed could have been grown on this 30 acres. The Court held, reversing the trial Judge, that the word "crop" in the lease included a green crop, and not merely a grain crop, and that if the lessee did not choose to crop he must summer-fallow.

APPEAL from the trial judgment in an action for breach of covenants in a lease from the plaintiffs to the defendants. Reversed.

John Cormack, K.C., for appellants.

C. F. Newell, K.C., for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—This is an appeal from the judgment of Scott, J. (now Chief Justice), determining the proportion of the grain in the elevators to which each party is entitled, and awarding the plaintiff $838 for breach by the defendant of covenants in the lease from the plaintiffs to the defendant and awarding the defendant $1,278.02 in respect of his counterclaim.

I agree in the finding as to the rights of the parties in the grain and that plaintiffs have no further claim in respect of the matters complained of in paras. 5 (h) and (l) of the statement of claim.

If the matter were before me in the first instance, I would perhaps have been inclined to allow the plaintiffs some damages under 5 (l) on account of the defendant's wrongful act in storing the grain in the elevator in the names of both parties in violation of the terms of the lease which interfered to some extent with the facility for marketing the plaintiffs' share of the grain. They acted promptly in bringing the action on October 22, 1920, within a week after the last of the grain was put in the elevator, but it does not clearly appear that they would have sold before the drop in prices, and in any event it was quite competent to either party in the action to apply to a Judge under Rule 485 for an immediate sale of the grain, if there was reason to fear a fall in prices and it is reasonable to suppose such an order would have been made as to prevent a loss from delay. The proceeds could have been impounded in lieu of the grain and the rights of both parties fully protected.

There is no appeal in respect of the amount allowed to the plaintiffs for hay, viz., $16, nor in respect of the sum of $822, found by the award of arbitrators in respect of the matters referred to them. I think the plaintiffs are entitled to damages in respect of the matters referred to in paras. 5 (a) and (aa), which were disallowed by the trial Judge, upon the following facts:

Under the terms of the lease the defendant agreed that he would in each year of the term "either put to crop or summer fallow in a good husbandlike and proper manner every portion of the demised premises which has been or shall hereafter be brought under cultivation, the summer-fallow to be plowed between June 15 and July 5 in each year," and also that he would use his best and earnest endeavours to rid the demised premises of Canada thistle, French weed, Russian thistle, Tumble weed, wild mustard and all other noxious weeds.

Admittedly, there were 30 acres which had been brought under cultivation, which the defendant failed to crop or summer-fallow, the reason therefor given by the defendant in his statement of defence being that owing to the wet season the land was covered with water and continued so to be during the whole of the spring and summer of 1920.

According to the evidence of the plaintiff, Alva Steffes, a crop of green feed could have been grown on the 30 acres, and the season being favourable for such a crop his third share would have realised at least $300.

During the course of his evidence the trial Judge dismissed the plaintiffs' claim under this head, saying:

"I hold, upon the evidence of the plaintiff, that the plaintiffs are not entitled to any damages under sub-paragraphs A and Aa, as it was shewn that the thirty acres referred to therein could not have been put into a grain crop and that is the only kind of crop that the defendant was bount to put in, neither was the defendant bound to summer-fallow."

With deference, I think this is not the proper conclusion, assuming that the crop was confined to a grain crop. I see no reason why the defendant was absolved from his covenant to summer-fallow. He was bound to do one or the other. If, for any reason, he could not or did not choose to crop, he could fulfil his covenant by summer-fallowing, the evidence does not disclose any reason why this could not be done, and I think he was bound to do it. Besides, I think the judgment puts too narrow an interpretation upon the word "crop" and that within the meaning of the covenant in the lease it includes a green crop.

In Murray's English Dictionary the following definitions are

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given:—"8. The annual produce of plants cultivated or preserved for food exp. that of the cereals, the produce of the land."

"9. With qualification or contextual specification. The yield or produce of some particular cereal or other plant in a single season or in a particular locality."

"The annual or season's yield of any natural product."

"verb: to cause to bear a crop, to sow, or plant with a crop."

See also definitions given under "crop" in "Words and Phrases Judicially Defined, 1904, vol. 2, p. 1755."

So far as the context affects the interpretation, it favours the plaintiffs' view.

One covenant requires the defendant to disc and harrow the green feed ground. There is also a provision that the plaintiffs are to receive "one-third share of the whole of the different kinds and qualities which—except timothy which shall be divided equally in stock—shall be grown upon the demised premises."

It clearly appears, I think, from these provisions in the lease that both "green feed" and "timothy" come under the heading of "crops" for, if not, under the main covenant, they could not be grown at all, which would lead to contradiction.

I would hold that the plaintiffs are entitled to damages under this branch of their claim and it is unfortunate it was not referred to arbitration with the other matters so referred.

It is difficult to assess these damages. If the plaintiffs' one-third share of a crop of green feed were taken as the measure $300 would be, upon the evidence, not unreasonable, but the defendant was not bound to put in a crop. He could have summer-fallowed instead, and he is not liable for more than the plaintiffs would have profited by the summer-fallowing. Again, the cost of summer-fallowing is to be considered. It may be, too, there is some loss to the plaintiffs by reason of weeds being allowed to spread by reason of the land not being cultivated at all. Under the circumstances, I would allow the plaintiffs $150 for damages under this head.

But, as from the course the matters took at the trial, the plaintiffs probably had further evidence and the defendant offered no evidence on this claim, not being called upon to do so. I think either party has the right to have a reference on this branch of the case, if so desired.

Regarding the counterclaim, I would not interfere with the allowance to the defendant of the item of $42.50.

The other item in the counterclaim in respect of which the trial Judge allowed the defendant $1,235.52 is based upon a claim that the plaintiffs forbade the elevator company to permit

the defendant to sell his share of the grain threshed upon the leased land.

In my opinion, this claim cannot be sustained. Whatever loss he may have sustained is attributable to his own wrong. By the terms of the lease he was required to deliver the plaintiffs' share in the name of the lessors, and if delivery made at an elevator, it should be made by having the grain tickets made out in the name of and in favour of the plaintiffs and delivering the same to them. At the delivery of the first load of oats on or about October 7, the elevator was directed by the plaintiff's son to store them in special bins in the names of Smith and Steffes. One of the plaintiffs, learning of this, asked the elevator man to have one-third stored in the name of the plaintiffs. The latter called the defendant by telephone about this request and the defendant said to put it in Smith & Steffes' name. Later, after the delivery of about 20 loads, the defendant procured the tickets for the oats already delivered, as well as those for later delivery, to be marked 2/3 Smith, 1/3 Steffes. This was in direct violation of the agreement, and it is difficult to understand why defendant persisted in this course. It was also wrong in indicating that defendant was entitled to 2/3 of the oats stored because the defendant had retained 1,037 bushels of oats, which I find included the load sold to the livery stable, out of his share, which would reduce his share in the elevator to less than 2/3.

On or about October 19, after the grain was all hauled, the parties met at the elevator and discussed a division. There was no objection made by the plaintiffs to a division of the barley, which had been graded and placed in bulk. The defendant desired to divide the oats which had not been graded and were special binned. There would have been no difficulty about this if the oats were of one grade, making allowance for the quantity not delivered to the elevator, but being of 3 different grades, the plaintiffs were unwilling to divide them till graded, which, in their situation, could only be done by a government inspector, and the elevator man agrees that no proper division, giving both parties their proper proportions of each grade, could otherwise be had. Plaintiffs were willing to have the bulk shipped to the terminal elevator, to which defendant had already, without plaintiffs' knowledge or consent, shipped one carload so that they could be graded and divided, but defendant would not consent to this. The following day, one of the plaintiffs and the elevator man went to the farm to inspect the grain in the granary and still being unable to agree, the plaintiffs gave the notice complained of by the defendant, being a letter dated October 20, to the elevator company, stating that the grain or the proceeds

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must not be parted with in any way without the plaintiffs' consent. I cannot see how this can create any liability upon the plaintiffs. By the act of the defendant the grain was held for the parties in common and neither one had the right to dispose of any of it without the consent of the other, so that the letter only claimed what was the plaintiffs' right. Moreover, it does not appear that the letter was acted upon by the elevator company, which paid over to the defendant after receipt of the notice, the proceeds of the first car sold at a high price, at Fort William. Properly, this should not have been done, and if insisted upon, the defendant should have been held to account for this carload at the prices obtained.

The defendant also says in his evidence, in answer to the question "Do you mean to say you did not think their consent was necessary? A. Well, Mr. O'Brien (the elevator man) said 'If you want to ship it we will ship it.' I did not place much stress on the letter and that is why it was done . . ."

The defendant never asked the plaintiffs to consent to a sale of the grain or to it being shipped, but in December the balance, making three carloads, was shipped out, which the elevator man says was as soon as cars could be obtained. The grain was graded at Winnipeg or Fort William but the defendant gave the plaintiffs no notice of this or even suggested they should join in making a sale.

From the evidence, I see no reason to think that the plaintiffs would not have joined in any reasonable arrangement to ship out the grain and have it graded and sold, and the proceeds properly apportioned. They did all they could do by immediately, on October 22, commencing this action, in which it was open to the defendant as well as the plaintiffs, to apply to a Judge for an order which would have fully protected both parties.

In the result, I would vary the judgment below in the following respects:—1. Increase the amount which the plaintiffs are entitled to recover from the defendant by $150, making a total of $988 instead of $838. 2. Reduce the amount awarded to the defendant on his counterclaim from $1,278.02 to $42.50. 3. Give the plaintiffs the costs of the counterclaim as well as of the action.

The defendant succeeds as to $42.50. I cannot see that he has incurred any appreciable costs in respect of that item.

But if either party desires a reference as to the claims under paras. 5 (a) and (aa) of the statement of claim, he may have it by filing with the clerk and serving the solicitors of the opposite party with a notice to that effect within 2 weeks after

the delivery of this judgment, in which case the reference will be to the Clerk at Edmonton (Mr. Wallace), unless the parties otherwise agree, and the amount awarded to the plaintiffs upon the reference will be added to his present judgment intead of the $150 above mentioned. The costs of the reference to be as follows unless otherwise directed by a Judge of the Supreme Court, to the plaintiffs if the amount awarded be over $150; to the defendant if under $150. If exactly $150 awarded, the costs to be borne by the party asking the reference.

The amount allowed upon the counterclaim ($42.50) and any costs the defendant may be entitled to upon the reference to be set off against the plaintiffs' judgment.

The money in Court to be paid out to the plaintiffs and applied on their judgment.

In other respects the judgment will be affirmed.

The plaintiffs to have the costs of the appeal.

Judgment accordingly.

WESTERN CANADA INVESTMENT Co. v. McDIARMID.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. January 16, 1922.

VENDOR AND PURCHASER (§ IC—13a)—AGREEMENT TO PURCHASE LAND—COVENANT TO GIVE DEED IN FEE SIMPLE—RIGHT OF PURCHASER TO CERTIFICATE OF TITLE FREE FROM CAVEAT—INABILITY OF VENDOR TO GIVE CLEAR TITLE—RIGHT OF PURCHASER TO REFUSE TO MAKE PAYMENTS.

An agreement for the sale and purchase of land provided that the purchaser, upon payment of the purchase money and the performance of the covenants therein contained "shall be entitled to a deed or patent conveying the said land in fee simple or a transfer if the land is under the Real Property Act." The Court held that, the purchaser was entitled to a certificate of title clear of endorsement either of executions, mortgages or caveats, and inability of the owners to convey the land free from a caveat filed to protect certain building restrictions imposed, and of which the purchaser had no notice, justifies the purchaser in refusing to complete payments. By reselling the lots to a third party the purchaser does not assume such rights of ownership as disentitle him to object to the title. Purchasers of the owner's interest in such land, who become registered owners of the land, subsequently to the agreement for sale and with full knowledge of it, stand in exactly the same position as the original owner.

APPEAL by defendant from the trial judgment in an action claiming the entire balance of purchase-money and interest, alleged to be due and owing under an agreement for the sale and purchase of land. Reversed.

J. F. Frame, K.C., for appellant; *P. H. Gordon*, for respondent.

The judgment of the Court was delivered by

LAMONT, J.A.:—By an agreement bearing date December 30, 1912, the defendant purchased lots 34 and 35 in block 3, parish

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of St. James, in the city of Winnipeg, from one McDonald for $1,900, payable $634 cash, and the balance in two equal instalments on January 2, 1914, and January 2, 1915. The defendant made the cash payment. On June 10, 1913, the defendant resold the lots to one Cooper under agreement of sale. On July 10, 1913, McDonald assigned his interest under the agreement to the plaintiffs, and transferred to them the said lots, and on July 16, 1913, the plaintiffs obtained a certificate of title, but subject to a caveat filed by one McLaughlin, to protect certain building restrictions imposed, respecting these lots among others. On August 5, 1913, the plaintiffs secured from the defendant an acknowledgment that there was then due or accruing due from him under the said agreement of sale the sum of $1,266, together with interest thereon at 6% from January 2, 1913. In said acknowledgment the defendant further admitted having received notice of the assignment of the interest of the said McDonald to the plaintiffs, and he covenanted and agreed to pay to the plaintiffs the said sum of $1,266 and interest.

On January 13, 1915, Cooper paid the plaintiffs $100 in respect of his purchase from the defendant. Nothing more appears to have been done until this action was brought.

The plaintiffs claim for the entire balance of purchase money and interest. They allege that they are the registered owners of the lots in question, but they do not aver a readiness and willingness to convey. The defendant resists payment on the ground that the plaintiffs are unable to give him a clear title to the lots, as called for by his agreement.

The agreement provides that the defendant, upon payment of the purchase money and the performance of the covenants therein contained, "shall be entitled to a deed or patent conveying the said land in fee simple, or a transfer if the property is under the Real Property Act, subject to the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown, reserving all mines, minerals, coal or other valuable stone in or under the said land."

The caveat does not come within any of the reservations or conditions to which the title is by this provision made subject.

The plaintiffs do not pretend that they can give title freed from the caveat, but they claim that the defendant cannot now take any objections to the title which they possess, because:

1. The agreement contains the following provision: "The said purchaser hereby accepts title to the said land"; 2. He waived his right to object to title by assuming rights of ownership over the lots in reselling them to Cooper; and 3. He is now estopped from objecting to the plaintiffs' title because in the acknowledg-

ment of August 5 he promised to pay the balance of the purchase monies to them.

The question to be determined is: Can the defendant under the above circumstances be compelled to pay, although the plaintiffs cannot give him a title freed from the caveat?

The plaintiffs having become the registered owners of the lots subsequent to the defendant's agreement and with full knowledge thereof, stand towards the defendant in exactly the same position that McDonald had done.

As far back as *Taylor* v. *Stibbert* (1794), 2 Ves. 437, 30 E.R. 713, Lord Chancellor Loughborough, speaking of a purchaser taking an estate with notice of a prior right, said, at p. 439: "The rule that affects the purchaser is just as plain as that, which would entitle the plaintiff to a specific performance against *Wood*: if he is a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that, which the person, he represents, would be bound to do."

The same principle has been laid down in the following cases: *Greaves* v. *Tofield* (1880), 14 Ch. D. 563, at p. 577, 50 L.J. (Ch.) 118, 28 W.R. 840; *Strathy* v. *Stephens* (1913), 15 D.L.R. 125, 29 O.L.R. 383; and *Campbell* v. *Barrett & McCormick* (1914), 32 O.L.R. 157.

The plaintiffs then become entitled to all the benefits which the agreement conferred on McDonald, but at the same time they became subject to all the obligations which it imposed upon him. One of the obligations which the agreement imposed upon McDonald was, that he would convey the land to the defendant in fee simple upon payment of the purchase money. That this carries with it an obligation to give him a title freed from the caveat, is, in my opinion, clear. I agree with the language of Haultain, C.J., in *C.N.R.* v. *Peterson* (1914), 6 W.W.R. 1194, where he said at p. 1195:—"If I undertake to give a clear title to somebody else, that clear title under our system means, a certificate of title clear of anything in the way of endorsement either of executions, mortgages, or caveats, or any other thing that is an 'encumbrance.'"

Except, of course, caveats or incumbrances for which the purchaser himself is responsible. *C.N.R.* v. *Peterson* (in appeal) (1914), 7 S.L.R. 166.

The building restrictions imposed upon the title and protected by the caveat constitute an equitable interest in the lots in favour of others, which interest existed prior to the defendant's agreement.

In *Re Hunt and Bell* (1915), 24 D.L.R. 590 at p. 591, 34 O.L.R. 256, Garrow, J.A., says:—

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"The nature and effect of restrictive covenants have been under consideration in many recent cases. One of the latest is *London County Council* v. *Allen*, [1914] 3 K.B. 642, where such a covenant is spoken of as creating something in the nature of a negative easement, requiring for its creation and continuance a dominant and a servient tenement as in the case of ordinary easements; or, as put by Scrutton, J., at p. 672, it is 'an equitable interest analogous to a negative easement.' See also *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, and, in appeal, [1906] 1 Ch. 386; *Milbourn* v. *Lyons*, [1914] 1 Ch. 34, and, in appeal, [1914] 2 Ch. 231."

The title which the plaintiffs possess being subject to the caveat is, therefore, not the title to which the defendant is entitled under the agreement.

In the absence of an ability on the part of the plaintiffs to deliver the title called for by the agreement, they cannot recover the balance of the purchase monies unless the defendant has accepted such title as they have, or has waived his right to object to that title, or is otherwise estopped from denying that it is the title he was to get.

The provision in the agreement that "the purchaser accepts the title to the said land" has received judicial consideration in a number of cases, and the rule adopted is that which was laid down by the Master of Rolls in *Bousfield* v. *Hodges* (1863), 33 Beav. 90, at p. 94, 55 E.R. 300, as follows:—

"As to the acceptance of the title, I assent to this proposition:—that a purchaser is only bound by his acceptance of the title, so far as he is made cognizant of it, and that if anything is kept back by the vendor, he is not, as to that, bound by his acceptance."

See *In re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666, 70 L.J. (Ch.) 811, 50 W.R. 20; and *Strickee* v. *Ruckeman* (1914), 7 S.L.R. 371, where Elwood, J., has collected the principal authorities.

The defendant in the case at Bar had no knowledge whatever that building restrictions attached to the lots, or that the rights thereunder had been protected by a caveat. He is therefore not precluded by his acceptance of title from requiring the removal of the caveat before he can be called upon to pay.

The next question is: Did the defendant waive his right to object to the title?

Waiver implies the abandonment of some right that can be exercised, or to renouncement of some benefit or advantage which, but for such waiver, the party relinquishing would have

enjoyed. 40 Cyc. 258; *Crump* v. *McNeill* (1918), 14 Alta. L. R. 206.

To constitute waiver, two essential prerequisites are in general necessary. There must be knowledge of the existence of the right or privilege relinquished and of the possessor's right to enjoy it, and there must be a clear intention of foregoing the exercise of such right.

As applied to the facts of this case, the contention on behalf of the plaintiffs that the defendant by reselling to Cooper exercised rights of ownership over the lots which constitutes a waiver by him of his right to a clear title, simply means that by reselling the defendant impliedly agreed that he would accept a defective title. I fail to see how any such implication can arise in face of the fact that he had no knowledge that the title was defective. It is conceivable that in certain specific cases the exercise of rights of ownership would bind a purchaser to take a defective title where the defect was not known to him, but such rights would have to be the equivalent of a declaration that he had taken the property as it stood, and was taking a chance on the title being clear. Fry on Specific Performance, 6th ed., at p. 621.

This principle, however, in my opinion, could have no application where a purchaser does not assume any risk of title, but has taken the precaution to obtain an express covenant for good title, upon which he relies. I am therefore of opinion that the defendant, by reselling the lots to Cooper, did not preclude himself from insisting upon a clear title.

Then, is the defendant estopped by his acknowledgment of August 5? I do not think that he is. The principle upon which the doctrine of estoppel is founded is, that a person having represented a certain set of facts to exist, cannot be permitted to deny any fact which he has so asserted. In his acknowledgment the defendant did declare that there was due or accruing due the sum of $1,266, and he covenanted to pay this amount to the plaintiffs. Prior to the time that he did so, however, the plaintiffs had become the registered owners of the lots and had all the beneficial interest of McDonald under the agreement. They did not in any way alter their position by reason of the defendant's acknowledgment, and they knew when they obtained it that their certificate of title was subject to the caveat. They further knew that the defendant's obligation to pay the balance of the purchase money under the agreement was conditional upon their ability to give him a clear title. Knowing that the defendant's covenant to pay contained in the agreement was effective only if they could produce title, the obtaining of a

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further covenant to pay by the plaintiffs in the acknowledgment, cannot, in my opinion, relieve them from the obligation of making title. The plaintiffs not being able to make title, cannot succeed.

The appeal should be allowed with costs, the judgment below set aside, and judgment entered for the defendant with costs.

Appeal allowed.

CUMMINGS GRAIN Co. v. BUTCHER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 23, 1921.

CONTRACTS (§ID—51)—SALE OF GRAIN—OFFER—ACCEPTANCE—MUTUALITY.

Where in a negotiation for the sale of grain the seller says, "I undertake to let you have two cars, and I may be able to let you have three cars," the buyer is not entitled to bind the seller to the delivery of three cars, and where he attempts to do so and the seller dissents, there is no contract even for two cars.

APPEAL by defendant from the trial judgment in an action for damages for failure to deliver grain under an alleged contract. Reversed.

C. H. Russell, for appellant.

W. P. Taylor, for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—This is an appeal by the defendant from the judgment of McCarthy, J., at the trial.

There is a claim for a balance of $25 as an over-payment on certain previous grain transactions. This item was admitted in the defence.

The substantial matter is a claim for damages for non-delivery of grain under an alleged contract. The trial Judge gave judgment for the plaintiff, calculating the damages at $1,001.08.

The parties, as I have said, had had dealings in grain previous to the alleged contract.

On March 8, 1920, the defendant telegraphed from Wetaskiwin to the plaintiff company at Calgary as follows:—"One car completed two tomorrow for Saskatoon. Wire quotations three cars Duhamel New Norway."

The parties had been dealing in oats. This telegram referred to oats. The first part refers to transactions which are not in question. Duhamel and New Norway were two separate railway shipping points from which the defendant had been shipping oats to the plaintiff, billed in some cases to Fort William, and in others to Saskatoon. The plaintiff company on the same day answered the defendant's telegram as follows:—"Give 89¼ three cars Duhamel New Norway basis 2 C. W. Spot strong but premiums less. Quick answer."

The meaning of "basis 2 C. W." is that the price was for oats of the grade "2 Canada Western"; that if the oats graded higher than 2 C. W. a higher price would be paid for them, and if they graded lower a lower price. The words following were an expression of opinion by the plaintiff company as to the state of the market.

On the same day the defendant telegraphed the plaintiff company as follows:—"Accept your quotation on two to three cars Duhamel or New Norway. Mail shipping instructions."

On the copy of this telegram in the hands of the plaintiff company there was stamped, on March 9, the words:—"Contract 3 cars. Dated Mch 8-20. Mailed Mch 9", initialed "E. M. W." by E. M. Walbridge, a grain buyer for the plaintiff company.

The controversy between the parties turns upon the meaning and effect of the words "two or three." The plaintiff company, as indicated, claim that there is a binding contract for three cars. The defendant claims that there was no binding contract at all, or if there was, it was for two cars at most.

The notation "mailed Mch. 9" was meant to refer to a letter and enclosure sent by the plaintiff company on that date to the defendant. The letter and enclosure, so far as their terms are material, are as follows:—

"March 9th, 1920.

Your telegram accepting our bid on three cars oats just arrived this morning and we made your contract and herewith enclose same, being 89¼c. per bushel net loading track basis 2 C. W. oats.

We think you did a good thing in accepting this as the market to-day declined considerable and the best price we could pay to-day would be 88c. your track. The market closed very weak and looks at present that it may go lower."

Enclosure.

"Purchase note made out by licensed track buyer.

Bittern Lake Station, March 8, 1920.

Cummings Grain Company, Ltd., Calgary.

I have this day bought from C. S. Butcher..initial letter.. three cars no.....containing 5,400 bushels oats (more or less) net track Duhamel or at 89¼ cents per bushel basis 2 C. W.. in store Fort William or New Norway Port Arthur, weight and grade guaranteed by seller. Receipt of bill of lading for same properly endorsed by the consignor is hereby acknowledged.

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~~I have made an advance to Mr.~~
~~I have issued an order to paying agent to advance~~ Mr. .....

.....$.....~~on this car~~, the balance to be paid by .....
immediately upon receipt of weight and grade certificates and railroad expense bill.

The spread between grades is to be governed by that existing on day of inspection, and this rule shall also apply to commercial grades.

Remarks: Shipment to us Saskatoon soon as cars procurable. Make all drafts on us Calgary Documents Att.

E. M. Walbridge, buyer.

(Accepted, also received payment of advance $.....)

Seller."

The plaintiff company wrote the defendant again on March 12, and after referring to previous transactions said with respect to the transaction now in question:—

"Please advise if you have any of the other three cars loaded and if you should advise us immediately that these were loaded with a higher draft, so as not to make an overdraft against this, we will take care of your drafts. Please do not make your drafts quite so heavy in future until the official documents are to hand."

The defendant did not reply in writing to either of these letters.

The next communication between the parties was a telephone conversation between the defendant and Walbridge. The defendant gives the following account of it:—

"Q. Mr. Walbridge in his evidence referred to a telephone conversation some time prior to April 26, do you remember that? A. Yes, Mr. Walbridge called me up one evening, I would say about 7 o'clock probably, and this was prior, in connection with the draft, did you say?

Q. In connection with anything.

Mr. Taylor: The 26th of April you are referring to?

Witness: That would be prior to the time the car was shipped.

Q. Mr. Russell: Tell us about the conversation which took place with Mr. Walbridge which he talks about in his letter dated April 26. A. Mr. Walbridge called me up about, sometime in the evening, and he said 'How about those oats, Butcher, when are you getting them out?' I referred again to having written them and owing to having the 'flu.' that there had been considerable delay, but I told Mr. Walbridge then that I had

storage tickets on the elevator at Duhamel because I was short a few hundred bushels.

Q. Why were you short? A. It was caused simply, I didn't have any more tickets and the storage tickets being on the elevator, to fill a car it would have been necessary to have pulled out, to have loaded the oats from the elevator and then pulled it up to a platform, and loaded it with a farmer's oats to fill it up. I didn't wish to do that on account of liability to spoil the grade.

Q. What? A. Because it would spoil the grade, Mr. Walbridge said, 'You had better ship out what oats you have, Butcher, get them under way.' I told him this car was short and he said 'Well, you had better get those oats under way and get this one car out,' and so I said, 'I will,' and he said 'How about the other two cars?' Well, I said, 'There are not two cars due you to the best of my knowledge, Mr. Walbridge, I have only one more car.' He said, 'We have got you booked for three cars.' I said, 'Mr. Walbridge, I never signed any contract to that effect. My wire was two to three cars and I think two cars let me out and I will furnish the other car as soon as I can get to it.' That was all that was said in connection with it at that time."

Walbridge does not explicitly deny this conversation, though one may infer that had he been asked about it he would have done so; but I think the plaintiff's story must be accepted.

Following this conversation there was correspondence as follows:—

Letter plaintiff Co. to defendant, 26th April, 1920.

"We phoned you sometime ago re loading out 3 cars of oats Duhamel or New Norway purchased of you by telegraph on March 8. You stated at that time that one car would go out right away and the others soon. Now we would like you to hurry out these shipments as you understand we sold these oats the day we bought them and while we gave you plenty of time in which to load, still our buyers are after us to get these oats out and they should be delivered before May 10.

Originally, they should have been loaded before the 5th, and we trust you will be able to get them right out, or it will be necessary for us to buy in three cars of oats to fill your sales as well as the people who purchased from us.

Please hurry out your first car that you mentioned before and the others just as quickly as possible and keep us advised as to progress. Wire us for shipping instructions also as cars are loaded."

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Beck, J.A.

Telegram defendant to plaintiff company.

"Apl. 26-20.

Will load car 2 C. W. oats Duhamel Tuesday if any change in shipping instructions wire."

Telegram plaintiff company to defendant.

"April 27-20.

Bill oats to Calgary sure."

Letter defendant to plaintiff company, 28th Apl. 20.

"Re G.T.P. 307247 Ex Duhamel to Calgary today.

This is an extra good car of oats and should pass for seed."

The receipt of this was acknowledged by a letter which raised a dispute about the amount of the draft.

Throughout, the plaintiff company took the position that the defendant had made a contract with them for the delivery of 3 cars. It is clear, from what took place between the parties, that this is so only if that is the legal effect of the 3 telegrams, and the one letter as follows:—

(1) Defendant to plaintiff: "Wire quotations three cars." (2) Plaintiff to defendant: "Give 89¼ three cars basis 2 C.W." (3) Defendant to plaintiff: "Accept your quotation on 2 or 3 cars." (4) "Your telegram accepting our bid on three cars oats just arrived this morning and we made your contract and herewith enclose same being 89¼c. per bushel net loading track, basis 2 C. W. oats."

What is the proper interpretation to be put upon this correspondence? In my opinion telegram (3) was not an acceptance by the defendant of an offer by the plaintiff company; for the plaintiff's quotation was for 3 cars—neither more nor less; and it might well be that the company was not prepared to buy either less or more than three cars. Telegram (3) was an offer by the defendant to sell to the plaintiff company 2 or 3 cars on the basis of the price quoted by the plaintiff company for 3 cars.

Was the true sense of the offer:—"I offer to sell you either 2 or 3 cars as you choose," leaving the plaintiff company to accept the offer to the extent of either 2 or 3 cars? or was it "I am not sure whether I can procure more than 2 cars, (for the plaintiff company knew the defendant was buying from farmers for sale to dealers); I undertake to let you have 2 cars and I may be able to let you have 3 cars"?

Every contract must be interpreted with due regard to the surrounding facts and circumstances. In view especially of the fact which I have stated in parenthesis, I think the latter interpretation is the correct one, though one may perhaps have some hesitation in coming to a conclusion.

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The decisions which come nearest to being of assistance are cited in that most useful work, to which I have had occasion many times to refer, Williston's Sales of Goods, pp. 801-2, where English and Ontario cases are cited.

If this conclusion is correct, it follows that the plaintiff company was not entitled to bind the defendant to the delivery of 3 cars. Having attempted to do so and the defendant having dissented, there was no contract, even for 2 cars. If the defendant became bound to deliver 2 cars it must be by reason of subsequent negotiations, and I can find nothing in the evidence to justify such a conclusion.

In my opinion, therefore, the plaintiff had no cause of action against the defendant except for the $25—which was admitted and which doubtless would have been paid if asked for. I would, therefore, allow the appeal with costs and dismiss the plaintiff's action with costs, except as to the claim of $25, in respect of which I would allow no costs.

Appeal allowed.

NORTH AMERICAN FINANCE Co. v. WESTERN ELEVATOR Co.

Manitoba King's Bench, Galt, J. March 22, 1922.

ESTOPPEL (§IIIE—71)—AGENT HAVING AUTHORITY TO SELL TO ELEVATOR—NEW AGREEMENT MADE WITH AGENT—NO NOTICE GIVEN TO ELEVATOR COMPANY—RIGHT OF ELEVATOR COMPANY TO ASSUME THAT OLD ARRANGEMENT STILL IN FORCE—CROP PAYMENTS ACT, 1915, MAN. STATS., CH. 13, SEC. 2—CONSTRUCTION—CONVERSION.

Where for a number of years a person has been recognized by the owners of certain land, as having full authority to sell the proceeds of a farm to an elevator company, and receive payment for it and account for it to such owners, and such owners without notice to the elevator company enter into a new agreement with such person whereby he is only entitled to retain a two-thirds share of the crop grown, such owners cannot recover against the elevator for conversion of the one-third share notwithstanding the provisions of sec. 2 of the Crop Payments Act, 1915, Man. Stats., ch. 13. The elevator company is entitled to assume that the old arrangement is in force until notified of the new agreement.

ACTION by the plaintiff for damages for conversion by the defendants of the plaintiff's one-third interest in the crop of grain grown on the plaintiff's farm by D. S. Robb, the lessee. Action dismissed.

C. H. Locke, for plaintiff.

A. E. Hoskin, K.C., and *J. F. Fisher*, for defendants.

GALT, J.:—A motion has been made on behalf of the defendants for a non-suit in this case. It becomes my duty to dispose of the motion, and I may as well do so now.

The first point taken by Mr. Hoskin, on behalf of the defendants, is that in a case of this kind it must be clearly shewn

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by the party complaining that he has lost his interest in the crop—that the defendants have in truth wrongly disposed of that interest.

Evidence has been given with regard to the general way in which the plaintiff managed its business at Carey, during several years prior to the year in question—1920—and it appears that the plaintiff's business was managed for the most part, or altogether, by W. A. Robb, as foreman, but his brother, D. S. Robb, who resided in Winnipeg, had a great deal to do with it and apparently conducted a great deal of the business from Winnipeg.

The principal point, however, is this—a new arrangement was made by the plaintiff company with D. S. Robb in the year 1920, by which it leased its farm to him on the terms mentioned, among other things, that he should pay the company one-third of the crop, or its proceeds, by way of rental. A number of transactions took place during that year, but the plaintiff complains that the entire crop was sold and was accounted for by the defendants to the Robbs, both of them or one of them, so that the company lost its one-third. There is no clear evidence as to the total crop produced on the farm during the year 1920. It seems to have been assumed that because for the most part the crops were sent year by year to this particular elevator of the defendants, that it was so done in the year 1920, but, in my opinion, when one has to actually decide on the particular share of the crop that is claimed by the plaintiff, it must be shewn exactly what the total was, and I think the plaintiff has failed to shew, as it might have done, what the crop was.

Mr. Locke—Does your lordship overlook the fact that we are not claiming this was a third of all the crop? There is some other grain—some other wheat and some other flax that is not mentioned in the statement of claim and forms no part of this action.

The Court—I did not understand there was anything else, but leaving that out, I have no evidence before me to shew the total number of bushels of oats and barley that were grown on that farm.

Mr. Locke—We are entitled to one-third of all the grain of each kind. Here we have 7,500 bushels of grain—oats and barley—that we are entitled to one-third of, and do not overlook Schultz's evidence that when he was down there in October he went to the elevator at Carey and to the farm, and he found the oats and barley had at that time been disposed of.

The Court—I do not think he was able to say all the crop had been disposed of—he could not have gone over the whole farm.

However, I think that is a feature that might easily have been cleared up by one or the other of the Robbs, and I do not think it has been shewn sufficiently satisfactorily what the total crop was.

However, the other point that I really rely upon more than that, is the point depending upon sec. 2 of the Crop Payments Act, 1915, ch. 13. That section says:—

"In all cases in which a bona fide lease has been made and a bona fide tenancy created between a landlord and tenant, providing for payment of the rent reserved, or any part thereof, or in lieu of rent, by the tenant delivering to the landlord a share of the crop grown or to be grown on the demised premises or the proceeds of such share, then notwithstanding anything contained in 'The Bills of Sale and Chattel Mortgage Act,' or in any other statute, or in the common law, the lessor, his personal representatives and assigns shall, without registration, have a right to the said crops or the proceeds thereof to the extent of the share or interest reserved or agreed to be paid or delivered to him under the terms of such lease, in priority to the interest of the lessee in said crops or the proceeds thereof, and to the interest of any person claiming through or under the lessee, whether as execution creditor, purchaser or mortgagor or otherwise, it being the intention of this Act that in all such cases the share of crops or of the proceeds thereof so agreed to be reserved for the lessor shall not, under any circumstances, be capable of alienation by the lessee, whether voluntary or by any legal process against him."

Now, in endeavouring to interpret that lengthy section, one must give a reasonable meaning to the language used. It is evidently intended to protect a lessor, or a vendor where there has been an arrangement for payment in a certain share or proportion of the crop; but it would be unreasonable to apply the language in such a way as to work an utter injustice or an absurdity. For instance, is it impossible, under this section, for the lessor to arrange with the lessee that the lessee should be at liberty to dispose of the whole crop? He surely might do so; the section cannot be intended to prohibit such a transaction as that. It is pretty hard on persons dealing with a man who has taken a lease with a crop rental, that they are bound by this law whether they know of the lease or not, and have no means whereby they can find out about it, or even if they did inquire they might be told, "Oh, no, there was no lease in existence," yet the section apparently would apply and deprive them of the just fruits of their dealings, whatever they happened to be.

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In this case, one has to consider which of two innocent parties is to suffer by reason of the fraud of the third. At one time, the property was managed for some years by W. A. Robb, and his brother had a good deal to do with it all the way through. The company must have known that. They left it to them. The Robbs, both of them dealt with the defendant elevator company, settled up with them year by year for all the proceeds of the crop off the Carey farm, received payment, and accounted for it, whether properly or improperly, to the plaintiff company, without any objection by the plaintiff company. They recognized them, and in fact appointed one of them—W. A. Robb—as their foreman.

Then the plaintiffs decided to make a new deal, and without any notice whatever to the defendant company, they make a lease to one of these parties—D. S. Robb—and come now to Court and ask for relief, relying upon that particular section of the Crop Payments Act.

I do not think they are entitled to do so. I think they have been dealing with the defendants, through their own agents—through the Robbs—for years, on the basis that the defendants should be entitled to settle up for the whole crop with their agents. No complaint has been made and no difficulty has arisen. Apparently it was all honestly done, but now they have made a loss, and it seems to me they are not in a position to rely upon that section, but on the contrary, the defendants were entitled to rely upon the continued authority of the Robbs as their agents up there at the Carey farm.

The plaintiffs could, without difficulty, have notified the defendants of the new arrangement, but they did not do so.

In sec. 494 of 1 Halsbury, the question is dealt with in this way:—

"The cases in which notice of termination has been held to be necessary are all cases in which a third person had been induced to believe through the act of the principal that the agent had authority, and therefore depend on the principle of estoppel. The belief may have been induced through the principal giving the agent express authority to do certain acts, or through his having ratified the agent's acts. In such cases, in the absence of actual notice, or of constructive notice by lapse of time or other indications, the principal will remain liable to those dealing in good faith with the agent on the assumption that his authority still continues."

There are several cases cited which bear out that it seems to me, under these circumstances, the defendants were entirely justified in relying on the continued agency. The plaintiffs

could have authorised D. S. Robb to sell their interest if they had chosen, and I think owing to the course of conduct, that such authority must be now implied. For that reason I must enter a nonsuit.

The defendants are entitled to their costs.

Judgment accordingly.

RIGBY v. RIGBY.

Alberta Supreme Court, Walsh, J. June 9, 1922.

DOWER (§ III—70)—DOWER ACT, ALTA. STATS. 1919, CH. 40, SEC. 5—WIFE LIVING APART FROM HUSBAND—NOT ENTITLED TO ALIMONY—WILL OF HUSBAND LEAVING PROPERTY TO BROTHER AND SISTER—CAVEAT REGISTERED BY WIFE—NOTICE TO PROCEED—ACTION FOR DECLARATION AND CONTINUING CAVEAT.

Section 7 of the Dower Act as amended by sec. 5 of ch. 40 Alta. Stats., 1919, which provides that "where a husband and his wife are living apart a Judge of the Supreme Court may by order dispense with the consent of the wife to any proposed disposition (of land by the husband) if in the opinion of such Judge it seems fair and reasonable under the circumstances so to do," only applies to a disposition *inter vivos*, and gives such Judge no power to relieve against a proposed disposition of the homestead by will, which is provided for by sec. 4 of the Dower Act, 1917, Alta. Stats., ch. 14, which provides that such disposition shall be subject and postponed to an estate for the life of such married man's wife, hereby declared to be vested in the wife so surviving, and under which section no question of consent by the wife arises.

ACTION by a wife for a declaration that she has an interest in certain land of her husband, and continuing a caveat registered by her against the land.

H. R. Milner, K.C., for plaintiff.

S. W. Field, K.C., for defendant.

WALSH, J.:—The plaintiff registered a caveat to protect her interest under the Dower Act, 1917, ch. 14, in what is the defendant's homestead under that Act, she being his wife. Being served with notice to proceed under the provisions of the Land Titles Act, she brought this action for a declaration that she has an interest in the land under the Dower Act and for an order continuing the caveat. The case has already been before the Appellate Division of this Court (1922), 66 D.L.R. 261, 17 Alta. L.R. 1, which held that a wife has such an interest in her husband's homestead under the Dower Act as to entitle her to file a caveat to protect it. The defence disclosed by the pleadings filed as amended at the trial in addition to that disposed of adversely to him by the judgment of the Appellate Division above referred to is that "the plaintiff has no interest in the land because she is living apart from the defendant under circumstances which disentitle her to alimony, and under cir-

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cumstances under which a Judge of this Honourable Court would dispense with her consent to any proposed disposition of the land. The defendant proposes to dispose of the land by will giving the plaintiff no interest therein." By counterclaim the defendant asks for an order dispensing with the plaintiff's consent to such disposition.

If this was an application made to me under the Act for an order dispensing with the plaintiff's consent to a proposed disposition of it by act *inter vivos*, I would, upon the evidence before me, unhesitatingly grant it. The defendant, who is about 70 years of age, got into communication with the plaintiff about 6 years ago through an advertisement in a newspaper. They corresponded and exchanged photographs, and eventually he went to California where she was living and met her. He married her there and they came together to Alberta, where they lived on the farm in question. After the first week of their residence on this farm, she left his bed, but though remaining in another room in the same house, did no work of any kind but spent most of her time in bed. After a fortnight of this kind of life she left him without any warning or any valid excuse, and apparently returned to California where she now lives. This was some 5 years ago, and he has never seen nor heard from her since. It is fair to say that this is his story, but it is uncontradicted, as his is the only evidence before me at all. Under these circumstances, it would seem to me to be fair and reasonable to order that her consent to any proposed disposition of this land by him should be dispensed with. He made a will 3 days ago devising this land to his brother and sister, and that is the proposed disposition with respect to which the order is asked. The question for my determination is whether or not this is a proposed disposition of the land within the section which empowers me to make the order applied for.

The only provision of the Act as it affects this case, which clothes me with any authority in this respect, is sec. 7 as enacted by sec. 5 of ch. 40 of the statutes of 1919, which reads as follows:—

"Where a husband and his wife are living apart, a Judge of the Supreme Court may by order dispense with the consent of the wife to any proposed disposition if in the opinion of such Judge it seems fair and reasonable under the circumstances so to do."

Under the interpretation given to it both by sec. 2 (c) of the original Act, ch. 14 of the statutes of 1917, and the amendment by sec. 1, ch. 40 of the statutes of 1919, the expression "dis-

position" includes "every devise or other disposition made by will."

A devise by will is of course not an effective disposition of land during the life time of the testator, partly because it is subject to revocation and partly because notwithstanding it the testator may afterwards effectively dispose of it by Act *inter vivos*. It is, however, not to a disposition actually and effectively made but to a proposed disposition that the section applies, and so a devise by the will of a living man would seem to be within it.

The difficulty is, however, that the section only empowers a Judge to "dispense with the consent of the wife to any proposed disposition," and there is nothing in the Act which requires her consent to a disposition by will. Section 3 is the only section which makes her consent necessary to a complete disposition of the homestead and that section is expressly limited to a disposition by Act *inter vivos* whereby his interest shall or may vest in any other person during his or her life. Obviously, there is no need for me, even if I have the power to dispense with a consent that is not required. The case of a disposition by will is provided for by sec. 4, which enacts that such disposition shall "be subject and postponed to an estate for the life of such married man's wife hereby declared to be vested in the wife so surviving." No question of her consent arises under it.

I feel myself powerless to give the defendant any relief along the lines suggested by his defence and counterclaim. The sections of the Act which make for the husband's relief during his lifetime are applicable, in my conception of them, only to some concrete proposal for a disposition of the homestead which he has in mind. He cannot go to a Judge and upon his representation that he may at some future time want to sell, lease or mortgage his homestead, get an order in anticipation dispensing with his wife's consent to such prospective transaction. The defendant has no proposal to lay before me now for a disposition of this land by Act *inter vivos* and there is, therefore, nothing of that character in respect of which I could make the required order. The Act does not provide for her consent to a disposition by will, and so my order dispensing with such consent would be futile. I do not think that I have the power to make a declaration that will bind a Judge to whom an application may hereafter be made for an order dispensing with her consent to some *inter vivos* transaction. That must be determined by the conditions then existing. I have expressed my opinion of the conditions as they exist to-day, and that, I fear, is all I can do for the defendant.

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I think I should direct attention to what seems to be a clear *casus omissus*. Section 4 gives to the wife a life estate in the homestead whether her husband dies testate or intestate. Section 4 (2) as enacted by sec. 53 of ch. 4 of the statutes of 1918, provides that "where at the time of the death of a married man *intestate* with respect to his homestead, his wife is living apart from her husband under circumstances disentitling her to alimony no such life estate shall vest in such wife or shall she take any benefit under this Act." This sub-section applies only to a case of intestacy. There is no similar provision, and in fact no provision at all to meet a similar case when the husband has left a will. There seems to be nothing in the statute at all by which an erring wife can be deprived of the estate vested in her under sec. 4, if her husband dies leaving a will, and so to cut her out of it, he must die intestate. This, it seems to me, could hardly have been the deliberate intent of the Legislature.

The plaintiff is entitled to an order continuing her caveat until further ordered with costs under col. 2, Rule 27, not to apply. The counterclaim is dismissed without costs.

Judgment accordingly.

REX v. STRIKE (ALIAS STRECK) et al.

Manitoba King's Bench, Mathers, C.J.K.B. January 31, 1921.

CONTEMPT (§IV—40)—CRIMINAL TRIAL FOR ROBBERY AND THEFT—PRISONER UNDER SENTENCE FOR COMPLICITY REFUSING TO BE SWORN.

A prisoner witness already sentenced on his summary trial for complicity in the offence being tried may be sentenced for contempt for his refusal to testify for the prosecution on the trial of the others concerned in charges of robbery and theft, and it may be directed that such sentence shall commence at the expiration of his own sentence.

The prisoners Strike (Alias Streck) and Nelson were indicted on three counts, namely, for robbery with violence, robbery and theft, at the assizes of the eastern judicial district, held at the law Courts, Winnipeg, on Monday, January 31, 1921, they were tried before Mathers, C.J.K.B., and a jury.

At the trial, Harry W. Lowe, a prisoner who had elected for summary trial before a Police Magistrate at Winnipeg, for the same offence committed with the prisoners, and who had been sentenced to 5 years' imprisonment in the Manitoba penitentiary with hard labour, was produced and called as a witness on behalf of the Crown. He had been a witness on behalf of the Crown at the preliminary inquiry and had there been sworn and gave evidence without objection. He now, however, refused to be sworn or to give evidence touching the matter in issue in the

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indictment. The Court warned him that he was bound by law to submit to be sworn, and to give evidence, and that his refusal would constitute a wilful contempt of Court, for which he might be punished. It was further pointed out to him that his refusal would not assist the accused as in that event his depositions taken at the preliminary hearing could be read to the jury. He, however, persisted in his refusal to be sworn or to give evidence.

H. P. Blackwood, K.C., for the Crown.

J. B. Andrews, for the accused.

Counsel referred to *Rex* v. *Preston* (Lord) (1691), 12 How, St. Tr. 645; Archbold's Criminal Pleading, Evidence and Practice, 25th ed. 963; Oswald on Contempt of Court, 3rd ed. at p. 64; and *Ex parte Fernandez* (1861), 10 C.B. (N.S.) 3, 142 E.R. 349; 6 H. & N. 717, 158 E.R. 296, and to the form of commitment there given.

THE COURT adjudged him to be guilty of a contempt of Court and for such contempt committed him to the penitentiary at Stony Mountain for the term of 2 years to commence at the expiration of the term of 5 years' imprisonment then being served, to which he had been sentenced upon his own trial.

February, 1921, Lowe was, on a subsequent day, brought into Court as witness on behalf of the Crown on the trial of Fred Strike (Alias Streck) and Fred Kowlyk for similar offences. He again refused to be sworn or to give evidence and was again adjudged guilty of contempt of Court and for such contempt committed to the penitentiary for 2 years, to run concurrently with the previous sentence for contempt.

ATT'Y GEN'L FOR BRITISH COLUMBIA v BROOKS, BIDLAKE et al.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. February 7, 1922.

CONTRACTS (§IC—14)—TIMBER LICENSE—CONDITION AGAINST EMPLOYMENT OF CHINESE OR JAPANESE—VALIDITY—CONDITION PRECEDENT—VALIDITY OF LICENSE—NON-COMPLIANCE WITH CONDITION—CANCELLATION OF LICENSE.

A grant subject to a condition precedent which is, or becomes before the performance of it illegal or impossible conveys no interest, differing in this respect from a condition subsequent, which, because the interest passes by the grant and is vested in the grantee is inoperative to divest that interest, if it be impossible in fact or in law. Held, that a clause in a special timber license issued by the Government of British Columbia under sec. 50 of the Crown Lands Act that "This license is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith" was a condition precedent, and part of the

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ATT'Y GEN'L FOR B. C. v. BROOKS, BIDLAKE, ET AL.

Idington, J.

consideration for granting the license and if it was illegal, the whole license was void; if it was not illegal the respondent had no ground for complaint. That the license was cancelled for non-compliance with the condition.

[*Union Collieries* v. *Bryden*, [1899] A.C. 580, 68 L.J. (P.C.) 118, distinguished; The *Tomey Homma* case, [1903] A.C. 151, 72 L.J. (P.C.) 23; *St. Catherines Milling Co.* v. *The Queen* (1888), 14 App. Cas. 56, 58 L.J. (P.C.) 54; *Smylie* v. *The Queen* (1900), 27 A.R. (Ont.) 172; *Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 C.R.C. 541, 81 L.J. (P.C.) 145; *Grand Trunk Pacific R. Co.* v. *Fort William* [1912] A.C. 224, 81 L.J. (P.C.) 137 referred to.]

APPEAL by the Attorney-General for British Columbia from a judgment of Murphy, J., in an action brought by the assignees of a special timber license claiming a declaration that they are entitled to employ Chinese and Japanese on lands held by them under such license. Reversed.

J. A. Ritchie, for appellant.

Charles Wilson, K.C., and *C. H. Tupper*, K.C., for respondents.

E. L. Newcombe, K.C., for Att'y-Gen'l of Canada, intervenant.

DAVIES, C.J.:—For the reasons stated by my brother Mignault, J., I am of the opinion that this appeal should be allowed without costs and also that the respondent's action should be dismissed without costs.

IDINGTON, J.:—The respondent is the assignee of a special timber license issued by the Deputy Minister of Lands on behalf of the Government of British Columbia in the following form:—

TIMBER LICENSE

In consideration of one hundred and sixty dollars, now paid, being one annual renewal fee and the additional fee provided for in sub-section (3a) of sec. 57 of the Land Act as enacted by sec. 6 of ch. 28 of 1910, and of other moneys to be paid under the said Acts and subject to the provisions thereof, I, Robert A. Renwick, Deputy Minister of Lands, license Melville Tait to cut, fell, and carry away timber upon all that particular tract of land described in original license No. 1812, renewed by Nos. 3314, 5025, 6877, 12767, 25200, 40997, 5948, 14351.

The duration of this license is for one year from Feb. 11, 1912, renewable from year to year as provided by said sub-sec. (3a) of sec. 57.

The license does not authorize the entry upon an Indian Reserve or Settlement, and is issued and accepted subject to such prior rights of other persons as may exist by law and on the understanding that the Government shall not be held responsible for or in connection with any conflict which may arise with

other claimants of the same ground, and that under no circumstances will license fees be refunded.

N.B.—This license is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith.

Robt. A. Renwick, Deputy Minister of Lands."

The lands in question on which the timber to be cut grows, belong to the said Province of British Columbia by virtue of sec. 109 of the B.N.A. Act, 1867, which reads as follows:—

"109. All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

Such is the result of the steps taken in 1871 by virtue of sec. 148 of said Act to constitute the union of said province with the other Provinces of Canada under said Act.

The Province of British Columbia may have had theretofore another title to said lands but whether higher or not need not concern us for the language just quoted seems to me for our present purpose to define as comprehensive and absolute an ownership as necessary to enable those duly empowered to act and acting on behalf of the province to make whatever bargain they may deem proper.

Of course under our system of responsible government that power of bargaining is again limited by the declared will of the Legislature of the province.

That Legislature declared on April 15, 1902, its will by the following resolution:—

"That in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the Government or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

That was followed in June, 1902, by an Order in Council which made the declaration that the said resolution was applicable to many kinds of contracts enumerated therein and of those, "special timber licenses" such as that set forth above were named. Hence the stipulation, contained in the said license above quotetd and now in question, was adopted by the Executive of British Columbia's Government. Its obligation

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binding respondent, the licensee, to the due observance thereof formed part of the consideration for the said licence.

The rights in question thereunder in any of the relevant yearly renewals are founded upon the contract of 1912.

Notwithstanding the last mentioned fact or any of those considerations arising out of the ownership of the lands in question and the right of an owner to deal with the lands belonging to him or it as to such owner may seem fit, the respondents applied to the Supreme Court of British Columbia for an injunction against the appellants restraining them from taking any steps to cancel the said licence by reason of the non-observance of the above quoted provisions in said license against the employment of Chinese or Japanese, and the same was granted accordingly.

The Judge granting same seems to have done so, without any argument, and in the course of the opening statement by counsel for respondents, relying upon an opinion expressed by the Court of Appeal for British Columbia on the submission of a question to the said Court under the "Constitutional Questions Determination Act" R.S.B.C. 1911, ch. 45, of the Province.

In order to get here, on their way to the Court above, as speedily as possible the parties concerned consented to an appeal here, direct from the judgment granting said injunction to this Court.

The reliance for said opinion of the Court of Appeal upon the case of *Union Collieries* v. *Bryden*, [1899] A.C. 580, 68 L.J. (P.C.) 118, seems to me, with great respect, to be misplaced.

The principle there involved was the right of mine owners to employ aliens or native Chinese or others despite the efforts of the Government to regulate or prohibit the doing so. And it was held in said case to be *ultra vires* the powers of a Provincial Legislature to direct a general discrimination such as attempted and there in question.

This licensing of the right to cut timber on lands belonging to the Province is entirely another question and depends on the right of an owner to impose limitations or conditions upon any grant made by virtue of such absolute ownership.

Surely, the private owner of lands on which there is timber, can, so long as owning it, refuse to employ either Chinese or Japanese or any other class he sees fit, to cut same and also impose the like terms by way of condition of employment on anyone claiming under him by way of license lease or chopping contract of any kind.

And I cannot see why the duly constituted authorities of a

Province empowered by the Legislature to so act cannot do likewise.

Suppose for safety's sake the Legislature directed the exclusion of men in the habit of smoking from being employed in any way relative to the cutting of timber, could said enactment be held *ultra vires?*

The question involved, of the right to do so or as involved herein is in principle much more like that involved in the *Tomey Homma* case, [1903] A.C. 151, 72 L.J. (P.C.) 23, than in the *Bryden* case.

There, the discrimination was made as to the right to vote over which the local Legislature had exclusive authority to give or to withhold as it saw fit.

I do not think that power was any more sacred than the absolute right over property expressly defined as belonging to the Province.

Again, I am unable to understand upon what principle an injunction can be maintained to deprive one of the parties to a contract from asserting its rights thereunder, against the other thereby attempting to get rid of its obligation which formed an important part of the consideration inducing the contract.

Surely, there can be no doubt that a contract which was founded upon the obligation to execute it by means of a restricted field of labour, cannot be held, economically speaking, to be the same contract, when the field of labour and cheap labour (as is sounded sometimes in our ears, open to receive common knowledge) is introduced to the advantage of the licensee.

That suggests another consideration, if provincial autonomy is to be disregarded, and it is that of the duty to administer its affairs in the most economical way possible and derive the best possible revenue from its timber resources.

That, however, is the business of the people of the Province. And to take away from them the benefit thereof and bestow it upon someone else such as respondent does not seem to me a fair and equitable ground upon which to found an injunction such as in question herein.

And none of these considerations are met by the claim that the Act of the Dominion Parliament enforcing the Japanese Treaty renders the contract illegal.

Assuming for a moment that it has such effect as contended by respondent, then it renders the consideration for such a contract illegal and hence the whole void.

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Idington, J.

How can such a contract founded upon an illegal consideration be held good in part and void as to that other?

I cannot think any injunction met by such objections can be maintained.

On the general principles relative to the foundation for such an injunction as granted below, I think there are so many errors, for the foregoing reasons, that it cannot be upheld and should be dissolved.

The decisions in the cases of *St. Catherines Milling Co.* v. *The Queen* (1888), 14 App. Cas. 56, 58 L.J. (P.C.) 54; *Smylie* v. *The Queen* (1900), 27 A.R. (Ont.) 172, and *Montreal* v. *Montreal Street R. Co.*, 1 D.L.R. 681, [1912] A.C. 333, 13 C.R.C. 541, 81 L.J. (P.C.) 145, seem to me in point in regard to some of the grounds I have taken.

And as to the enactment pretending to enforce the Japanese Treaty, I do not find therein anything which necessarily involves the questions raised herein.

The only section of said Treaty which has the slightest resemblance to anything that might bear upon what is herein involved is the third sub-section of art. 1 thereof, which is as follows:—

"They shall, in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

This certainly never was intended to deprive the owners of property, whether private citizens or Provinces, of their inherent rights as such, much less to destroy a contract made before the Act in question.

Another observation must be made and it is that this injunction professes to deal with the Chinese as if upon the same footing as the Japanese, though the Treaty is only one with Japan and does not touch the question of the employment of Chinese specified in the provision of the contract and in the requirements of the injunction.

What right exists to deal with the Chinese in this case? Yet if the license has become void or liable to be cancelled on any single ground, why should the appellants be enjoined from proceeding to do so?

I think this appeal should be allowed with costs throughout.

We heard the Deputy Minister of Justice on behalf of his department, but, as I understood him, the Minister of Justice did not wish to intervene.

I may be permitted to suggest once more that all the funda-

mental facts presented herein do not seem to present a case for raising the neat point of how far, if at all, the Dominion statute of 1913, ch. 27, known as the Japanese Treaty Act can be held to invade the rights of a province in its property or of its private citizens; that a provincial enactment similar to that in the R.S.O. 1914, ch. 55, and its counterpart in sec. 67 of the Supreme Court Act, R.S.C. 1906, ch. 139, could be made applicable to produce more satisfactory results than can be hoped for herein in the way of definite determination of what is desired.

DUFF, J.:—The respondents are the assignees of a special timber license issued in the year 1912 under the provisions of the Crown Lands Act of British Columbia R.S.B.C. 1911, ch. 129 which, by the terms of it, was on specified terms renewable from year to year for a period which it may be assumed for the purposes of this appeal, has not yet expired. One of the provisions of the license is in these words "This license is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith." Admittedly this provision was not complied with and after some correspondence with the Attorney-General proceedings were taken by the respondents in the Supreme Court of British Columbia claiming a declaration that they are entitled to employ Chinese and Japenese on the lands held by them under special timber licenses; and Murphy, J. before whom the proceedings came, held, following a previous judgment of the British Columbia Court of Appeal, that the stipulation was illegal and unenforceable and accordingly gave judgment against the Attorney-General.

The general questions raised in the factums and on the argument have been fully discussed in the judgments on the reference in relation to the British Columbia Statute of 1921 and these subjects require little further consideration on the present appeal; but the question now raised differs from that considered on the reference in this, that the statute of 1921 does not, for the purpose of determining the actual rights of the parties in litigation, that is to say, for the purpose of determining the rights of the respondents under their timber license, come into play at all.

The provision which is the subject of discussion was inserted in the special timber license in compliance with an Order-in-Council passed by the Government of British Columbia in June, 1902, pursuant to a resolution of the Legislature passed in April of the same year to the following effect:—

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"That in all contracts, leases, and concessions of whatsoever kind entered into, issued, or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

The Order-in-Council declared that the resolution applied to special timber licenses granted under sec. 50 of the Crown Lands Act, a class to which the respondents' license admittedly belongs and provided that a clause conforming to the instructions given by the resolution should be inserted in such instruments.

Section 50 of the Land Act authorizes the Chief Commissioner of lands and works to grant special timber licenses subject to "such conditions, regulations and instructions as may from time to time be established by the Lieutenant-Governor in Council" and by an amendment adding a sub-sec. (3a) to sec. 57 of the Act passed in the year 1910 (sec. 6 of ch. 28 of the statutes of that year) it was provided that such licenses should be "renewable from year to year" so long as there should be an adequate quantity of merchantable timber upon the land "if the terms and conditions of the license and provisions . . . . and any regulations passed by Order-in-Council respecting or affecting the same have been complied with." The license itself in terms provided: "the duration of the license is for one year from February 11, 1912, renewable from year to year as provided by . . . . sub-sec. 3a of sec. 57," of the Land Act. The stipulation touching the employment of Chinese and Japanese is one of the terms and conditions of the license within the meaning of the amendment of 1910 and it is also a provision of the regulation established by Order-in-Council within the meaning of that amendment. The observance of this stipulation is, therefore, by virtue of the provisions of the statute as well as by virtue of the terms of the contract as expressed in the instrument evidencing the license in any one year, a condition precedent to the right of a licensee to have his license renewed for the following year.

It follows that the Commissioner of Crown Lands had no authority to renew the license in February, 1921, unless performance of the condition precedent had been waived and the existence of the authority to waive such a statutory condition precedent may be open to doubt. However that may be, it is quite clear that performance of the condition during the year ending in February, 1922, has not been waived and the declaration claimed by the respondent is one which cannot properly be pronounced.

This requires perhaps a little elucidation. The rule of law is

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that a grant subject to a condition precedent which is (or becomes before the performance of it) illegal or impossible, conveys no interest, "no state or interest can grow thereupon," Coke on Littleton 206a; Comyn's Digest, Conditions, D 3; differing in this respect from a condition subsequent which because the interest passes by the grant and is vested in the grantee is inoperative to divest that interest if it be impossible in fact or in law. The Act of 1913 giving the force of law to the Japanese Treaty plainly did not make it an illegal thing to abstain from employing Japanese nor did it, I think, prohibit agreements between private persons to abstain from engaging the services of such persons; and it may, however, be a debatable question whether a provincial government in exacting, in the exercise of its discretion, a stipulation such as that under discussion, is doing anything repugnant to the covenants of the Treaty which guarantee to Japanese subjects equality with other aliens in the eye of the law.

I shall assume however, conformably to the contention of the respondents, that the Order-in-Council of 1912 laying down a general rule amounting to a regulation established by the Lieutenant-Governor in Council under sec. 50 of the Land Act is an ordinance which could not remain in operation consistently with the due observance of the Treaty stipulations; and that in this respect the legislation of 1913 operated upon existing as well as upon future grants. It does not follow that the respondents are entitled to the annual renewal of their license. Even if, as the respondents contend, such is the effect of the legislation of 1913, still on the principle above mentioned, which, I think, applies, the respondents' license has already lapsed or must lapse at the end of the current year, that is to say on February 11, 1922; and the respondents' claim for a declaration in the terms of the writ must accordingly fail.

In the special circumstances of the case I think there should be no costs.

ANGLIN, J.:—Although appended as a note or annexed to the plaintiffs' lease, the condition against the employment of Orientals I regard as one of its essential terms—as part of the consideration for which it was given.

The lessees sue for an injunction to restrain the lessors from cancelling the lease for non-observance of this condition, on the ground that it was illegal and, therefore, void.

If the condition was good, the plaintiffs have no grievance; if it was bad, the license I think fails as a whole, with the result that the plaintiffs have no status as licensees.

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On this ground, apart from other considerations, in my opinion, this suit brought for an injunction against the Attorney-General and the Minister of Lands for British Columbia cannot be maintained.

MIGNAULT, J.:—This is an appeal *per saltem* by consent from the judgment of the Supreme Court of British Columbia granting an injunction demanded by the respondents. The trial Judge felt himself bound by a judgment of the Court of Appeal of that Province on a reference by the Lieutenant-Governor in Council deciding that a clause in timber licenses prohibiting the employment of Chinese and Japanese was *ultra vires*. It was, therefore, thought advisable to appeal direct to this Court.

By the endorsement on the respondents' writ it is stated that it claims a declaration that it is entitled to employ Chinese and Japanese upon the hereditaments held by it under special timber licenses containing this condition:—

"N.B. This license is issued and accepted upon the understanding that no Chinese or Japanese shall be employed in connection therewith."

The respondents prayed for an injunction restraining the appellant from interfering with it in its enjoyment of its special timber licenses upon the ground that, in the course of working its special timber licenses, it had employed and was continuing to employ Chinese and Japanese as labourers.

In my opinion, if the condition of the special timber license prohibiting the employment of Chinese and Japanese is void as being *ultra vires*, the license itself, granted on this express condition taken *ex hypothesi* to be bad, is itself void.

I would apply a familiar rule relating to contracts.

"Where there is one promise made upon several considera tions, some of which are bad and some good, the promise would seem to be void, for you cannot say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise." Anson, Law of Contract, 15th ed. pp. 255-256.

The timber license here was issued in consideration of $160 and of other monies to be paid under the provisions of the Land Act, and it contained, undoubtedly as part of the consideration, the condition that I have cited.

If this condition be bad, the license is also bad; if it be valid, the respondent has no ground for complaint. In other words, the Government granted and the respondent accepted the license upon the express understanding that no Chinese or Japanese should be employed in connection therewith. To treat this con-

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dition as if it had not been inserted in the license, would be to substitute an unconditional license for one which the Government granted conditionally. If the condition be bad, the license itself, and not the mere condition must fail.

I think that what I have said is supported by the *ratio decidendi* of the Judicial Committee in *Grand Trunk Pacific R. Co.* v. *Fort William Land Investment Co.*, [1912] A.C. 224, 81 L.J. (P.C.) 137. There, the Railway Committee had made an order subject to a condition which it was without jurisdiction to insert in the order, and their Lordships decided that "the order itself, and not the mere condition, must fail."

Here the demand of the respondents was clearly not maintainable, for, if, as it alleged, the condition of non-employment of Chinese or Japanese was illegal, the timber license it had obtained was void, and if the condition was a valid one, its action was unfounded. Under these circumstances, the constitutional question need not be discussed.

I would allow the appeal without costs and dismiss the respondents' action also without costs.

Appeal allowed.

Re IMMIGRATION ACT AND WONG SHEE.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJ.A. April 11, 1922.

APPEAL (§IIC—50)—IMMIGRATION ACT 1910 (CAN.) CH. 27—DEPORTATION OF IMMIGRANT ORDERED—RELEASE BY JUDGE ON HABEAS CORPUS—RIGHT OF APPEAL TO BRITISH COLUMBIA COURT OF APPEAL.

By the Court of Appeal Act Amendment Act 1920, (B.C.) ch. 21, sec. 2, the British Columbia Court of Appeal has jurisdiction, on appeal by the immigration authorities from an order of habeas corpus releasing a person ordered by a Board of Inquiry to be deported under the Immigration Act 1910, (Can.) ch. 27.

HABEAS CORPUS (§IB—5)—JURISDICTION OF JUDGE OF SUPREME COURT OF BRITISH COLUMBIA TO ORDER RELEASE OF IMMIGRANT HELD FOR DEPORTATION—IMMIGRATION ACT 1910, (CAN.) CH 27, SEC. 23—CONSTRUCTION.

Under sec. 23 of the Immigration Act 1910, (Can.) ch. 27 the Court has no jurisdiction to review or otherwise interfere with the decision of the Board of Inquiry constituted by the Immigration Act to hear and determine upon the facts relating to the right of an immigrant to enter Canada, and an order of habeas corpus releasing an immigrant held for deportation by the Board will be set aside on appeal and the immigrant restored to the custody of the immigration authorities.

[*In re Tiderington* (1912), 5 D.L.R. 138, 19 Can. Cr. Cas. 365, 17 B.C.R. 81; *Re Rahim* (1912), 4 D.L.R. 701, 19 Can. Cr. Cas. 394, 17 B.C.R. 276; *Barnardo* v. *Ford*, [1892] A.C. 326; *Cox* v. *Hakes* (1890), 15 App. Cas. 506; *The King* v. *Jeu Jang How* (1919), 50 D.L.R. 41, 59 Can. S.C.R. 175, 27 B.C.R. 294, referred to.]

APPEAL by the Crown from order of *habeas corpus* of Hunter C.J.B.C. (1921), 59 D.L.R. 626, 36 Can. Cr. Cas. 405, 30 B.C.R.

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70, ordering the release of an immigrant held by the immigration authorities for deportation. Order set aside.

R. L. Reid, K.C., for appellant.

Alex. Henderson, K.C., and *R. L. Maitland*, for respondent.

MACDONALD, C.J.A.:—The respondent Wong Shee, was ordered by a Board of Inquiry to be deported on the ground that her entry into Canada was contrary to P.C. 1202. She was released upon *habeas corpus* proceedings and this appeal is taken by the immigration authorities against that order.

Preliminary objection was taken by respondent's counsel that no appeal lies to this Court from an order of *habeas corpus* releasing the person detained. This was the law prior to the amendment made by the Provincial Legislature by the statutes of 1920, ch. 21, sec. 2, which so far as the Province had power to enact, gave an appeal in cases like the present one. The law prior to this enactment is referred to in two cases in this Court, *In re Tiderington* (1912), 5 D.L.R. 138, 19 Can. Cr. Cas. 365, 17 B.C.R. 81, and *Re Rahim* (1912), 4 D.L.R. 701, 19 Can. Cr. Cas. 394, 17 B.C. R. 276.

These cases follow the decision of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, 60 L.J. (Q.B.) 89, 39 W.R. 145. It was held in *Barnardo* v. *Ford*, [1892] A.C. 326, 61 L.J. (Q.B.) 728, that where the order was one refusing a writ of certiorari an appeal would lie. Both *Cox* v. *Hakes* and *Barnardo* v. *Ford*, depended for their decision upon the construction of sec. 19 of the English Judicature Act, which has to do with the right of appeal in civil cases. By the Act of 1920 the Court of Appeal Act, which gave a similar right of appeal in civil causes was amended so as to give an appeal where the person detained was discharged, so that at the present time in this Province in civil matters, or rather in matters over which the Legislature of British Columbia has jurisdiction, an appeal lies to this Court whether the person detained be remanded to custody or be discharged from custody.

The question in this case is as to whether the legislation of the Province is applicable where the inquiry is under a Federal Act, namely, the Immigration Act, 1910, ch. 27. That the proceedings are not criminal proceedings is quite clear, *Cox* v. *Hakes, supra; The King* v. *Jeu Jang How* (1919), 50 D.L.R. 41, 59 Can. S.C.R. 175, 32 Can. Cr. Cas. 103, 27 B.C.R. 294.

The power to legislate in relation to civil rights was assigned to the Province, the right to liberty where a person is detained not for a crime or supposed crime, but as in this case, to test whether or not the person has fulfilled the conditions necessary

to her admission into Canada, is a civil right. The right to the writ of *habeas corpus* is not given by Dominion statute but is part of the common and statutory law of England introduced into and made part of the law of this Province. The right of appeal is a substantive right and not a mere matter of practice and procedure, but even if it were a matter of procedure in a civil case, it would fall within the jurisdiction of the Province. The recent amendment of the Act giving an appeal in a case like the present, is an amendment to the civil laws of this Province. It has nothing to do with criminal law or criminal procedure, and hence the preliminary objection must be overruled.

On the merits it seems to me it is impossible to sustain the order appealed from. The Immigration Act has constituted the Board of Inquiry the tribunal to hear and determine upon the facts relating to the right of an immigrant to enter Canada. It has put the burden of proof upon the immigrant and it has provided by sec. 23 that no Court shall have jurisdiction to review or otherwise interfere with the decision or order of the Minister or of the Board of Inquiry in relation to the admission or deportation of any rejected immigrant, unless such person be a Canadian citizen or have Canadian domicile. The Board of Inquiry unquestionably had jurisdiction to enter upon the inquiry; they were entitled to disbelieve the evidence of the respondent if in their opinion, circumstances tended to throw doubt upon it. It is true that the evidence is practically all one way, but it is not of that character which entitles me to say that as a matter of law the Board of Inquiry were not entitled to disbelieve it. The Board may have come to the conclusion that the story of the death of the former wife and marriage of the respondent to Soo Gar, was not entitled to belief. They may not have been satisfied, and the respondent was bound to satisfy them, that she was not one of a prohibited class.

The appeal should be allowed.

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

GALLIHER, J.A.:—In this matter the immigration authorities made an order for the deportation of Wong Shee, on the ground that she was a labourer and this order was confirmed at Ottawa.

The matter then came before Hunter, C.J.B.C. (1921), 59 D.L.R. 626, 36 Can. Cr. Cas. 405, 30 B.C.R. 70, on *habeas corpus*, who ordered her discharge and this order is appealed against.

Mr. Henderson for the respondent, took the preliminary objection that there was no appeal to us from an order discharging a person from custody on *habeas corpus* proceedings.

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This Court dealt with that point in *Re Tiderington*, in 5 D.L.R. 138, and also *In re Rahim*, 4 D.L.R. 701, and it was also dealt with by Duff and Anglin, JJ., in the Supreme Court of Canada in *The King* v. *Jeu Jang How*, 50 D.L.R. 41.

In the cases before us and per Duff and Anglin, JJ., in the *Jeu Jang How* case, it was decided on the authority of *Cox* v. *Hakes*, 15 App. Cas. 506, that no appeal lies from an order discharging an accused person on a writ of *habeas corpus*. Subsequent to the decisions in these cases the Legislature of the Province of British Columbia passed an Act, 1920 (B.C.) ch. 21, amending sec. 6 of the Court of Appeal Act, R.S.B.C. 1911, ch. 51, in express words, conferring jurisdiction on the Court of Appeal to hear appeals in *habeas corpus* and providing the machinery for the re-arrest of accused persons discharged upon *habeas corpus* proceedings. Here the accused is detained under a Dominion statute—the Immigration Act—and such proceedings have been held not to be criminal proceedings per Duff and Anglin, JJ., in *Jeu Jang How, supra*, and per Mathers, C.J. K.B. in *R* v. *Alamazoff* (1919), 47 D.L.R. 533, 31 Can. Cr. Cas. 335, 30 Man. L.R. 143.

If this were a matter where the applicant for *habeas corpus* was in custody on a criminal charge, it may be that the Legislature could not give the Court jurisdiction to hear the appeal, but where as here, it is an offence not of a criminal nature that is being enquired into and civil rights only are involved, it is within the purview of the Legislation to pass the Act. This gives us jurisdiction to entertain an appeal in matters not of a criminal nature, (at all events) where a party has been discharged upon *habeas corpus*.

I think for the reasons given by the Chief Justice that the order of Hunter, C.J.B.C., should be set aside and the party again taken into custody for deportation.

MCPHILLIPS, J.A.:—I am in entire agreement with the judgment of my brother Martin. I merely wish to add that during the argument I was in some doubt as to whether if the marriage could be deemed to have been valid the effect would not be to give the wife the *status* of the husband and that the result would be that she would not be of the "labouring classes." However, after fuller consideration and owing to the fact that although the wife's domicile is the domicile of the husband in ordinary cases, yet in this case the statute stands in the way, and the wife has not acquired Canadian domicile. I am satisfied that the Court has not the power of review in the present case, in fact there is inhibition in the most positive terms upon the

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reading of sec. 23. I dealt with this point and the subject generally in a somewhat exhaustive way in *Re Munshi Singh* (1914), 20 B.C.R. 243, at pp. 278 to 292, and would refer to my reasons for judgment there given which obviates the necessity of repeating them here and those reasons are equally applicable to the present case—*i.e.*, there is an absolute inhibition upon the Court in the present case from interfering with the decision of the Board of Inquiry.

It follows therefore that in my opinion, and with great respect to Hunter, C.J.B.C., there was no power to grant a writ of *habeas corpus* discharging Wong Shee from custody and she should be restored to the custody of the Controller of Immigration—the appeal to be allowed.

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

Appeal allowed.

RODGERS v. HETTINGER.

Saskatchewan King's Bench, Mackenzie, J., May 26, 1922.

PLEADING (§IIIB—305)—FARM IMPLEMENT ACT R.S.S. 1920 CH. 128—SALE OF LARGE IMPLEMENT—NO RIGHT OF ACTION EXCEPT ON CONTRACT IN FORM A—NECESSITY OF PLEADING IN STATEMENT OF CLAIM.

By the Farm Implement Act R.S.S. 1920 ch. 128, the validity of the right of action which the vendor of a large implement would have had at Common Law for its price has been so affected by the words "No contract for the sale of any large implement shall be valid" that he cannot now recover such price at all save through the medium of a contract in form A. to the Act, and such contract being essential to the existence, as distinguished from the formalities attendant upon the enforcement of his right, the plaintiff must plead it in his statement of claim. It cannot be disregarded under R. 144, in drawing the statement of claim, leaving it to the defendant to put the non-compliance of such provisions in issue.

[*Haubrich* v. *Keefner* (1922), 65 D.L.R. 50, distinguished.]

APPEAL from the order of the local Master at Moose Jaw, in which he directed that paras. 2 and 3 of the plaintiff's joinder and issue and reply be struck out, on the ground that the said paragraphs constitute a departure and raise allegations inconsistent with the statement of claim. Varied.

W. H. B. Spotton, for plaintiff.

LeRoy Johnson, for the defendant.

MACKENZIE, J.:—The action is brought on a lien agreement in writing alleged to have been given by the defendant in consideration of a grain separator with attachments, for the sum of $622 and interest, which became due on October 1, 1920, and has not been paid. In his statement of defence, the defendant sets up,

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inter alia, that the plaintiff is a vendor of farm implements within the meaning of the Farm Implement Act, R.S.S. 1920, ch. 128; that if he did give the plaintiff such a lien agreement in writing it was a contract for the sale of a large implement within the meaning of the said Act, and not in form A of the schedule thereof, that the said lien is not a contract for the sale of a large implement within the meaning of the said Act; and that the implement in question was sold with a verbal warranty that it would perform the work for which it was intended; and that it failed to fulfil the terms of such warranty.

In addition to joining issue, the plaintiff has delivered a reply wherein are the paras. 2 and 3 in question, whereby he alleges that the said lien agreement is founded upon a written contract, dated April 29, 1919, for the sale of large implements, and that such contract is in form A of the schedules to the said Act, and that the plaintiff gave to the defendant certain notices required by said contract.

The defendant now contends that the allegations contained in these 2 paras. are inconsistent with the allegations upon which the plaintiff has founded his cause of action in his statement of claim, and that they therefore constitute a departure in pleading within the meaning of R. 146, and that if the plaintiff wishes to set up the contract in form A of the schedule to the said Act at all, he should do it by way of amendment to his statement of claim.

If there were no other considerations necessary to a decision of this question, I would be prepared to hold the plaintiff entitled to succeed on the ground that the issues of the existence of the contract under form A, and of a verbal warranty, were first raised by the defendant, and that said paragraphs were properly pleaded as a reply thereto.

Section 12 of the Farm Implement Act, however, says:—

"No contract for the sale of any large implement shall be valid, and no action shall be taken in any court for the recovery of the whole or part of the purchase price of any such implement, or for damages for any breach of any such contract, unless the said contract is in writing in form A and signed by the parties thereto."

It was contended on behalf of the plaintiff that by virtue of the non-payment of the lien agreement in question, the plaintiff has a right of action at Common Law, which *primâ facie* entitles him to judgment for the amount due, and that compliance with the provisions of the above section have merely been made essential by statute by way of a condition precedent, which under R.

144, the plaintiff could properly disregard in drawing his statement of claim, leaving it to the defendant to put the non-compliance of such provisions in issue, if so advised in his statement of defence. I think this contention would be sound if said section had commenced with the words, "No action shall be taken in any Court for the recovery," etc., on the principle laid down in *Jolly* v. *Brown*, [1914] 2 K.B. 109, 83 L.J. (K.B.) 308, and *Gates* and *Jacobs Ltd.*, [1920]1 Ch. 567, 89 L.J. (Ch.) 319. The section, however, it is to be noted, commences with the words, "No contract for the sale of any large implement shall be valid." Of these words due account must be taken. It was held by the Court of Appeal in the recent case of *Haubrich* v. *Keefner* (1922), 65 D.L.R. 50, that a contract not under said Act, is so far voided, that the Court will not enforce it though the parties thereto can make it and carry it out if they wish. From this it seems clear that such a contract cannot be made the basis of any legal obligation which one party thereto can enforce against the other by right of action. To illustrate the effect of such invalidity in a manner relevant to the question now before me, I take it that as the plaintiff's statement of claim now stands the Court should properly refuse, *ex mero motu*, to grant an order for judgment thereon in an action upon a motion for judgment in default of defence; or, if defended, that the defendant could successfully oppose it simply by pleading, without more, that it discloses no cause of action.

The implement in question on being admittedly a large implement within the said Act, I think it must be held that the validity of the right of action which the plaintiff would have had at Common Law for its price has been so affected by the above words at the commencement of the said section, that he cannot now recover such price at all, save through the medium of a contract in form A of the schedule to said Act. Such a contract then, being essential to the existence, as distinguished from the formalities attendant upon the enforcement of his right, it follows that the plaintiff should have pleaded it in his statement of claim. A clear exposition of the principles of pleading in this respect is to be found in Odgers' on Pleading, 8th ed., p. 103, where the author says as follows:—

"When the right claimed or defence raised existed at common law, but the common law applicable to the case has been materially altered in its substance by statute, all facts are material which tend to take the case out of the rule of common law and bring it within the statute . . . . But where the right claimed or the defence raised existed at common law, *and the subsequent*

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statute has not affected its validity, but merely introduced regulations as to the mode of its existence or performance, the statute does not affect the form of pleading, it is sufficient to allege whatever was sufficient before the statute."

The plaintiff's counsel cited me the case of *Haubrich* v. *Keefner* as authority for showing that a defence under the Act should be raised by the defendant, presumably because the Chief Justice therein goes on to say, "He (i.e. the plaintiff) must be assumed to have known that he was under no legal obligation to pay the money or take delivery of the tractor, and if an action had been brought he could have defended himself under the statute." It is to be observed, however, the attention of the Chief Justice is being directed, not to the question of pleading, but to a matter of substantive right. Hence, I do not think I can treat it as an authority in the former respect.

On the technical merits of this application, therefore, I think the defendant is entitled to succeed. By dismissing the appeal, however, the plaintiff would be left to move for an amendment to his statement of claim. This, to my mind, would make the result unduly severe on the plaintiff, having regard to the state of the record and to the fact that this is apparently the first time that such a question has been raised under the said Act. I will, therefore, vary the order of the local Master by allowing paras. 2 and 3 to stand in plaintiff's reply, with leave to the defendant to deliver a rejoinder thereto within 5 days. The plaintiff, however, must pay the costs of the application both here and below.

Judgment varied.

REX. v. LEE.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Metcalfe, JJ.A. December 28, 1921.

MUNICIPAL CORPORATIONS (§IID—105)—EARLY CLOSING LAW—SHOP REGULATION—SHOP OPEN WITHOUT INTENTION OF SERVING CUSTOMERS.

If the magistrate trying a prosecution under a municipal by-law for early closing passed under the Shops Regulation Act, R.S.M., 1913, ch. 180, finds that there was no intention on the part of the shopkeeper to serve any customer during prohibited hours, the fact that the shop door was unlocked, the lights turned on and that persons were in the shop is not sufficient to establish an infraction of the law.

CASE stated by Sir Hugh John Macdonald, police magistrate, in respect to his dismissal of a charge that the accused did unlawfully omit to close and keep closed his shop during certain prohibited hours.

R. B. Graham, K.C., for the prosecution.

J. S. Hough, K.C., for the accused.

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REX v. LEE.

Dennistoun, J.A.

The judgment of the Court was delivered by

DENNISTOUN, J.A.:—This case is stated by Sir Hugh John Macdonald for the opinion of the Court in respect to his dismissal of a charge that the accused: "Did unlawfully omit to close and keep closed his shop between the hours of six o'clock in the afternoon of the said day and five o'clock in the morning of the day following."

The evidence shews that the door of the accused's shop was closed but not locked. Both rooms were lighted, and in the back room there were a number of Chinamen playing cards. In the front part of the shop there were six or seven individuals but there was no evidence as to why they were there, or what they were doing.

The magistrate dismissed the charge and submits the following question to this Court:

"Was I right in holding that in order to establish that a shop is open, within the meaning of The Shops Regulation Act, it is necessary to prove a sale, an endeavour to make a sale, or an intention to make a sale."

By the Act referred to, ch. 180, R.S.M., 1913, sec. 2 (b): "The expression 'closed' means not open for the serving of any customer."

The fact that there were persons in the shop may afford some evidence that they were customers or prospective customers, and I do not care to hamper the judgment of the magistrate by attempting to define the weight he should give to such evidence unsupported by any additional testimony. Each case must be dealt with as it arises. In the present case the fact that a game of cards was in progress may have influenced the magistrate in coming to the conclusion that those present in the shop were not there as customers, and that there was no intention on the part of the shop-keeper of serving them as such.

If the magistrate can find that there was no intention on the part of the shop-keeper of serving any customer, the fact that the door was unlocked, the lights turned on, and that persons were in the shop is not, in my humble opinion, sufficient to establish a violation of the by-law.

The wording of the definition quoted above seems to imply that the shop may be open for purposes unconnected with the serving of customers. Had it been otherwise the Legislature would have used apt words to make it clear that the shop was not to be occupied during prohibited hours.

This prosecution was under by-law No. 1853 of the city of Winnipeg and amendments thereto.

I would answer "Yes" to the question propounded.

Dismissed; order sustained.

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MONTICELLO STATE BANK v. BAILLEE.

Alberta Supreme Court, Appellate Division, Beck, Hyndman and Clarke, JJ.A. May 12, 1922.

INCOMPETENT PERSONS (§II—10)—JUDICIAL ORDER IN LUNACY—JURISDICTION OF DISTRICT COURT JUDGE—ORDER APPROVED BY JUDGE OF SUPREME COURT—VALIDITY—POWER OF LUNATIC TO ENTER INTO VALID CONTRACT WHILE ORDER UNREVOKED.

An order made by a District Court Judge adjudging a person to be of unsound mind and appointing a guardian for him, such order being made when such Judge had no jurisdiction in lunacy either as local Judge or as district Judge, will be considered as a valid order of a Judge of the Supreme Court, where such Supreme Court Judge has approved of and signed the said order. So long as a judicial declaration of lunacy stands unrevoked the lunatic is legally incapacitated from entering into any contract. [*In Re Walker*, [1905] 1 Ch. 160, 74 L.J. (Ch.) 86; 53 W.R. 177 followed.]

APPEAL by the plaintiff bank from the judgment of Simmons, J. at the trial by which he dismissed the action as against the defendant Hotze, the other two defendants having allowed judgment to go by default.

A. B. Hogg, for appellant. *A. E. Dunlop*, for respondent.

The judgment of the Court was delivered by

BECK, J.A.:—The action was brought to recover the amount of three promissory notes dated March 1, 1920, made by the three defendants aggregating $2,866 and bearing interest at 8% per annum. These notes were renewals of notes made in 1917 and given for the purchase-price of a stallion then bought by the three defendants.

The only defence relied upon by the defendant Hotze, who defended by his father, his duly appointed guardian, is that of insanity.

On February 28, 1913, Winter, J., then District Court Judge of the District of Lethbridge, and a Local Judge of the Supreme Court, upon the petition of Herman Hotze, the father of the defendant Oscar Hotze, made an order whereby, after reciting that it appeared that Oscar Hotze—whom the Judge had seen and interrogated personally—was a person of unsound mind and incapable of taking care of himself or of attending to his affairs, he appointed the said Herman Hotze, guardian of the person and estate of the said Oscar Hotze "with all the powers and duties specified in Order XLIV of the Judicature Ordinance and amendments thereto." Order XLIV comprised Rules 551 to 563 of the Statutory Rules appended to the Judicature Act ch. 21 C.O. 1898 and are identical with our present Rules 698 to 710.

Hotze was sent to an asylum for the insane in Iowa in 1906

and was there during various periods every year from 1906 to 1921 except 1908 and 1916 and was replaced in the same institution on November 8, 1917, the original transaction of the purchase of the stallion having taken place on the 2nd of that month.

The judicial declaration of Hotze's lunacy has never been revoked.

It is urged in the plaintiff's behalf that the declaratory order is void on its face because a District Court Judge had not, either in his capacity of a District Court Judge or of a Local Judge of the Supreme Court, jurisdiction to make an order in lunacy.

It does appear that at the date of the order a Local Judge had not jurisdiction in lunacy. The District Court Act ch. 4 of 1907, sec. 42 defined the powers of District Court Judges as Local Judges of the Supreme Court which expressly excepted jurisdiction in lunacy. This section was amended by ch. 2 of 1910 (2nd. Sess.) sec. 15 in such a way as to authorise the conferring of such jurisdiction by Rule of Court upon Local Judges, but this amendment was to come into effect only on proclamation and the proclamation was not issued until 1914 (See Office Consolidation of Public Statutes, 1906-1915 p. 266) and the necessary rule was not passed until it was included as R. 536 in the Consolidated Rules which came into force on September 1, 1914. A doubt of the jurisdiction of a Local Judge was held at the time and, as a consequence, this order was endorsed or underwritten by Simmons, J. with the following memorandum:—"Approved at Calgary in the Province of Alberta this 7th day of March A.D. 1913. W. C. Simmons, a Judge of the Supreme Court."

It is clear that had the petition presented to Simmons, J. (the petition was properly addressed to the Supreme Court), he might properly have referred the taking of all the evidence to some other person (R. 701), the production and examination of the lunatic is not necessary (R. 703). Had this course been taken the Judge would have fulfilled his duty by perusing the evidence and passing upon it. Everything is to be presumed in favor of the jurisdiction of a Judge of a Superior Court and of the regularity and propriety of the proceedings upon which any judicial act of his is based. I think, therefore, that the order in question must be recognised as a valid order of Simmons, J.

The contention of counsel for the defendant Hotze is that so long as a judicial declaration of lunacy stands unrevoked

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the lunatic is legally incapacitated from entering into any contract, (unless perhaps for necessaries or under some extraordinary circumstances). In support of this proposition he cites the decision of the English Court of Appeal in *Re Walker* (a lunatic so found) [1905] 1 Ch. 160, 74 L.J. (Ch.) 86, 53 W.R. 177, and the Annotation upon the question in 7 A.L.R. Annotated pp. 568 *et seq.* and some other authorities. In *Re Walker* it was held that when a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property, although he may, during a lucid interval execute a valid will.

In the course of his judgment Vaughan Williams, L.J. says at p. 171:—

"It must not be supposed that . . . I intend to limit my reasoning entirely to such a case" i.e. to a case of one found lunatic by the old method of "inquisition." "It may well be that, looking at the provisions of the Act of 1890 (The Lunacy Act), with regard to persons—not found lunatic, but who have been made the subject of an order under this Act, the same reasoning might bring the Court to the same conclusion with reference to those persons. I say nothing about that one way or the other."

In so saying he appears to be referring to orders respecting persons who are lunatics not so found by inquisition, described in sec. 116 of the Act.

The method of procuring a declaration of lunacy in this jurisdiction, that is, under the Statutory Rules of Court already referred to, is, in my opinion, a simplified "inquisition" (Compare Rules with Act of 1890 secs. 90 et seq.)

What are spoken of in *Re Walker* as the rights of the Crown over the person and property of lunatics, are, I think, in this jurisdiction vested in this Court.

The Judicature Act ch. 3 of 1919, re-enacting earlier like provisions, gives the Court jurisdiction. "In all matters relating . . . . to infants, idiots or lunatics and their estates" and also declares (sec. 14) that the jurisdiction of the Court shall include the jurisdiction which at any time prior to the organisation of the Supreme Court of the North West Territories (1886) was vested in or capable of being exercised by all or anyone or more of the Judges of any of the former English Courts of Common law or Equity specified including the Court of Chancery when acting as Judges or a Judge in pursuance of any statute, law or *custom;* and also all minister-

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ial powers, duties and authorities incident to any and every part of the jurisdiction so conferred and sec. 36 reads as follows: "In the case of lunatics and their property and estates the jurisdiction of the court, shall, subject to the rules of court, include that which in England is conferred upon the Lord High Chancellor by a Commission from the Crown under the sign Manual. The Statutory Rules passed in 1893 already referred to, now embodied in our present rules, regulate the jurisdiction over lunatics and their property by this Court.

There is also the Act to appoint an administrator of Lunatics' Estates (ch. 11 of 1916) relating primarily to lunatics confined in a provincial asylum for the insane.

The combined effect of these several statutory enactments is, it is clear, to extinguish all rights of the Crown over lunatics or their property dependent upon prerogative and to vest those rights in, and to place lunatics and their property wholly, under the jurisdiction of this Court, subject to provisions of the special Act just mentioned.

In my opinion I think the decision in *Re Walker, supra,* and the reasoning upon which it is founded should be adopted in this jurisdiction. A like case can seldom arise. It seems reasonable that where there has been a judicial declaration of incapacity, on the ground of lunacy, and a consequent placing of the control of the lunatic's property in the hands of a judicially appointed guardian, it should ordinarily be impossible that the lunatic should, while the judicial declaration and appointment remain unrevoked, be able to enter into contracts and thereby indirectly effect charges upon his property. There is no ground for distinction between a contract under seal and any other kind of contract. The right of a lunatic to dispose of his property by will, during a lucid interval, is not affected. See also Bouvier's Law Dictionary tit. "Insanity."

Accepting then this view of the law, it is unnecessary to discuss the case further and the result is that the appeal should be dismissed with costs. *Appeal dismissed.*

REX v. LEONARD.

Saskatchewan Court of Appeal, Haultain, C.J.S., McKay, J.A., and Embury, J., ad hoc. November 28, 1921.

PROHIBITION (§III—10)—PROSECUTION UNDER ULTRA VIRES STATUTE—COSTS OF PROHIBITION MOTION AGAINST PROSECUTOR—DISCRETION—APPEAL —SASK. CROWN PRACTICE RULE 40.

Where a writ of prohibition is granted to prevent a Magistrate from proceeding further with a prosecution under an *ultra vires* provincial law, the discretion of the Judge in awarding costs against the prosecutor will not be interfered with on an appeal taken solely on the question of costs.

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Haultain, C.J.S.

APPEAL by the informant against the award of costs against him on the allowance of a writ of prohibition against summary proceedings instituted under the Game Act, R.S.S. 1920, ch. 132, sec. 43 (1921), 57 D.L.R. 620. The appeal was dismissed.

H. E. Sampson, K.C., for the informant, appellant.

L. McK. Robinson, for the defendant, respondent.

The judgment of the Court was delivered by

HAULTAIN, C.J.S.:—The defendant Leonard was charged before the Provincial Police Magistrate under sec. 43 of the Game Act (R.S.S. 1920, ch. 132). That section reads as follows:—

"43. Every person who, while hunting or apparently hunting any game, shoots at or wounds any other person whether by accident, mistake or otherwise, under circumstances which would not constitute a crime under the provisions of *The Criminal Code*, shall be guilty of an offence and liable to a fine of not less than $500 nor more than $1,000 and in default of payment to imprisonment for the term of not more than six months."

Objection was taken before the magistrate on behalf of the defendant that the section in question was *ultra vires* of the Legislature.

The magistrate decided that the section was within the powers of the Legislature, and the defendant then applied for a writ of prohibition to prevent the magistrate from proceeding further with the hearing. The Chief Justice of the King's Bench, who heard the application, granted the writ of prohibition, with costs against the prosecutor Cornell. *R.* v. *Leonard* (1921), 57 D.L.R. 620, 34 Can. Cr. Cas. 242, 14 S.L.R. 185.

The plaintiff [informant] Cornell now appeals from that part of the order awarding costs against him.

In my opinion the appeal should be dismissed on the authority of *Ogloff* v. *Danis* (1920), 53 D.L.R. 513, 33 Can. Cr. Cas. 200.

Crown Practice Rule No. 40 leaves the question of costs to the discretion of the Judge who hears the application.

The case of *The Queen* v. *Banks* (1894), 2 Terr. L.R. 81, cited by Mr. Sampson, is not an authority for a hard and fast rule of practice. Contrary to what was stated in that case the High Court of England has, ever since the Judicature Act, had jurisdiction to award costs in *certiorari* in cases on the Crown side. 10 Hals. p. 211; *R.* v. *Woodhouse*, [1906] 2 K.B. 501, 75 L.J. (K.B.) 745.

In granting or refusing prohibition the Court in England has always had a discretion to give costs. *Wallace* v. *Allen* (1875), L.R. 10 C.P. 607, 44 L.J. (C.P.) 351, 23 W.R. 703; *The Queen*

v. *Justices for the County of London*, [1894] 1 Q.B. 453, 63 L.J. (Q.B.) 301, 42 W.R. 225.

The appeal will therefore be dismissed with costs.

Appeal dismissed.

GOTTSCHALK v. HUTTON.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 29, 1921.

SEARCH AND SEIZURE (§I—11)—RECOVERY OF PROPERTY SEIZED BY POLICE—ACTION BY BAILEE OF LIQUOR AFTER CONVICTION FOR ILLEGAL POSSESSION UNDER LIQUOR LAWS—PRIOR QUASHING OF FORFEITURE ORDER—STATUS OF BAILEE TO MAINTAIN ACTION FOR RETURN OF LIQUOR—POSSESSION FOR PURPOSES OF TRANSPORTATION TO OWNER—LIQUOR ACT, ALTA. 1916, CH. 4.

The person convicted of having illegal possession of intoxicating liquor in a place other than his dwelling house and whose possession was that of a bailee for an export liquor company lawfully entitled to keep liquor in its export warehouse may maintain an action in his own name for the return of the liquor after the quashing of an invalid order of forfeiture made by the magistrate. The bailee's possession for the purpose of immediate return of the liquor to the liquor export company would be a lawful possession on his part.

ACTION for return of intoxicating liquor seized by officers representing the Crown and transferred to the custody of the defendant, a Government vendor. The plaintiff, in whose possession the liquor was at the time of seizure, was convicted of illegal possession of same at a place where it was not authorised to be kept. *R.* v. *Gottschalk* (1921), 59 D.L.R. 116, 35 Can. Cr. Cas. 257, affirming (1921), 57 D.L.R. 705. An order of forfeiture made in the proceedings had been quashed as unauthorised in respect of the charge as laid, which was not one of keeping for sale. *R.* v. *Gottschalk* (1921), 57 D.L.R. 705; *R.* v. *Diamond* (1921), 59 D.L.R. 109, 35 Can. Cr. Cas. 250, 16 Alta. L.R. 302, reversing (1921), 57 D.L.R. 705. On the quashing of the forfeiture order the Judge hearing that application had declined to make an order of restoration, as Gottschalk claimed no title on his own behalf to the liquor.

A. A. McGillivray, K.C., for plaintiff, appellant.

H. W. Lunney, K.C., for defendant, respondent.

The judgment of the Court was delivered by

BECK, J.A.:—This is a special case stated for the opinion of this Court.

Samuel Diamond and Joseph Diamond were convicted of unlawfully selling intoxicating liquor contrary to sec. 233 of the Liquor Act, 1916, ch. 4; Gottschalk was convicted of unlawfully having intoxicating liquor in a place other than his private dwelling house contrary to sec. 24 of that Act. These convictions were affirmed by Ives, J. (1921), 57 D.L.R. 705. The

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decision of Ives, J., was reversed with respect to the Diamonds (1921), 59 D.L.R. 109, but affirmed with respect to Gottschalk noted, [1921] 2 W.W.R. 186, and reported in full, 59 D.L.R. 116.

In the case against the Diamonds it appeared that the two accused were representatives of the Diamond Liquor Co., that the liquor in question belonged to that company, evidently a company entitled to export it under the Liquor Export Act, 1918, ch. 8; that in truth there was no sale of the liquor, as was pretended, to one Miller in Saskatchewan. Neither of the Diamonds was called as a witness in the case.

The evidence of Gottschalk, which is extracted in the special case and made a part of it, makes it quite clear, in the light of the decisions above mentioned, that he was a mere bailee, as a carrier, of the liquor in question for the owner, the Diamond Liquor Co., Ltd.

In the case of Gottschalk the magistrate purported to make an order forfeiting the liquor found in his possession. This order was quashed by Ives, J., on the ground that an order for forfeiture can be made only after conviction upon a charge for having or keeping for sale. His decision in this respect was affirmed.

The liquor in question, 72 dozen bottles, being, when these cases were before the magistrate, in the hands of the Alberta provincial police, was shortly afterwards transferred to the custody of the government vendor, who is the defendant in the present proceeding, and who, as agreed by counsel for the Attorney-General, is to be treated as representing all persons acting on behalf of the Crown with respect to the liquor and as the proper defendant in these proceedings.

The special case as amended also states that the liquor was in the plaintiff's possession in contravention of sec. 24; that the defendant took the liquor from the possession of the plaintiff and refuses to deliver it to the plaintiff; that the defendant claims no right, title or interest in the liquor other than the possessory one, and holds it subject to the disposition of this Court, and that the bailor of the liquor has demanded the return of it from the plaintiff. This must mean that the Diamond Liquor Co. has demanded return of the liquor from the plaintiff.

The case states the question of law for the opinion of the Court to be whether the plaintiff is entitled in law to a judgment against the defendant for damages for the value of the goods, and it is agreed that the relief to be given, subject to the approval of the Court, is: (*a*) Judgment for the plaintiff for damages in the amount of the value of the goods to be assessed

and costs, or in the alternative for the return of the goods, or (*b*) Dismissal of the plaintiff's claim with costs.

It is quite clearly settled by decision of the highest Courts that, in an action of trespass to goods or of trover, as against a wrongdoer, any possession which is complete and unequivocal is a sufficient title to entitle the plaintiff to recover, and that the defendant cannot against such title set up the title of a third person (*jus tertii*) unless he claims under such third person. Hals., vol. 27, tit. "Trespass," pp. 865, 870; *Jeffries* v. *G.W.R. Co.* (1856), 5 El. & Bl. 802, 119 E.R. 680, 25 L.J. (Q.B.) 107, 4 W.R. 201, followed in *The Winkfield*, [1902] P. 42, 71 L.J. (P.) 21, 50 W. R. 246; *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, 73 L.J. (P.C.) 62; *Eastern Const. Co.* v. *National Trust Co.*, 15 D.L.R. 755, [1914] A.C. 197, 83 L.J. (P.C.) 122, (reported below *sub nom. Nat. Trust Co.* v. *Miller* (1912), 3 D.L.R. 69, 46 Can. S.C.R. 45).

These cases also establish that if a person with a limited interest in goods sues a stranger *for trespass* to the goods he is entitled to recover the full value of the goods if they are destroyed, but what he recovers above the value of his own interest he recovers in trust for the owner of the goods, Halsbury *ubi supra*, p. 869.

A person who is in mere possession of goods, as, for instance, the innocent finder of lost goods, has sufficient title in the goods to sue *in trover or detinue* any person, except the true owner, Hals.*ubi supra*, p. 905.

A refusal to deliver up the goods after demand amounts to a conversion (p. 894), and an offer to restore the goods, after refusal, though effective to reduce the damages if made before action or even after action brought (pp. 896, 911), would evidently be quite ineffective after judgment. Judgment for conversion, if satisfied by the payment of the damages, vests the property in the defendant (p. 916).

These authorities, if accepted and applied to the present case, *prima facie* entitle the plaintiff to judgment not merely on his alternative claim for the return of the goods themselves but, in accordance with his primary claim, to judgment for their value to be assessed. But against this several objections are put, first, that the plaintiff's own possession being wrongful, the rule that possession is title does not apply.

A very satisfactory treatment of this objection is to be found in a case in the Court of Appeal of Manitoba, *Dutton* v. *Canadian Northern Railway* (1916), 30 D.L.R. 250, 26 Man. L.R. 493, 21 C.R.C. 294.

It was there held that as against a wrongdoer, even one who

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has been merely negligent, a plaintiff needs to show possession only, and the fact that he has obtained such possession by his own trespass and has no other title is no defence to his action. The Court after referring to the cases already cited establishing the general rule, approved the decision in *Northern Pacific* v. *Lewis* (1892), 51 Fed. 658, in which it was laid down that:

"The defendant is not allowed to justify his own wrong by shewing the plaintiff's wrong, and he is not allowed to question the title of the plaintiff in possession, unless he connects himself with the true title," and two of the Judges of the Court of Appeal of Manitoba (Richards and Perdue, JJ.A.) expressly approve of the dictum of Blackburn, J., in *Buckley* v. *Gross* (1863), 3 B. & S. 566, 122 E.R. 213, 32 L.J.Q.B. 129:

"I do not know that it makes any difference whether the goods have been feloniously taken or not," which, in Salmond's Law of Torts, 4th ed., at p. 355, is cited as authority for the statement:

"Presumably it makes no difference in what mode the plaintiff obtained the possession on which he relies. Whether honest or dishonest, it is a good title *adversus extraneos.*"

As has already been noted, a plaintiff, recovering on a title by possession, is entitled to either the goods or their full value. His right in this respect does not depend upon his legal liability to account to the true owner, as is pointed out in the cases already cited, but if he recovers damages in lieu of the goods he becomes legally liable to account to the true owner. In regard to the goods themselves, though there may be, in some cases, no legal obligation by the possessor to account for them, there may yet be a moral obligation which the possessor is entitled to be placed in a position to fulfil. In the case of a felonious acquisition by the possessor there would, of course, be both a legal and moral obligation to restore.

Another objection to which attention was called during the argument was that the goods, having apparently been used at the hearing as an exhibit, they were in the custody of the Magistrate's Court, but this objection is met by the agreement of the parties that the defendant should represent all parties. It is, furthermore, answered by the answer to the main objection that, in view of the character of the goods, the plaintiff is not entitled to recover. This remains to be dealt with.

The seizure of the liquor at the time it was seized was not justified by anything contained in the Liquor Act, and as we have already held, the liquor was not subject to confiscation.

It is undoubted law (5 Corpus Juris tit "Arrest," p. 434) that "After making an arrest an officer has the right to search

the prisoner, removing his clothing, if necessary, and take from his person, and hold for the disposition of the trial court, any property which he in good faith believes to be connected with the offence charged, or that may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape."

The English cases are collected in Roscoe's Criminal Evidence, 13th ed., pp. 195-6, to which may be added *Buckley* v. *Gross, supra.*

Two cases which are not available, are noted in Corpus Juris as follows at p. 435:

"Where an arrest is made for violation of an ordinance by the beating of drums, the officer is not justified in detaining the drums after trial, without an order of the Court, even though he has reason to and does believe that the arrested party will immediately use the drums in violation of the same ordinance. *Thatcher* v. *Weeks* (1887), 79 Me. 547, 548, 11 Atl. Rep. 599 (where the Court said: "The principle, thus contended for by the officer would enable him to detain the team of a person arrested for too fast driving, so long as he, the officer, believed with reason the owner would immediately repeat his offence of too fast driving, if the team were restored to him . . . We do not find any authority or reason for the officer rendering any judgment in the matter.")

"There is an evident distinction between articles which can have only an unlawful use, like counterfeit coin, and articles in themselves innocent. If an officer may indefinitely hold the former, it does not follow that he can so hold the latter. *Thatcher* v. *Weeks, supra,* distinguishing *Spalding* v. *Preston,* 21 Vt. 9, 50 Am. D. 68."

That the mere fact that an offence has been committed by means of the goods in question and may perhaps be again committed is not an obstacle to the plaintiff's recovery against the police, in whose custody they are, after the conclusion of the proceedings is held in the very interesting Australian case of *Doodeward* v. *Spence* (1908), 6 Com. L.R. 406.

Intoxicating liquor is not something which can be used only for an unlawful purpose. The use of it is restricted. Undoubtedly such a quantity as is in question here can, in view of the Liquor Act, be lawfully in the possession only of a government vendor or of an exporter. The Diamond Liquor Co., which upon the case stated is the owner of the liquor, can lawfully have possession of the liquor. That company having demanded

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the liquor from the plaintiff as its bailee, he has, in my opinion, the right to have it returned to him for the purpose of enabling him to fulfill his legal and moral obligation to return the liquor to the company as the true owner. The Liquor Act itself (sec. 80, added by ch. 22 of 1917, sec. 41) contemplates that where there has been a seizure and the case is such as to suggest a *prima facie* right of forfeiture, an order of forfeiture shall not be made until "the shipper, consignee or owner" of the liquor has been duly notified and has thus had an opportunity of showing cause why the liquor should not be destroyed or otherwise dealt with. This course being expressly contemplated, where there exists a right of seizure and forfeiture, *a fortiori*, the true owner's title should be recognized where no such right exists. In the present case the admitted facts are such as to show who is the true owner and that the plaintiff was a mere bailee for the owner, and that, the owner having demanded a return of the liquor from the plaintiff, he has a right to have it returned to him for the purpose of enabling him to fulfil the obligation—both a legal and moral one—to return it to the owner. Under these circumstances, it seems to me that the general rule applies that the purpose for which the goods, taken possession of by the police authorities (possibly lawfully for the purposes of the proceedings in the police court), having served the only purpose justifying, if it did justify, the police in taking possession of them, and their return having been demanded, the plaintiff is entitled to their return.

The following authorities are of interest in this connection:

In Woollen & Thornton's Law of Intoxicating Liquors, vol. 2, sec. 999, the statement is made, fortified by a number of American authorities, that intoxicating liquors are the subject of larceny, even though not the subject of sale, as in a prohibition State, and even though they are kept in violation of law. (*Commonwealth* v. *Coffee* (1857), 75 Mass. 139.)

"It is a principle or rule of property as old as the common law itself, that the possession of one is good against all others who cannot show a better right of possession. Hence he who steals a stolen article of property from a thief may himself be convicted, notwithstanding the criminality of the possession by his immediate predecessor in crime." (*State of Iowa* v. *May* (1866), 20 Iowa 305, at p. 308.) Much more so are the proceeds of illegal sales of liquor the subject of theft. (*Commonwealth* v. *Rourke* (1852), 64 Mass. 397.)

"Notwithstanding that statute, spirituous liquors are still property in this Commonwealth, *Fisher* v. *McGirr*, 1 Gray 47. An action may be maintained against a wrongdoer who inter-

feres with the possession or property of the owner. A sale, even when made under such circumstances as the law forbids, yet passes the property to the purchaser. The seller commits an offence for which he is punishable, but he does not retain his property in the article sold. It has never been held, under any of the statutes regulating the sale of spirituous or intoxicating liquors in this Commonwealth, that the purchaser was guilty of any offence or was *particeps criminis.*" (*Cobb* v. *Farr* (1860), 82 Mass. 597.)

Taking it as a result of the decisions in the proceedings against the two Diamonds and Gottschalk that it appears that the sale of the liquor and its intended export to Saskatchewan was a mere pretence and that the Diamond Liquor Co. remained the true owner of it, that company had a right to demand the return of it by Gottschalk. It can hardly be contended that both must be taken to have so fixed their illegal course of action as to leave no *locus poenitentiae*. If the company had a right to demand it and did so, Gottschalk would have had not only the right but the duty to return it, and instantly Gottschalk *bona fide* set about fulfilling this duty, that is, was rightfully conveying the liquor to the company which was legally entitled to it both as respects property and possession, his possession clearly in my opinion would have become a lawful possession for a lawful purpose, for if the law admits that one person may lawfully give and another lawfully receive it seems a necessary implication of law that the act of conveyance from one to the other is lawful. To emphasize this aspect of the case, let it be supposed that upon Gottschalk being arrested in possession of the liquor he had at once admitted that he knew the sale was a pretence and that the real intention was that he should sell the liquor within Alberta and had said that having been caught he would instantly return it to the company (and certainly if a representative of the company had appeared upon the scene and demanded it) Gottschalk, though liable to conviction for his possession up to that moment, would not be liable in respect of the possession which was necessary in conveying it to the company, or at least the representative of the company could rightfully take possession of it for the purpose of replacing it in the company's warehouse, where it lawfully might be, though perhaps liable for an offence in respect of the liquor under the Liquor Export Act.

It seems clear then that if the liquor itself were returned to the plaintiff and he, immediately and *bona fide*, went about delivering it back to the owner, he would not be said to be in possession of it unlawfully—there is a necessary implication, if

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not an express provision, that where liquor may lawfully be transferred by one person to another the intermediary, carrier, drayman or messenger *bona fide* fulfilling that purpose has lawful possession.

In the result *prima facie* I think that the plaintiff is entitled to damages, but for various reasons—one being the fact that the value of the liquor depends upon its quality, which can perhaps only be ascertained by more or less extensive testing—my brother Judges think that the judgment should be for a return of the liquor *in specie*, and, as they agree that during the course of conveyance from its present depositary to an export warehouse it cannot lawfully be interfered with by the police authorities, I also agree.

The judgment therefore will be for the plaintiff for a return of the goods, with costs.

Judgment for plaintiff.

Re TRIPP ESTATE.

Saskatchewan King's Bench, Bigelow, J. March 22, 1921.

EXEMPTIONS (§IIA—12b)—EXECUTION DEBTOR—EXEMPTIONS ACT, R.S.S. 1920, CH. 51, SEC. 6—CONSTRUCTION—RIGHTS OF WIDOW AND CHILDREN IN HOMESTEAD.

Section 6 of the Exemptions Act, R.S.S. 1920, ch. 51, is not available in favour of the widow and children of a deceased execution debtor unless it is in the use and enjoyment of such widow and children, and is also necessary for their support and maintenance.

APPLICATION on behalf of the widow and children of a deceased execution debtor to have it declared that the homestead is exempt from execution.

C. A. Scott, for executor.

R. W. Pearson, for widow.

R. I. Hogarth, for official guardian.

BIGELOW, J.:—I made a fiat in this matter on October 22, 1920. The order has been taken out and by consent the matter is reargued and further material filed.

At the time of the death of William A. Tripp, the north-east quarter of sec. 9, tp. 48, range 23, west of the third meridian, was their homestead. The widow and children continued to reside on it until 1913, when they were forced to leave it as the executor had sold the chattels. The widow remarried (when, it does not matter except that it was before the fall of 1915) and the children have been adopted through the auspices of the Saskatoon Aid Society. The widow and children claim their quarter section is exempt from any claims by creditors. Section 6 of the Exemptions Act, R.S.S. 1920, ch. 51, says it shall be exempt if it is in the use and enjoyment of the widow and

children *and* is necessary for the maintenance and support of said widow and children or any of them.

In 1917 when the sale was made, the land certainly was not in the use and enjoyment of the widow and children (or any of them). It might be possible to shew that it is necessary for their maintenance and support. The present material does not shew that, and even if it did I do not think that would be sufficient. It must both be necessary for their maintenance, and be in the use and enjoyment of the widow and children. I do not see how I can extend the wording of the statute to cover a case where they considered it necessary to abandon the lands to better their position or to support themselves.

The sale will be approved as in the summons, and the proceeds of the sale will form part of the general estate.

The widow should not have any costs as her contention has not succeeded. The costs of the executor and the official guardian to be taxed on the middle scale and paid out of the estate.

REX v. GRAMAN.

Alberta Supreme Court, Appellate Division, Scott, C.J., Beck and Clarke, JJ.A. November 25, 1921.

CERTIORARI (§ IB—12)—DISORDERLY HOUSE—SEARCH ORDER—OTHER JUSTIFICATION FOR ARREST BY PEACE OFFICER—CR. CODE SECS. 30, 225, 228, 648.

The sufficiency of the search order under Cr. Code, sec. 641, as authority for defendant's arrest on the ground that it failed to specify the time at which it was to be executed, need not be enquired into on a *certiorari* motion to quash a conviction for keeping a common bawdy-house if the arrest was one which was justifiable under Cr. Code, secs. 30 and 648.

[*R.* v. *Pollard* (1917), 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 Alta. L.R. 157, and *R.* v. *Hing Hoy* (1917), 36 D.L.R. 765, 28 Can. Cr. Cas. 229, 11 Alta. L.R. 518, distinguished.]

APPEAL, by leave, from an order of Stuart, J., dismissing a *certiorari* application. The appeal was dismissed, Beck, J.A., dissenting.

J. E. Varley, for defendant, appellant.

A. Mahaffy, for the Crown.

SCOTT, C.J., concurred with CLARKE, J.A.

BECK, J.A. (dissenting): The defendant was charged with being the keeper of a disorderly house, that is, a common bawdy house. The charge was laid under sec. 228 of the Criminal Code.

A common bawdy house is defined by sec. 225 as a house, room, set of rooms or place of any kind kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes.

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The only evidence is as follows:

A woman, Anna Danhoff, who in the course of her evidence for the defence, admitted that she had been convicted of "being a prostitute" lived nearby the house of the accused. The accused was a married woman, her husband living with her. She said her husband was at home every night. There is nothing to rebut the natural inference that such would be the case.

The woman, Anna Danhoff, was a frequent visitor at the house of the accused but only during the day time. The evidence shewed that while sitting on the verandah of the accused's house she hailed a man passing the house and took him to a room upstairs where, the man says, an act of fornication took place. He also says that he paid the woman $3. The woman says that he paid her $1 for the rent of the room for the night. The accused says that the woman paid her $1 for the rent of the room. Of course this evidence must be taken for the purpose of this motion most strongly against the accused and inferences against the accused may be drawn.

The foregoing is in my opinion the only admissible evidence and the only evidence to which any weight is to be attached.

A constable volunteered the statement that the accused was "a convicted prostitute." The statement was not made in such a way as to have made it possible to object to it before it was made. A previous conviction could not be proved in that way. The same constable moreover admitted that that was a considerable time before the accused was married and while she was living in another house.

Then it was contended that there was evidence of reputation. There is no evidence of the reputation of the accused. The only evidence about her is what I have stated. There is no evidence of the reputation of the woman, Anna Danhoff, unless her admission of her conviction can be so considered.

There is, in my opinion, no evidence of the reputation of the house. The only evidence that is suggested as evidence of reputation is the following: A constable says: "All I know is that complaints have been made about this house." Another constable says he got a search warrant. Asked, on what ground? He answered: "On complaints received that the house was a disorderly house along with others." Evidence of one or two, or two or three, more complaints is not in my opinion any evidence of reputation. But, in any case, in my opinion evidence of the bad reputation of the house is not admissible at all on a charge of keeping a bawdy house. Possibly such evidence may be admissible to prove knowledge on a charge of being a frequenter. Probably too the character—not, I

think, the reputation—of women resorting to a house may be proved for the purpose of shewing the character of the house.

In my opinion, there is no ground of principle upon which evidence of the reputation of a house as a common bawdy house is admissible at all and any such evidence when tendered ought to be rejected as inadmissible.

Reg. v. *McNamara* (1891), 20 O.R. 489, is commonly cited as an authority for the admission of evidence of reputation in such cases. The charge there was not that of keeping a bawdy house. It was for attempting to procure a woman to become a common prostitute. The Court (Galt, C.J., Rose and MacMahon, JJ.) held that on such a charge evidence of the general reputation of the house is admissible, in corroboration of the complainant's evidence. Galt, C.J., puts the matter baldly in that way. Rose, J., discussed a number of English and American decisions and text books. I cannot see that the English authorities furnished any support whatever for his conclusion. The authorities which say that a charge relating to a brothel—keeping or frequenting—may be general in its statement that the house is a bawdy house and need not set out particular instances seem to be made to do service to establish the proposition that the evidence may be equally general.

Burn's Justice of the Peace is quoted as an authority for the statement (doubtless a correct one) that if a person be indicted for frequenting a bawdy house, it must appear that he knew it to be such a house; but the author does not go on to say that general reputation is admissible as evidence to prove the house to be in fact a bawdy house or even to bring home knowledge of its character to the accused, although for this later purpose I should be inclined to think it would be admissible.

Finally Rose, J., adopts *in toto* the reasoning of a South Carolina case which holds that in such cases as the present, evidence of general reputation is admissible. I find the reasoning of the American judge in some parts quite faulty and on the whole unconvincing.

MacMahon, J., merely concurred.

In *Rex.* v. *Carroll* (1908), 9 W.L.R. 119, (B.C.) Hunter, C.J. expressly declines to follow *Reg.* v. *McNamara*, though it had apparently been approved by Craig, J., in *Rex* v. *Mercier* (1908), 7 W.L.R. 922 (Y.T.).

Reg. v. *St. Clair* (1900), 3 Can. Cr. Cas. 551, 27 A.R. (Ont.) 308, a decision of the Court of Appeal of Ontario, is opposed to

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Reg. v. *McNamara.* Osler, J.A., who gave the judgment of the Court, says, p. 314:—

"Evidence of the general reputation of the house seems to be admissible, *or has been held to be so*, but I am not prepared to say that such evidence alone would be sufficient to convict. Such a reputation is not acquired without acts or conduct capable of proof from which the character of the house may be inferred, such as the character of the women as being common prostitutes and the fact of men visiting the house at all hours and dissolute and disorderly behaviour there. As Lord Hardwicke says in *Clarke* v. *Periam* (1742), 2 Atk. at p. 339, speaking of cases where the character is the particular issue to be tried: 'Suppose in the case of an indictment for keeping a common bawdy house, without charging any particular fact, though the charge is general, yet at the trial you may give in evidence particular facts and the particular time of doing them.' That, I think, points to the proper way of proving the charge. . . . I may refer to the case of *Reg.* v. *McNamara* (1891), 20 O.R. 489, where this question was examined. I am not prepared, however, to concur unreservedly in the observations made in the case there cited by my learned brother Rose from Dudley's South Carolina Reports, p. 346."

R. v. *Sands* (1915), 28 D.L.R. 375, 25 Can. Cr. Cas. 120, 25 Man. L.R. 690, a decision of the Court of Appeal of Manitoba, distinctly approves of *R.* v. *St. Clair* as against *R.* v. *McNamara.*

If there is excluded all evidence sought to be utilized as evidence of reputation, we have evidence of nothing more than that one act of fornication was committed in the house with a woman who said she had been—quite indefinitely as to time or place—convicted as a common prostitute.

There was no evidence to shew that the house was "resorted to" for the purposes of prostitution, either by this one man or by this one woman. Resorting implies going to at least more than once.

I would allow the appeal and quash the conviction.

CLARKE, J.A.:—Appeal by leave from judgment of Stuart, J., dismissing an application in *certiorari* proceedings to quash a conviction by a police magistrate against the defendant for keeping and maintaining a common bawdy house contrary to sec. 228 of the Criminal Code.

The grounds of appeal to this Court were limited to the two following, viz.:—1. That there was no evidence to support the conviction. Upon a careful perusal of the evidence I am satisfied it was sufficient. 2. That the search order under which the defendant was arrested was bad inasmuch as it did not prescribe

the date or hours within which search might be made and was not in fact executed until 7 days after it was made by reason whereof the arrest was illegal and the magistrate was without jurisdiction.

This objection presupposes that the authority to arrest in such a case is governed wholly by section 641 of the Criminal Code. If so, or if any inference is sought to be drawn from some obstruction to the officer seeking to enter, under section 986 the form and sufficiency of the order would be material, but as I understand the procedure in case of persons charged with committing a criminal offence no order or warrant is required in order to justify an arrest by a peace officer.

Section 648 provides that a peace officer may arrest, without warrant, anyone whom he finds committing any criminal offence.

Section 30 provides that a peace officer who on reasonable and probable grounds believes that an offence for which the offender may be arrested without warrant has been committed whether it has been committed or not and who on reasonable and probable grounds believes that any person has committed that offence is justified in arresting such person without warrant whether such person is guilty or not.

I think that in the present case the arrest was authorised under either of these sections.

Section 668 provides that when any person accused of an indictable offence is before a justice whether voluntarily or upon summons or after being apprehended with or without warrant, the justice shall proceed to enquire into the matters charged against such person in the manner thereinafter directed.

Sections 773 and 774 provide that whenever any person is charged before a magistrate with certain offences including the one in question here, the magistrate may hear and determine the charge in a summary way.

The arrest having been legal, these sections, I think, fully clothe the magistrate with jurisdiction.

This decision does not conflict with the decision in *Rex* v. *Pollard* (1917), 39 D.L.R. 111, 13 Alta. L.R. 157, 29 Can. Cr. Cas. 35, which had reference to an offence created by a Provincial Legislature and is, therefore, inapplicable, nor with the opinion expressed by Stuart, J., in *Rex* v. *Hing Hoy* (1917), 36 D.L.R. 765, 11 Alta. L.R. 518, 28 Can. Cr. Cas. 229, in which the effect of sec. 985 of the Criminal Code was considered. Both cases are distinguishable.

In my view of the matter it is unnecessary to consider the sufficiency of the order to search.

I would dismiss the appeal with costs. *Appeal dismissed.*

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REX v. VICTORIA UNIT (ARMY AND NAVY VETERANS).

British Columbia Supreme Court, Murphy, J. September 3, 1921.

INTOXICATING LIQUORS (§IIIA—50)—ILLEGAL SALES—"PERSON"—PROSECUTION OF A "UNIT" OF AN INCORPORATED ASSOCIATION—GOVERNMENT LIQUOR ACT, 1921 B.C., CH. 30—ARMY AND NAVY VETERANS ACT, 1917 (CAN.), CH. 70.

A prosecution of "The Army and Navy Veterans in Canada (Victoria Unit)" for unlawful sale of intoxicating liquor in contravention of the Government Liquor Act, 1921 B.C., ch. 30, is not maintainable as it is neither a natural person nor a corporation and, therefore, is not included within the prohibition of sec. 26 of that Act, which is aimed at "persons" as defined by the Interpretation Act, R.S.B.C. 1911, ch. 1, and amendments.

A corporation is a "person" within the statutory definition, but while "The Army and Navy Veterans in Canada" are incorporated under 1917 (Can.), ch. 70, with power to establish local "units," one of the units so established is not thereby made a corporation.

STATED CASE by Police Magistrate Jay, Victoria, dated August, 12, 1921, heard before Murphy, J., at Victoria, August 18, 1921.

E. C. Mayers, for Crown.

H. D. Twigg, for Veterans.

MURPHY, J.:—In my opinion the Dominion Statute, 1917, ch. 70, is referred to as "the statute," the corporation thereby created under the name of "The Army & Navy Veterans in Canada" is referred to as "the association" and the body named in the case stated "The Army & Navy Veterans in Canada (Victoria Unit)" is referred to as the "Victoria Unit."

The legal point raised by question No. 1 has already been decided by Macdonald, J., and as I intimated I would follow his decision, was not argued before me. I would answer it in the affirmative.

As to question No. 2. "Person" by the Interpretation Act includes any body corporate or politic. The phrase "or corporation" in this question is, therefore, I think surplusage. "Person" in law may include both a natural person (a human being) and an artificial person (a corporation). *Pharmaceutical Society of Great Britain* v. *London & Provincial Supply Ass'n* (1880), 5 App. Cas. 857, 49 L.J. (Q.B.) 736, 28 W.R. 957. As stated, by virtue of the Interpretation Act, it does include both as used in the Government Liquor Act, 1921 (B.C.), ch. 30. I know of no other entity or concept that, as used in the Government Liquor Act, it can include; and none was suggested in argument. Obviously, the Victoria Unit is not a natural person (a human being). Is it an artificial person (a corporation)? If it is, it must be so by reason of something contained in the statute under the provisions whereof, according to the case stated, it was created. The case stated further finds that

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Murphy, J.

the Victoria Unit was created by the association under powers conferred by the statute. There is no power in the statute authorising the Association to confer the status of a corporation on the Victoria unit. It cannot, therefore, be a corporation by virtue of any act of the association nor, as I understood his argument, did counsel for the Crown so contend. Since whatever status the Victoria unit has must be the creation of the statute; since the association cannot create a corporation and since the statute creates but one corporation, viz., the association, it follows that if the Victoria unit is a corporation, it must be the corporation created by the statute. In other words, "the Victoria unit" and the "association" are one and the same artificial person. This, to my mind, is to assert the identity of cause and effect. The statute did not create the Victoria unit; it authorised the association (which it did create a corporation) to establish the Victoria unit. How can a corporation created by statute create another body which is the identical artificial person as itself? In my opinion, to assert that it can involves an absurdity. It was endeavoured in argument to maintain the identity of the Victoria unit and the association by the analogy of branches of a Canadian chartered bank. But no one, I think, would argue that a Vancouver branch of, say, the Bank of Montreal, is the corporation known as "the Bank of Montreal." The fallacy involved, I think, arises from confusing status with agency. Question No. 2 of the case stated deals with status not agency. It had to do so, for secs. 26 and 46 of the Government Liquor Act deal with status not agency. I would answer the question thus, "The Victoria Unit" is not a person within the meaning of the Government Liquor Act.

I do not think, in view of my answer to question No. 2, that the Court is called upon to answer question No. 3. This question is propounded to obtain light on sec. 26 of the Government Liquor Act, and would be a proper question for submission if the facts of the case stated shewed that any "person," for instance, and servant, officer, or member of the Victoria Unit was the convicted party. The conviction here, however, is against the Victoria Unit. Since I hold the Victoria Unit is not a "person" within the meaning of the Government Liquor Act, no case can arise on sec. 26 of said Act which contains a prohibition aimed at a "person" and at nothing else.

For the same reasons, I consider question 4 does not call for an answer, since the prohibition in sec. 46 of the Government Liquor Act is identical in nature with that contained in sec. 26.

Answers accordingly.

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REX v. BRADY.

Wynyard (Sask.) District Court, Bell, J. October 24, 1921.

SUMMARY CONVICTIONS (§ VIIA—75)—AMENDMENT ON APPEAL—POWERS UNDER CR. CODE, SEC. 754.

Under Cr. Code sec. 754, the power of modifying the summary conviction appealed from may be exercised upon the depositions returned where the parties call no witnesses on the appeal, by correcting such defects in the conviction as the omission to declare forfeiture of the fine imposed, omission to set out the amount of costs and to whom payable under Code Form 32 [1921 Can. ch. 25], and by striking out an unauthorised award of expenses to the informant.

APPEAL from a summary conviction under the provincial statute, R.S.S. 1920, ch. 124, sec. 55, for allowing a bull to run at large in contravention of the Stray Animals Act (Sask.).

The Magistrates Act R.S.S. 1920, ch. 64, sec. 8, enacts that "except it is otherwise especially provided, all the provisions of Part XV and Part XXII of the Criminal Code shall apply to all proceedings before justices of the peace under or by virtue of any law in force in Saskatchewan, or municipal by-laws, and to appeals from convictions or orders made thereunder."

The present appeal was taken accordingly under the provisions of sec. 749 *et seq*, of the Criminal Code. As to Saskatchewan, see the amendment of sec. 749 (f) made by statutes of Canada 1920, ch. 43.

E. M. Bell, for appellant.

A. E. Bence, for respondent.

BELL, D.C.J.:—I am asked by way of preliminary objection to quash this conviction without going into the facts because of the following defects:—1. The words "forfeit and" do not appear before the word "pay" in the conviction. (Form 32, Criminal Code.) 2. The conviction does not show the amount of the costs or to whom they are to be paid. 3. The conviction improperly contains a clause ordering payment of $10 to informant for capturing the bull in question.

In support of the first objection, *The Queen* v. *Crowell* (1897), 2 Can. Cr. Cas. 34, and *The Queen* v. *Burtress* (1900), 3 Can. Cr. Cas. 536, are cited, in both of which the omission of the word "forfeit" was held to be fatal, though some doubt is expressed in the latter judgment. These cases, however, were by way of *habeas corpus*, to which sec. 754 of the Code does not apply.

Strang v. *Gellatly* (1904), 8 Can. Cr. Cas. 17, is cited in support of the second and third objections, but it decides only that the insufficiency of a conviction is "legal merits" and affords

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no indication of what was wrong with the conviction beyond the bare statement that it "was bad on its face."

On appeal a conviction may, in certain cases, be quashed for defects apparent on the record without the evidence being gone into *de novo*, (*Strang* v. *Gellatly, supra; The King* v. *Brook* (1902), 7 Can. Cr. Cas. 216; *The King* v. *Koogo* (1911), 19 Can. Cr. Cas. 56; Annotation to *Rex* v. *Dunlap* (1914), 22 Can. Cr. Cas. 245), but the terms of sec. 754 are very wide, its operation is not limited to defects of form, and its object plainly, is to prevent appeals from succeeding on merely technical grounds. Where, then, as in this case, the conviction alleges an offence, the depositions appear to support it, and the information is not attached, I think the conviction is not to be disposed of so summarily. (*The King* v. *Boomer* (1907), 13 Can. Cr. Cas. 98, remarks of Anglin, J., at pp. 101, 102); *The King* v. *Sing Kee* (1909), 14 Can. Cr. Cas. 420, and *Rex* v. *Murphy* (1918), 29 Can. Cr. Cas. 445, are against the appellant as to the omission of costs, for the amount appears in the minute of adjudication; and no one can possibly have been prejudiced by the omission of complainant's name.

The King v. *Baird* (1908), 13 Can. Cr. Cas. 240, is authority for correcting an excessive sentence, if any be needed beyond sec. 754 itself, and that section also empowers me, I think, to strike out the order for payment to complainant, which is clearly wrong, without disturbing the penalty, because the two are quite separate and distinct.

The motion to quash is, therefore, refused.

The due entry of the appeal and the essential facts are admitted. Appellant's land adjoins that of respondent, both properties being enclosed by fences, and they are separated by a line fence. On August 31, 1921, appellant's bull, then more than 8 months old, broke through the line fence from appellant's land onto respondent's land. The conviction is for allowing the bull to run at large contrary to the Stray Animals Act, R.S.S. 1920, ch. 124, sec. 55 (2), and appellant contends that the animal was not running at large because, after breaking through, he was still confined within a fence. This amounts to saying that if the bull had broken out onto open unfenced prairie the appellant would have been liable to the penalty, but as it broke into an enclosure he is not; and, apparently, so long as such an animal is discriminating enough to keep to enclosed property the process may be continued indefinitely and the owner, nevertheless, remains exempt. "Running at large" is defined by sec. 2, clause 15, of the Act as "not being under

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control of the owner either by being securely tethered or in direct and continuous charge of a herder or confined within a building or other enclosure or a fence whether the same is lawful or not."

I quite agree with His Honor Judge Doak when he says with respect to this definition, "The essential ingredient is that they" (cattle and horses) "shall be under the control of the owner" (*Dobrolowski* v. *Danyluk*, [1921] 2 W.W.R. 729 at p. 731), and the short answer to this appeal is, I think, that, although the bull was still within a fence, he was not under the control of the owner. The phrase "under control" is, no doubt, difficult to define accurately, but the general intent in this connection seems sufficiently obvious. Whatever it may mean in other contexts, here it must surely mean the keeping of an animal so that it is not able to trespass of its own free will upon another person's property.

The conviction will be modified by inserting the words "forfeit and" in the proper place, by setting out the amount of the costs and the person to whom they are payable in accordance with Form 32, and by striking out the order to pay for the capture of the bull. The latter being clearly in excess of jurisdiction the appellant had every right to move against it, and he will, therefore, have the costs of appeal. If the solicitor will tax his bill before the clerk, I shall be able to fix the amount of costs and sign an order disposing of the whole matter, including payment out of Court of the money deposited. The amount of the fine must go to the Government, but the costs may be set off, and if a balance in favour of appellant results, the remainder of the money in Court will be paid out to him, and the respondent will pay the balance to the clerk as provided by sec. 758 of the Criminal Code. *Conviction modified.*

REX v. FOO LOY.

British Columbia Supreme Court, Gregory, J. July 29, 1921.

SEARCH AND SEIZURE (§ I—11)—COMMON GAMING HOUSE—MONEY SEIZED—FORFEITURE AND CONFISCATION—RETURN OF MONEY TO ACCUSED UNDER INVALID ORDER AFTERWARDS QUASHED—CIVIL ACTION BY CROWN FOR ITS RECOVERY.

Where money had been seized under a search order made under Cr. Code sec. 641 in respect of a common gaming house and a conviction and forfeiture order followed but the latter being reversed on appeal to a County Court Judge the money was returned to accused, although the conviction stood, the quashing of the order of the County Court Judge and consequent restoration of the forfeiture order will support an action by the Crown to recover the equivalent of the money which had been confiscated to the Crown for the public uses of Canada.

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TRIAL OF ACTION by the Crown to recover from defendant forfeited moneys seized under a search order under Cr. Code 641 and returned to him under a county judge's order which was afterwards quashed.

Ogilvie, for the Crown; *Wilson*, for defendant.

GREGORY, J.:—This is an action to recover from the defendant a sum of money ordered forfeited to the Crown in certain proceedings had before the Police Magistrate for the City of Prince George, wherein the defendant was convicted of keeping a common gaming house. The moneys had been seized under a search warrant and were present in Court at the time of the conviction.

The order of forfeiture was, on appeal, set aside by the County Court Judge and the moneys directed to be returned to the defendant. The moneys were accordingly returned but the order of the County Court Judge was subsequently quashed and this action is for the recovery of those moneys so improperly returned to the defendant.

Counsel for the defendant alleges that the proceedings before the magistrate were irregular and the magistrate was without jurisdiction and hence no action would lie. There is some evidence in support of his contention that the proceedings were irregular, in respect to the issuing of a search warrant.

Counsel for the Crown contends that as the conviction has been appealed from and still stands, the action will lie; the conviction cannot be set aside in this action.

Neither counsel has referred me to any authority in support of his contention, and I accept that of the Crown as the most reasonable one.

There will be judgment for the plaintiff for the amount claimed, viz., $1,120.00, with costs.

Judgment for the Crown.

REX. v. WONG MAH.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. November 28, 1921.

SUMMARY CONVICTIONS (§ VI—60)—NARCOTIC DRUGS—CONVICTION FOR UNLAWFUL POSSESSION—DESCRIPTION OF OFFENCE—CR. CODE SECS. 717, 723, 1124, 1125—OPIUM AND NARCOTIC DRUGS ACT, 1911 CAN., CH. 17 AND AMENDMENTS.

A conviction for unlawful possession of opium in contravention of the Opium and Narcotic Drug Act, Can., is sufficient in form if it recites the offence as having the opium in possession without lawful excuse contrary to a specified section of the Act correctly stated. The allegation of want of lawful excuse necessarily includes an allegation that the

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possession was "without lawful authority" (Act sec. 5*a*); and it was not necessary to specifically negative in the conviction the obtaining of a license from the Minister for such possession.

JUDGMENT (§ IG—55)—REVISION OF SENTENCE—APPLICATION BY SUBSTANTIVE MOTION REQUIRED—CR. CODE SEC. 1055A (CODE AMENDMENT OF 1921).

An application to the Court of Appeal for revision of sentence under Cr. Code sec. 1055A (amendment of 1921, ch. 25) should be made by substantive motion and should not be entertained on oral motion made on the giving of judgment by that Court reversing an order of discharge made on *habeas corpus* in respect of a conviction made by a magistrate.

APPEAL by the Crown from the judgment of Simmons, J., quashing a warrant of commitment and discharging the defendant from custody.

S. S. Cormack, for the appeal.

G. B. O'Connor, K.C., for defendant.

The judgment of the Court was delivered by

CLARKE, J.A.:—The defendant was committed to imprisonment in the Provincial Jail at Fort Saskatchewan by the Police Magistrate at Calgary under a warrant of commitment which recites that the defendant was convicted "for that he the said Wong Mah of Calgary on the 18th day of September, A.D. 1921, at Calgary aforesaid did have in his possession *without lawful excuse* a certain drug, to wit opium, contrary to sub-sec. 2 (e) of section 5a of The Opium and Narcotic Drug Act," [1911 ch. 17 amended by 1919 (2nd Sess.) ch. 25; 1920 ch. 31, 1921 Can. ch. 42.]

Sub-section 2 (e) provides as follows:—

"Any person who has in his possession *without lawful authority*.....any drug without first obtaining a license from the Minister shall be guilty of a criminal offence, &c." "Drug" is interpreted by the Act as including "opium."

The onus is placed upon the accused to establish that he had lawful authority to commit the act complained of or that he had a license from the Minister authorising such act.

The offence is punishable either upon indictment or upon summary conviction.

The following are the grounds specified by the defendant in his notice of motion by way of habeas corpus.

1. That the warrant of commitment discloses no offence under the Opium and Narcotic Drug Act.

2. The said Act is *ultra vires*.

3. The warrant is not under seal as required by law. [Note (*a*)].

(a) By the Criminal Code Amendment Act 1921 Can. ch. 25, sec. 21, it was enacted as follows: "It shall not hereafter be necessary for any justice to attach or affix any seal to any proceedings or process the forms for which are contained in Part XXV. of the said Act" (the Criminal Code).

I understand that the Judge below quashed the warrant on the first ground inasmuch as in the statement of the offence in the warrant the word "excuse" instead of the word "authority" is used and for that reason the warrant did not set forth any offence under the Act.

Upon this appeal grounds 2 and 3 were not advanced either in the respondent's factum or at Bar and I shall, therefore, pass them over.

Referring to the first ground of attack, I do not think it is necessary to describe the offence in the precise words of the statute. Section 723 (3) of the Code provides that "The description of any offence in the words of the Act.....creating the offence, or any similar words, shall be sufficient in law."

In *Reg.* v. *Harvey* (1871), L.R. 1 C.C.R. 284, 11 Cox C.C. 662 (which was not cited on the motion below) a similar question arose over a statute which enacted that "whosoever without *lawful authority or excuse* shall knowingly make.....or have in his custody or possession any die impressed with the resemblance of either side of any current coin shall be guilty of felony."

The indictment charged the prisoner with "knowingly and without lawful excuse feloniously" having in his possession dies impressed with the resemblance of the sides of a sovereign. Bovill, C.J., in delivering the judgment of the Court said: "If the word 'excuse' necessarily includes authority, the indictment will be good; if not, it will be bad."

And again:

"We have been unable to conceive any case in which there could be a lawful authority, which was not also a lawful excuse. We must, therefore, hold that the word 'excuse' includes authority and the indictment is sufficient." For my part I am willing to follow this decision by a Court of five Judges which, in my judgment, disposes of any objection to the use of the word "excuse" instead of the word "authority."

The further objection that the statement of the offence in the warrant does not contain the words "without first obtaining a license from the minister" is met by secs. 717, 1124 and 1125 of the Code as well as by the statement in the warrant that the defendant had the drug in his possession contrary to sub-sec. 2 (e) of sec. 5a of the Act.

Counsel for the defendant asks, in any event, that the punishment should be mitigated. It is not in excess of nor as great as might have been made under the Act.

If there is any authority to vary the punishment it is found in the recent amendment to the Code, ch. 25, sec. 22, 1921.

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I express no opinion as to whether or not the amendment is intended to apply to cases of summary convictions even though the offence may be an indictable one and in any event the matter should only be dealt with under the amendment by a substantive application. It is not a case in which the Court is likely to interfere if it has power to do so.

For the reasons stated I would allow the appeal with costs, set aside the order appealed from and dismiss the defendant's application with costs.

Appeal allowed.

Re JAY SET.

British Columbia Supreme Court, Macdonald, J. August 3, 1921.

CERTIORARI (§ IB—12)—STATUTE TAKING AWAY—QUESTION OF JURISDICTION BELOW—WHETHER ANY EVIDENCE TO SUPPORT CHARGE—REFERENCE TO DEPOSITIONS—OPIUM AND DRUG ACT 1911 (CAN.) CH. 17.

The right to *certiorari* having been taken away by statute as regards summary convictions for unlawful possession of opium, [The Opium and Narcotic Drug Act 1911, CAN., ch. 17], a superior Court has no right to examine on *certiorari* the depositions taken before the magistrate for the purpose of ascertaining whether or not there was any evidence upon which the magistrate could properly find as he did. [*R.* v. *Featherstone* (1919), 46 D.L.R. 665, followed.]

MOTION on behalf of the accused for a *certiorari* to quash a summary conviction for unlawfully having opium in his possession. Dismissed.

D. Armour, K.C., for accused; *H. E. Bond*, for Crown.

MACDONALD, J.:—Jay Set applies for *certiorari*, to bring before the Court and quash a conviction, whereby he was fined $200 for unlawfully having opium in his possession, without having obtained the requisite license from the Minister presiding over the Department of Health. The main ground in support of the application is that there was no proper evidence submitted to the magistrate upon which he could determine that the commodity found in the possession of the applicant was opium. In order to ascertain whether this contention is well founded, I would require to examine the depositions. Objection, however, is taken to my adopting this course, it being submitted that under The Opium and Narcotic Drug Act, 1911, ch. 17, the right to *certiorari* is taken away, and thus that neither the conviction nor the depositions are properly before me for consideration. If it be a fact that there was no evidence before the magistrate that the commodity, alleged to be opium, was a drug of that nature, then the right of the magistrate to adjudicate and decide might well be questioned. See *Re Mackey* (1918), 40 D.L.R. 287, 52 N.S.R. 165, 29 Can. Cr. Cas. 282;

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29 Can. Cr. Cas. 167; *In re Bailey* (1854), 3 El. & Bl. 607, 118 E.R. 1269, 23 L.J. (M.C.) 161; *Re Anthers* (1889), 22 Q.B.D. 345, 58 L.J. (M.C.) 62. Have I then the right to peruse the depositions? Upon a similar application to quash a conviction under the same Act, it was decided by Walsh, J., in *R.* v. *Featherstone* (1919), 46 D.L.R. 665, that the right to *certiorari* having been taken away by statute, he had "no right to examine the depositions to ascertain whether or not there was any evidence upon which the magistrate could properly find as he did." He then added that this situation rendered him powerless to help the defendant, as it was only by a perusal of the depositions that he could find anything upon which to found relief for the applicant, though he thought he had been rather harshly treated. It is desirable that there should be a uniformity of decisions throughout Canada in criminal matters. I think this principle is entitled to great weight when a crime has been created by statute and the effect of such legislation has been decided by a Superior Court of another province. I feel that I should under such circumstances follow the decision that the right to *certiorari* has been taken away. So the application is dismissed with costs.

Certiorari refused.

LAMSON v. DISTRICT COURT JUDGE. REX v. SHARPE AND INGLIS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. November 28, 1921.

APPEAL (§IIIF—98)—SUMMARY CONVICTION—EXTENSION OF TIME—JURISDICTION—NO ORDER AFTER 30 DAYS TO EXTEND TIME NUNC PRO TUNC AND VALIDATE LATE SERVICE—CR. CODE SEC. 750—1919 (CAN.), CH. 46, SEC. 12.

Only under exceptional circumstances is there jurisdiction to hear an appeal from a summary conviction without due service of notice of appeal. The fact that service within the time was omitted through an oversight of defendants' solicitor is not sufficient, and the statutory power of ordering an extension for not more than an additional twenty days following the usual ten days given for notice is not exercisable after thirty days from the conviction to validate an illegal service of notice made within the thirty days but after the expiry of the ten days.

PROHIBITION (§ III—10)—LACK OF JURISDICTION IN INFERIOR COURT—APPEAL FROM SUMMARY CONVICTION—NOTICE TOO LATE AND EXTENSION ORDER VOID—CR. CODE SEC. 750.

Where the case made out on a prohibition motion shews that the notice of appeal from a summary conviction was served too late, that an order of the District Court Judge purporting to extend the time was invalid in law and that the circumstances did not justify a hearing of the appeal without the statutory notice being given, a writ of prohibition is properly granted without waiting for the respondent in the appeal to first raise objection before the District Court Judge upon the return of the appeal.

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Haultain, C.J.S.

APPEAL by H. Sharpe and Thos. Inglis from an order of Brown, C.J.K.B., directing the issue of a writ of prohibition to a District Court Judge on the application of the complainant Lamson to prevent the hearing of an appeal by Sharpe and Inglis from a summary conviction made against them under Cr. Code sec. 537 for wilfully killing complainant's dogs. The ground on which prohibition was granted was that the proposed appeal was out of time and that the Judge of the District Court had no jurisdiction after the expiration of 30 days from the conviction appealed against to extend the time *nunc pro tunc* for appealing under Cr. Code sec. 750 (1B) as amended by 1919, Can. ch. 46, sec. 12, and so to confirm a notice of appeal served without any previous order of extension twelve days after the making of the conviction. Affirmed.

W. B. O'Regan, for appellants, H. Sharpe and Thos. Inglis.

G. T. Killam, for respondent, Lamson.

HAULTAIN, C.J.S.:—The appellants Sharpe and Inglis were on the complaint of Ernest Lamson tried and convicted by James Fraser, a justice of the peace, for wilfully and without legal justification, or excuse or colour of right, killing dogs, the property of the complainant Lamson. The conviction is dated July 12, 1920. Notice of appeal from this conviction was not served on the respondent Lamson until July 24, 1920, 12 days after the date of the conviction. On September 14, 1920, an application was made *ex parte* to the acting Judge of the judicial district of Yorkton on behalf of Sharpe and Inglis for an order to extend the time for service of the notice of appeal on the complainant Lamson, and to confirm and make good the service made on July 24. As a result of this application the following order was made:

"It is ordered that the time for service on the respondent of the notice of appeal herein, be extended for the period of three (3) days beyond the ten (10) days allowed by sec. 750 of the Criminal Code of Canada.

It is further ordered that the service of the said notice of appeal on the said respondents on July 24, 1920, be, and the same is hereby confirmed."

A "duplicate" of this order was mailed to Lamson by registered letter on September 17. Later on an application was made on behalf of Lamson for a writ of prohibition, prohibiting the district court Judge from entertaining or hearing the appeal from the conviction in question. The writ was granted by the Chief Justice of the King's Bench, on the grounds stated in the following reasons for decision:

"With reference to sec. 12 of ch. 46 of the statutes (Canada)

of 1919, I am of the opinion that the section contemplates that the order for extension being made before service and not after as here, and that, therefore, there was no jurisdiction to make an order after the expiration of the 30 days. In the result there is no jurisdiction to hear this appeal and the writ of prohibition lies and should issue. Lamson to have his costs of the application."

This appeal is brought against that decision.

In my opinion, the Chief Justice was right in holding that the District Court Judge was acting beyond his powers in making the order confirming the notice of appeal. The sub-section of the Criminal Code, as enacted by the above mentioned sec. 12, 1919 (Can.) ch. 46, is as follows:—

"(b) The appellant shall give notice of his intention to appeal by filing in the office of the Clerk of the Court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the Court appealed to, and the notice shall be served upon the respondent and the justice who tried the case, or, in the alternative, upon such person or persons as a Judge of the Court appealed to shall direct, and such service shall be within ten days of the making of the conviction or order complained of, or within such further time, not exceeding an additional twenty days, as a Judge of the Court appealed to may see fit to fix either before or after the expiration of the said ten days."

The notice of appeal in question was not served until 12 days after the making of the conviction or order complained of. At the time of the service, the time fixed by statute had elapsed and there was no further time fixed by the Judge of the Court appealed to. The service was therefore, in my opinion, a nullity. I am also of opinion that the District Court Judge had no jurisdiction in the matter after 30 days from the date of the conviction. Further time for serving the notice of appeal may be fixed by the Judge at any time within 30 days of the making of the conviction, but no later. The "fixing" of further time is a condition precedent to service after the 10 days period, and the statute does not, in my opinion, give the Judge power to make an illegal service good *ex post facto*.

Objection was also taken on behalf of the appellants in this appeal that the facts of this case do not warrant proceeding by way of prohibition. The defect of jurisdiction is clear, in my opinion, and the applicant is entitled as of right to the writ. *Ex parte The Overseers of the Township of Everton* (1871), L.R. 6 C.P. 245, 40 L.J. (C.P.) 201, 19 W.R. 927; *Liverpool*

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Gas Light Co. v. *Everton* (1871), L.R. 6 C.P. 414, 40 L.J. (M.C.) 104. The appeal should therefore be dismissed with costs.

LAMONT, J.A.:—On July 12, 1920, the appellants were convicted of having wilfully and without lawful jurisdiction or excuse or colour of right killed two dogs, the property of the informant Lamson.

From that conviction they appealed to the District Court. Their notice of appeal was duly filed and was served upon the magistrate on July 16, 1920, and on the respondent Lamson on July 25. On September 14 they applied to the Judge of the District Court for an order extending the time for service of the notice of appeal on the respondent. The Judge made an order extending the time until July 25, and validated the service which had already been made. On being served with this order, Lamson made an application to the Court of King's Bench for a writ of prohibition directed to the Judge of the District Court, prohibiting him from hearing the appeal. The ground upon which prohibition was sought was, that the District Court Judge had no jurisdiction to hear the appeal for the reason that Lamson had not been served with the notice of appeal within 10 days from the conviction, and that the Judge had no jurisdiction on September 14 to make an order extending the time for serving notice of appeal. On the hearing in Chambers, the following fiat was made:

"With reference to para. 12 of ch. 46 of 1919, I am of the opinion that the section contemplates the order for extension being made before service and not after as here, and that, therefore, there was no jurisdiction to make an order after the expiration of the 30 days. In the result, there is no jurisdiction to hear this appeal and the writ of prohibition lies and should issue. Lamson to have his costs of the application."

Section 750, sub-sec. (b) of the Criminal Code as amended by sec. 12 of ch. 46 of the statute of Canada 1919, reads as follows:—

"(b) The appellant shall give notice of his intention to appeal by filing in the office of the clerk of the Court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the Court appealed to, and the notice shall be served upon the respondent and the Justice who tried the case or, in the alternative, upon such person or persons as a Judge of the Court appealed to shall direct, and such service shall be within ten days of the making of the conviction or order complained of, or within such further time, not exceeding an additional twenty days, as a Judge of

the Court appealed to may see fit to fix either before or after the expiration of the said ten days."

This sub-section shows that the Judge may extend the time for service, but cannot extend it beyond the additional 20 days. As the service must be effected within the time fixed by the Judge, which must be within the additional 20 days, it would seem to follow that the order extending the time must be obtained before the expiration of the 20 days. I am, therefore, of opinion that the Judge was right in holding that the District Court Judge had no jurisdiction on September 14 to make the order which he did make, and such order was therefore a nullity.

In my opinion, however, the want of jurisdiction on the part of the District Court Judge to make the order does not, of itself, establish a want of jurisdiction to hear the appeal. If the material in support of the application was sufficient to establish that the District Court Judge would not have jurisdiction to hear the appeal at the time fixed for the hearing thereof, prohibition should be granted. *Mayor of London* v. *Cox* (1867), L.R. 2 H.L. 239, 36 L.J. (Ex.) 225. But that he would not have jurisdiction must be clearly established.

In Seton's Judgments and Orders, vol. 1, 7th ed., at p. 785, the author says:—"The affidavit must show clearly and distinctly that the inferior Court has not jurisdiction or has gone beyond it."

Under the Criminal Code a right of appeal from a summary conviction is given to the District Court, subject to the performance of certain conditions. As the right of appeal is a statutory one, the conditions imposed must, in general, be strictly complied with. One of these conditions is, that the notice of appeal must be served upon the justice who tried the case and upon the respondent within the time fixed by the statute. Failure to literally comply with this statutory requirement does not, however, in every case, deprive the District Court Judge of his jurisdiction to hear the appeal.

In *Syred* v. *Carruthers* (1858), 1 E.B. & E. 469, 120 E.R. 584, 27 L.J. (M.C.) 273, the statute required the appellant to serve the respondent within 3 days after obtaining his stated case from the justices. The respondent was not served within 3 days. When the case came on for hearing, counsel for the appellant made an affidavit which showed that the appellant had within the 3 days attempted to find the respondent, but that he could not be found; that he served a copy of the case on the attorney who had appeared for the respondent before the magistrates, and that he also had served the respondent himself, but after

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the expiration of the 3 days. This service was held to be sufficient.

Many of the English cases are reviewed in *Wills & Sons* v. *McSherry*, [1913] 1 K.B. 20, 82 L.J. (K.B.) 71. In that case, when the appeal was called, counsel for the appellant informed the Court that the respondents had not been served as required by the statute, and he read an affidavit which showed that every reasonable effort had been made to serve them, but without success, as they could not be found. The Court held that where it was not reasonably possible to effect the service required by the statute, the Court had power to dispense with such service and still have jurisdiction to hear the appeal.

See also *R.* v. *Trottier* (1913), 14 D.L.R. 355, 6 Alta. L.R. 451, 22 Can. Cr. Cas. 102.

In *Kowalenko* v. *Lewis and Lepine* (1921), 59 D.L.R. 333, 35 Can. Cr. Cas. 224, my brother Turgeon, in giving the judgment of this Court, referring to an objection that service of notice of appeal had not been made upon the magistrates, said at p. 334:—

"If the plaintiff had failed to serve the defendants as required by the Code, his appeal could not have been heard, unless, at least, he could have shewn that he had endeavoured with all diligence to effect the service and had been deterred therefrom by circumstances altogether beyond his control, and which rendered such service impossible."

Did the appellants in the present case endeavour with all diligence to effect service upon Lamson within the time provided by the Code, and was their failure to so serve him due to circumstances which rendered such service impossible? The appellants' solicitor in his affidavit says:

"I endeavoured to effect service on the respondent, Ernest Lamson, but, owing to an oversight the matter was not attended to until the 24th day of July."

It having been admitted that the failure to effect service within the time fixed by the Code was due to an oversight and not to circumstances making an earlier service impossible, it seems clear that the District Court Judge would not have jurisdiction to hear the appeal, because, under the above authorities, failure to serve within the time fixed by the Code would not be dispensed with or the service made considered sufficient where such service failure was due to an oversight or other carelessness, and not to circumstances which made it not reasonably possible to effect it in time.

The order for prohibition was, in my opinion, on the material before the Judge, properly granted.

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The appeal should be dismissed with costs.

TURGEON, J.A.:—There is no doubt in my mind that, on the material before us in this case, the appellant is out of Court and his appeal ought not to be heard. Nor do I see how he is likely to better his position later on as has been suggested, as I think it is to be assumed that the case which he made out in opposing the application before us is his whole case. I agree that the order made by the District Court Judge on September 14, 1920, is of no effect. In these circumstances, should the order for prohibition be granted?

After considerable hesitation I have come to the conclusion that it should. It might have been better practice for the appellant to have bided his time until the appeal came up for hearing before the District Court Judge, when he might have urged before that Judge his objection to the appeal being proceeded with on the ground of lack of jurisdiction. Nevertheless, the material before us shows that service was not made upon the applicant within the time limited by the statute, and we have the affidavit of the appellant's solicitor stating that such service was not made "owing to an oversight." Even then, if we should adopt the proposition laid down in *Wills & Sons* v. *McSherry*, [1913] 1 K.B. 20, and the cases therein referred to, that, under certain circumstances, impossibility of performance of a statutory condition by the appellant will be taken as the equivalent of performance itself so as to confer jurisdiction upon the Court, I do not see how the position of the appellant will be strengthened. Therefore, as we have what must be assumed to be all the material before us, and as that material shews that service was not made within the statutory time merely through an oversight, the want of jurisdiction in the District Court Judge is apparent, and the order should go.

The appeal, in my opinion, should be dismissed with costs.

Appeal from prohibition order dismissed.

B. C. MILLS, TUG & BARGE Co. v. KELLEY.

British Columbia Supreme Court, Macdonald, J. June 5, 1922.

SHIPPING (§ II—7)—CHARTER OF TUG TO TOW RAFTS OF LOGS—STIPULATION FOR PAY WHILE HELD UP BY STRESS OF WEATHER—TUG HELD UP FOR ENTIRE TIME CONTEMPLATED IN CONTRACT—DISCRETION OF CAPTAIN—EVIDENCE—BURDEN OF PROOF—RIGHT TO RECOVER.

A contract for the towage of certain rafts contained a clause, "If by reason of stress of weather, the said tug is forced to tie up for a longer time than 4 consecutive days of 24 hours each, at any one time the charter will pay hire for the first four days she is so tied up, at the rate of $300 per day, and for the remaindeer of the time she is so tied up, at the rate of $250 per day. The contract was dated November 16, 1921, and apparently estimated that the necessary towing would

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be accomplished by December 31, 1921. The tug was tied up on account of stress of weather for practically the whole period. The Court held upon the evidence and the contract, that the captain of the tug had a right to exercise his discretion and was not bound to "take chances, in proceeding when he knew that, in doing so, he was not exercising reasonable caution. That the burden rested upon the owners of the tug, seeking to recover for the time the tug was tied up, to prove that the tying up was justifiable, on account of the weather conditions. That they had succeeded in doing this and were consequently entitled to recover the balance due under the contract.

[*The Forfarshire*, [1908] P. 339, 78 L.J. (P.) 44; *Pyman Steamship Co.* v. *Hull & Barnsley R. Co.*, [1914] 2 K.B. 788, 83 L.J. (K.B.) 1321; *The West Cock*, [1911] P. 208, 80 L.J. (P.) 97; *Nemo* v. *The Canadian Fishing Co.* (1916), 26 D.L.R. 714, referred to. See Annotation 49 D.L.R. 172.]

ACTION by the owners of a tug to recover the balance due under a contract to tow certain rafts of the defendants. Judgment for plaintiff.

C. B. Macneill, K.C., and *D. N. Hossie*, for plaintiff.

E. C. Mayers, for defendant.

MACDONALD, J.:—Plaintiff seeks to recover from the defendant $803.98, as balance of charter money owing under a towage contract, dated November 16, 1921. Defendant counterclaims, alleging non-fulfillment of such contract and resulting damages amounting to $16,958.

Defendant had three cribs or "Davis" rafts at Queen Charlotte Islands, ready for transportation to market, and after negotiations with the plaintiff, selected its tug "Commodore" for towage purposes. The agreement was reduced to writing and provided that the plaintiff should place such tug, at the disposal of the defendant (as "Charterer"), for towing the rafts from Queen Charlotte Islands to Captain Cove, Pitt Island and Hardy Bay, Vancouver Island. The first two rafts were to be towed to Captain Cove and the third one to Hardy Bay, and then the tug should return to Captain Cove and tow one of the rafts to Hardy Bay. As soon as such service had been rendered the contract was to expire. It was apparently estimated that the necessary towing would be accomplished by December 31, 1921, as it was stipulated that in any case, the agreement should terminate on that date, unless otherwise mutually agreed.

No question arises as to the suitability and efficiency of the tug "Commodore" to carry out the contract, nor that its crew, tackle and equipment were not such, as should be reasonably expected in a vessel of her class. The tug and its captain were both well known to the defendant.

The contract provided that the defendant should pay for the hire of the tug at the rate of $300 per day, and that such

charter hire should commence from the time that the vessel was fully bunkered. This having been accomplished, the tug proceeded in due course to Queen Charlotte Islands, and shortly after its arrival took in tow one of the Davis rafts with a view to crossing the Hecate Strait to Captain Cove. It was found necessary, in view of the stress of weather, to take shelter, and from that time forward until December 28, 1921, when a request came from the defendant, cancelling the contract, none of the rafts were towed from Queen Charlotte Islands and the defendant received no benefit under the contract. On the contrary, he authorised payment by the Union Bank of $3,251.90, covering the charges for towage during November, and subsequently, the plaintiff received payment from the said bank, under its guarantee, of $6,748.10, making a total amount received for towage of $10,000, and still leaving the alleged balance of $803.98.

Defendant complains that not only was he thus required to pay this amount for towage, but through non-performance of the contract at the time, he was prevented from disposing of the logs and thus suffered the damages claimed.

It is submitted, on the part of the defendant, that the contract was absolute in its terms, and that there was no discretion reposed in the captain of the tug "Commodore" as to crossing from the Queen Charlotte Islands to the Mainland. In other words, that he was bound to undertake and carry out the service no matter what the state of the weather might be.

While this contention was made, on the part of the defendant, the trend of the trial took a different course. A large amount of evidence was adduced on both sides, as to the state of the weather from the arrival of the tug at the Islands until its departure, approximately 6 weeks after. The plaintiff alleges that it was excused from performance of the contract during such period by stress of weather.

There is no doubt that before the adoption of cribs or "Davis" rafts as a means of transporting logs, an attempt would not have been made, with any reasonable hope of success, to tow logs from Queen Charlotte Islands to the Mainland in open rafts. The advent of the scheme of "Davis" rafts solved the difficulty and enabled a large amount of excellent timber upon the Islands to be logged and transported to market. It proved of great assistance to the lumber industry, especially for war purposes. In this mode of transporting logs, Frank Johnson, captain of the "Commodore," had considerable experience. He had towed extensively along the coast of British Columbia and brought about 50 "Davis" rafts across the Hecate Strait.

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He had been in command of the tug when it had been employed on some occasions by the defendant for that purpose, and no suggestion as to any lack of capability was made. It was, however, contended that, whatever his ability might be as a tug captain, he had been over-cautious in not carrying out the contract with a view to its completion, or to use the expression, when objection was made to the service not being properly performed, that he had "loafed on the job." The period during which Johnson remained with the tug in shelter and did not, after his first attempt, proceed with the towing, would seem very prolonged, but one man has to consider the locality and consequent danger, especially during the winter months, in towing logs across such a widely exposed area as Hecate Strait. If Johnson had no discretion in the matter, as contended by defendant, then the state of the weather might be immaterial. He should then, presumably, have acted like one of the witnesses for the defence, who had experience as a tug boat captain, would have done, and "taken his chances." If he had done so and disaster occurred to any of the rafts, what would be the position of plaintiff? Should Johnson be believed in his statement as to there being no occasion during the period on which it was safe to proceed? It was pointed out that, in the contract, the plaintiff was only required to furnish the tug "Commodore" with a crew and equipment suitable for carrying out the agreement, and that it should not be "in any way responsible for the safe delivery of the cribs or rafts, which will in all respects be at the charterer's risk." While this provision in the contract was intended to relieve the plaintiff from responsibility, I do not think it would apply where loss ensued, through neglect of the captain in charge of the tug. It would certainly be want of care, amounting, under the circumstances, to negligence, for a tug captain, believing that a storm was impending, which would bring destruction to the property in his charge, to proceed across the Strait with one of the rafts. While the logs were insured by the defendant, this did not relieve the captain of the tug from exercising reasonable care in towing. In the event of his neglect, while the defendant might, in the meantime, recover from the insurance company, still, the plaintiff would not be relieved.

The law with respect to a clause in a contract for towing, which was at "the owner's risk," was discussed in *The Forfarshire*, [1908] P. 339, 78 L.J. (P.) 44. It was there contended that liability against the tug boat owners did not arise. Bargrave Deane, J., at p. 47, in expressing his opinion that the marginal wording in the contract, "all transporting to be at

owner's risk," did not protect the defendants, said at p. 347:—

"It would be monstrous to suppose that it was in the contemplation of these two parties, that, whatever neglect there might be on the part of the defendants to perform their part of the contract, still the plaintiffs would be responsible if any accident happened to the ship. In my opinion, that which happened is outside the purview of this particular indorsement on this agreement. I think it may very well be that what was in view was, that, the defendants performing all their duties in respect of this contract, if anything happened then the plaintiffs should suffer any expense which might be incurred; but I do not think it was intended to protect the defendants against the neglect on their part to carry out their part of the contract."

A contrary view seems to have been entertained by Bailhache, J., in *Pyman Steamship Co.* v. *Hull & Barnsley R. Co.*, [1914] 2 K.B. 788, 83 L.J. (K.B.) 1321, in which a somewhat similar provision was held to render the defendants immune from liability, through defective condition of blocks, provided by them in a contract for supporting a vessel when in dock. The judgment in *The Forfarshire, supra*, was questioned. Still, I think there is a distinction and that liability would attach against the owner where a captain in charge of his tug boat, knowingly undertakes a risk, when he is satisfied that such a course is unreasonable and unsafe. His employers would be required, should a raft be destroyed, to give an explanation which, if honestly afforded by the captain, would at the same time admit such neglect. This position of responsibility and necessity of proving absence of negligence, where an accident occurs to property while being towed, is referred to by Vaughan Williams, L.J., in *The West Cock*, [1911] P. 208, 80 L.J. (P.) 97, at p. 111, as follows:—

"I think that, apart from any warranty, treating the contract of towage as an ordinary contract, under which the contracting party is bound to use reasonable care and skill, when in the course of the performance of the contract an accident happens, that fact alone is sufficient to shift the onus on to the defendant tug owner, of explaining the accident. Until it is proved that the accident happened in the course of the towage, the onus is on the plaintiff, the shipowner; but when it has been shewn that the ship was injured in the course of the towage, the onus shifts, and it is for the tug owner to explain the cause of the accident and to relieve himself from liability by shewing that there was no negligence or want of reasonable care and skill on his part."

This would have been impossible in the present case, in the event of loss, assuming that Johnson would have told the truth,

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as to "taking chances" in proceeding when he well knew that he was not exercising reasonable caution. Even if the loss were caused by a peril of the sea and plaintiff sought to be excused on that account, the defendant could, under such circumstances, hold the plaintiff liable and come within the requirements of the decision in *The Glendarroch*, [1894] P. 226, *Cf.* as to obligations and liabilities of tug boat owners, *Nemo* v. *Canadian Fishing Co.* (1916), 26 D.L.R. 714, 22 B.C.R. 455.

In connection with this question of responsibility for negligence, the duties of a tug with respect to its tow, ought, to some extent, be considered, as being partly applicable, even though such tow be a vessel with a crew. They are stated in Newson, on Salvage and Towage, at p. 136, to be as follows:—

"In every contract of towage, there will be implied an engagement that each party will perform his duty in completing the contract; that proper skill and diligence will be used on board both the vessel towed and the tug; and *that neither by negligence or want of skill will unnecessarily imperil the other,* or increase any risk, incidental to the towage service." (*The Julia*, (1860), 14 Moo. P.C. 210, 15 E.R. 284).

Then again Sir Samuel Evans, in the *West Cock, supra,* at p. 102, after referring to the careful examination of authorities made by him, in the *Marechal Suchet* case, [1911] P. 1, 80 L.J. (P.) 51, refers to the obligations of a tug owner, under a towage contract, as follows:—"The owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be *done under all circumstances and at all hazards,* and the failure to accomplish it would be excused if it were due to *vis major* or to accidents not contemplated, and which rendered the doing of the work impossible."

This statement, as to the obligations which would rest upon the plaintiff under the charter party, and not requiring Johnson to proceed to sea "*at all hazards,*" would, in the absence of any provision for deduction, through not towing on account of bad weather, have entitled the plaintiff to recover at the fixed price *per diem.* Where freight is payable by time, it is earned at the end of each period specified unless a counter-intention appears, although it may be only payable under the charter at longer intervals. Then in the absence of special agreement, it is also payable during the ship's detention by blockade, embargo,

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bad weather or repairs, unless the delay involved is so great as to put an end to the whole contract. See Scrutton on Charter Parties, ed. 9, p. 382, where the charterer could, as defendant did here, cancel the contract. Though no weight was attached by plaintiff to this point. The case cited, in support of the proposition that freight is payable, when the ship is detained by bad weather, is *Moorsom* v. *Greaves* (1811), 2 Camp. 626. There the plaintiff let his ship to the defendants for a voyage at £6,300 freight for the first 8 months, and if the boat should be engaged for a longer time in completing the voyage, then at the rate of 47s. 6d. per ton per month. The ship was seized for attempting to enter a blockaded port and her cargo condemned; but she was afterwards released and Lord Ellenborough, in his judgment, held that the voyage had not discontinued and that the freighters were liable for the time the ship was detained in the blockaded port "in the same manner as if it had arisen by contrary winds or from embargo."

I think the same principle would apply to the towage contract in question, but aside from any such implication, it would appear that the parties had in contemplation that the actual towing operation might be delayed through stress of weather. The contract gives evidence of this understanding, as it contains a stipulation that

"If by reason of stress of weather, the said tug is forced to tie up for a longer time than 4 consecutive days of 24 hours each, at any one time the charterer will pay hire *for the first four days*, she is so tied up, at the rate of $300 per day, and for *the remainder of the time she is so tied up*, at the rate of $250 per day."

Then it provided that there might be a cessation of towage under the contract, while the tug was engaged in assisting any vessel in distress, and provision is made, as to the division of any salvage money that might be earned by such service. In construing a contract the object should be to arrive at the intention of the parties. The Court should not adhere to the literal meaning of the words, if an injury would thereby ensue. All the circumstances of each particular contract should be looked at. What the parties did, as well as what they said in the contract, might be considered as affording a basis of construction, if any ambiguity existed. If the contract in question is to be construed in this manner, one is required to consider it "in the light of the nature and details of the adventure contemplated by the parties." (*Mackill* v. *Wright* (1888), 14 App. Cas., per Lord Halsbury, p. 114; Lord Watson at p. 116; Lord Macnaghten, at p. 120).

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Then it is important not to give to mercantile instruments such as this, "an unnecessarily strict construction, but such a one as with reference to the context and the object of the contract will best effectuate the obvious and expressed intent of the parties." (*Dimech* v. *Corlett* (1858), 12 Moo. P.C. 199, at p. 224, 14 E.R. 887.

I do not think, however, that there is any ambiguity or contradiction in the terms of the contract. Upon its consideration as a whole, in order to arrive at its general meaning (see *Elderslie Steamship Co.* v. *Borthwick*, [1905] A.C. 93, 74 L.J. (K.B.) 338, 53 W.R. 401), and in view of the surrounding circumstances I conclude that the parties intended that the towage should be proceeded with as speedily as possible, subject to the stipulation made as to tying up at any time through stress of weather. In that event, the charterer should only pay for the use of the tug at the reduced date of $250 per day, should such tying up at any one time exceed four days. A reasonable construction would be that such tying up might occur more than once and consequent reduction take place. The incentive to the tug boat owner to proceed expeditionsly was the increased hire, while towing, with probably no appreciable increase of expenditure. Here, the tying up, as far as the rafts were concerned, was for almost the entire period, for which the plaintiff seeks to recover hire of its tug. If the plaintiff had the right to tie up and not proceed with the towing on account of the weather, without any limitations as to time, then was Johnson, as the captain of the tug, justified in not proceeding across the Hecate Strait during such lengthy period?

This involves consideration of his statement, as to the weather preventing him from doing so. I have first to determine whether he was honest in so stating, and then whether his decision was justifiable and relieved the plaintiff from non-performance. Johnson had an admittedly good record as a tug boat captain. In pursuance of the terms of the contract, he kept a log or diary, outlining the state of the weather and other essentials during the time that he was at Queen Charlotte Islands. A copy of this log was forwarded from time to time by Johnson to the plaintiff for transmission to the defendant. This would operate as a check as to the state of the weather, and whether it was fit for towing or otherwise. This clause may have been inserted in the contract for that purpose. Without discussing such reports in detail, suffice to say, that plaintiff contends they support Johnson's statement that during all the time he was at the Islands it was too stormy for him to cross the Strait to Captain Cove. He asserted that this was the sole reason for not proceed-

ing with the towing. He made ineffectual attempts, but claimed that he was prevented by stress of weather and had to seek shelter, generally at Thurston Harbour. He mentioned the general conditions as to wind, sea and weather, which should prevail, in order to justify him in making the crossing, but stated that upon no occasion were the conditions such as to warrant the venture.

I understood him to say that the weather during all this period was so severe as to be dangerous, even for the "Commodore" to cross alone, without any of the rafts. He explained afterwards that if his statements might be so construed, still that he did not so intend. Except, for what I thought at the time, was such exaggeration as to the weather, he gave his evidence candidly and impressed me favourably. On consideration, I was inclined to the opinion, that he could not have intended to convey the impression that the tug alone without any raft could not, during this lengthy period, have proceeded across the Strait. While no rafts had been towed across during this time, he was well aware that boats had crossed. He must have known that defendant or some of his witnesses in Court would also have this knowledge. I think he misunderstood the purport of the questions on this point and thus the answers were unresponsive or inaccurate. I am satisfied that Johnson was not wanting in courage to undertake completion of work with which he was so familiar, nor do I think that his log or diary was made up with a view of forming an excuse, for wasting the time of the tug and crew. It would mean that not only was he manufacturing evidence to meet any claim of defendant for not towing, but was preparing material to offset any complaint of his employers for not earning the full rate of hire of the tug. He kept his tug with steam up, apparently ready to cross whenever he considered the weather favourable for that purpose. While the locality is not thickly peopled, still it must have been common knowledge that Johnson was at the Islands with the "Commodore" for the purpose of towing defendant's rafts to the Mainland. As one day followed another without the work proceeding, Johnson must have appreciated the fact that his failure to depart would be noticed and criticised by members of his own crew, as well as all the inhabitants within a reasonable distance. I could see nothing to impute fraud or dishonesty and feel satisfied that the log or diary was a correct account of Johnson's observations. Further, I credit his statement that he honestly believed that the weather was not fit from the period of his arrival to his departure from the Islands to tow any of the rafts across to the Mainland.

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Was Johnson justified in coming to this honest conclusion? There was no specific provision in the contract as to who was to determine, when, the tug should tie up through stress of weather. It is fair to conclude that, in the absence of any such provision, the captain in charge of the towing operations should have the right to decide such important question. I do not see how the towing of logs, at any rate, along our extensive coast line, could proceed on any other basis. Tug boat owners must necessarily rely on the judgment and ability of captains in charge of their tugs. I do not think charterers could reasonably contend that, generally speaking, this position was unsound, and did not, in the absence of express provision, impliedly form part of any contract for towing.

While the defendant had John Macmillan, as logging superintendent, representing him at his camp, it was contended that his authority only extended to placing the rafts at the disposal of the plaintiff ready for towing. So the fact that MacMillan did not complain during the time as to the towing not proceeding, was met with the contention that, it was not within the scope of his authority. In other words, it was contended that the contract was absolute and was to be carried out, irrespective of any instructions that might be given by MacMillan or anyone on behalf of the defendant.

Defendant adhered firmly to this ground, to which I have already referred, and cited authorities where non-performance was not excused. I think the facts in these cases are distinguishable from the present one and that the parties contracted upon the basis that the towing should only proceed in favourable weather with a good excuse if bad weather prevented performance. On this point, a portion of the judgment of Lord Loreburn, in the *Tamplin* case, [1916] 2 A.C. 397, at p. 403, 85 L.J. (K.B.) 1389, might to some extent be aptly applied. He was there constructing a contract, and said in every such case it was now necessary "to examine the contract and the circumstances in which it was made not of course to vary, but only to explain it, in order to see whether or not from the nature of it, the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract."

There was a large amount of evidence as to the state of the weather during this period. Comparison was made between the statements contained in the log or diary and the witnesses produced on the part of the defence.

I think the decision of Johnson, as captain of the tug, as to

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the state of the weather, should prevail and be accepted, unless I am satisfied that such decision, though honest, was unjustified. The state of weather at different points along the coast differs even though the distance between such points is not great. Parties might have gone, even in a small boat, along the eastern side of the Islands towards the north with perfect safety, many days during this period, when a tug boat captain with due regard for care in operating his tug and tow would not venture to cross over to the Mainland, some 80 miles distant. There may be an honest difference of opinion, as to the state of the weather on particular days, and yet the decision of a person having such responsibility as Johnson should be entitled to greater weight than the ordinary observor, moving in a small compass, and not requiring to note conditions indicating the state of the weather 20 or 30 miles distant.

I think the burden rested upon the plaintiff of proving that it was excused from performance of the contract, or in other words, that the "tying up of the tug" was justifiable on account of weather conditions. Johnson was corroborated in his statements by other witnesses, and though met with a mass of evidence to the contrary, as coupled with criticism of his log, I have concluded that his decision was not only honestly formed, but was justified.

It follows that the plaintiff is entitled to the balance still due for towage under the contract. The counterclaim is dismissed with costs.

Judgment accordingly.

REX. v. FIDLER.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, Dennistoun and Metcalfe, JJ.A. December 5, 1921.

EVIDENCE (§XIIL—999)—UNLAWFUL CARNAL KNOWLEDGE—GIRL BETWEEN 14 AND 16 OF PREVIOUS CHASTE CHARACTER—CORROBORATION IN A MATERIAL PARTICULAR IMPLICATING THE ACCUSED—ALLEGED RESEMBLANCE OF CHILD OF COMPLAINANT HELD INSUFFICIENT AS STATUTORY CORROBORATION—CR. CODE, SEC. 301.

On a charge of unlawful carnal knowledge of a girl between 14 and 16, testimony in proof of general resemblance of a child at the age of three months said to have been born as a result of intercourse is not corroboration which implicates the accused "in a material particular," such as is required under Cr. Code, sec. 301 (2), amendment of 1920. In cases in which racial characteristics would afford evidence as to paternity it would probably be necessary to eliminate all persons with such characteristics in order to make such proof corroborative in a material particular implicating the accused.

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roborative evidence on a charge of carnal knowledge of a girl of previously chaste character under the age of sixteen and above the age of fourteen years not being accused's wife.

The case reserved by Macdonald, J., was as follows:—

The prisoner was tried before me with a jury on the second and third days of November and was found guilty and is now confined to the provincial gaol for the Eastern Judicial District for the Province of Manitoba waiting sentence.

Hereunto attached is the evidence of the trial in so far as the same relates to the corroboration for the alleged offence and the argument of the counsel for the prisoner at the close of the Crown's case in support of the application then made by him to have the case taken from the jury, which application I refused; and also my charge to the jury.

During the trial I admitted as evidence the testimony of the witness Violet Gledhill and Jennie Barton, the former the mother, and the latter the aunt of Annie Gledhill, the girl with whom the accused was charged with having carnal knowledge, and the production of the infant child of the said Annie Gledhill and the pointing out to the jury what these witnesses considered points of resemblance between the said infant child and the said John Fidler.

During the said trial it was shewn in evidence that the accused is a half breed, while the girl Annie Gledhill was born in England of English parents and is fair in complexion.

During the trial it was shewn in evidence that during the year one thousand nine hundred and twenty the said accused, together with a number of half-breeds younger than the accused and unmarried, were working in a gravel-pit about three-quarters of a mile from the home of the father and mother of Annie Gledhill, with whom she was living, and it was quite a common thing for her to be down around the gravel pit during the day and also in the evening after the men quit work during the summer and fall of 1920.

No evidence of corroboration was given save and except that of the said Jennie Barton and the said Violet Gledhill.

Upon the application of the counsel for the said John Fidler I have reserved for the opinion of the Court of Appeal the following questions:

1. Was the said testimony of Violet Gledhill and of Jennie Barton properly admissible in evidence?

2. Was I right in charging the jury that the said evidence of Violet Gledhill and of Jennie Barton was sufficient corroboration of the testimony of Annie Gledhill under section 301 of

The Criminal Code as amended by section 8 of chapter 43 of the Statutes of Canada, 1919 and 1920?

W. H. Hastings, for accused.

W. R. Cottingham and *F. G. Mathers*, for the Crown.

The judgment of the Court was delivered by

DENNISTOUN, J.A.:—The accused was tried at the Fall Assize at Winnipeg and found guilty of carnal knowledge of a girl of previously chaste character under the age of sixteen and above the age of fourteen not being his wife.

The statute creating this offence is 10-11 Geo. V., ch. 43, sec. 8, which amends sec. 301 of The Criminal Code [Note (a)].

After setting out the offence and the punishment it goes on to say:

No person accused of any offence under this sub-section shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

The girl Annie Gledhill gave evidence as to her seduction by the accused and to corroborate that evidence the Crown produced in Court an infant which it was said was born as the result of the seduction. The infant was about three months old. Violet Gledhill, mother of the girl, and Jennie Barton, an aunt, swore that the infant produced in Court resembled the accused and also resembled one of his children.

This was the only evidence tendered to corroborate the story of the seduction as told by the girl herself. The trial Judge in this reserved case asks if it was sufficient.

In my view it was not and the prosecution fails in consequence.

In *Rex* v. *Baskerville*, [1916] 2 K.B. 658, 86 L.J. (K.B.) 28, the Court of Criminal Appeal specially constituted for the elabora-

(a) By sec. 8 of Canada Statutes, 1920, ch. 43, it was enacted that sec. 301 of the Criminal Code be amended by adding thereto the following sub-section:—"(2) Every one is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen, not being his wife, and whether he believes her to be above the age of sixteen years or not. No person accused of any offence under this sub-section shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused."

By sec. 17 of the same statute the further provision was made that on the trial of any offence against *(inter alia)* this section of the Act, the trial Judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

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tion of this point lays down general principles, per Lord Reading, C.J., at p. 667:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it . . . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The evidence of the two women as to the resemblance of the infant to the accused was of the most general character and in no way implicated the accused. Apparently the accused has some of the marked characteristics of the half-breed, but there were in the neighbourhood of the locality in question many half-breeds to whom the infant in its racial features bears as much resemblance as it does to the accused.

There may arise cases in which racial characteristics would afford evidence as to paternity but in such cases it would probably be necessary to eliminate all persons with such characteristics except the accused in order to implicate him.

If carnal knowledge of a woman lay between a white man and a negro, the racial features of the infant might directly implicate one or other of them.

No British case has been referred to in which the resemblance of a very young child to an accused person has been put in evidence in a criminal case to prove intercourse with the mother.

Such evidence has often been given in bastardy cases and cases concerning the family affiliations of a claimant to a title or to property, where paternity is the issue to be tried: *Burnaby* v. *Baillie* (1889), 42 Ch. D. 282, at pp. 297-8, 58 L.J. (Ch.) 842, 38 W.R. 125.

But it must be borne in mind that the paternity of this infant is not the issue to be tried and that the father of the infant may have had nothing to do with the carnal knowledge charged in the case at Bar. Taylor on Evidence, 10th ed., sec. 335; Taylor's Medical Jurisprudence, 1910, vol. II., p. 100.

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The evidence of resemblance here was of the most indefinite character. That the child had dark hair and blue eyes which correspond with the eyes of one of the accused's children and had a general resemblance to the accused falls short of evidence of corroboration which implicates the accused in a material particular. Even if it had been established that the child had a marked likeness to the accused, I do not think it would have made the Crown's case any stronger in the circumstances here described, for there are many contingencies which would have to be negatived before such evidence could complicate the accused with the criminal seduction charged.

The first question need not be answered as a simple affirmative or negative reply would not be sufficient. [Note (b)].

I would answer "No" to the second question and direct that the prisoner be discharged from custody in so far as this charge is concerned.

Conviction quashed.

DOMINION GLASS Co. v. DESPINS.

Supreme Court of Canada, Idington, J., Cassels, J. (ad hoc.), Anglin, Brodeur, and Mignault, JJ. March 29, 1922.

MASTER AND SERVANT (§V—345)—FACTORY—EMPLOYMENT OF BOY—DESERTION BY BOY—CLIMBING OVER BARRICADED DOOR—JUMPING ON CONDUIT PIPE—DEATH OF BOY—LIABILITY OF EMPLOYER.

In an attempt to desert his post in the appellant's factory and escape the notice of the foreman, the respondent's son, less than 16 years of age went to an annex of the factory where there was a door on the second floor opening into a sort of court. This door was securely barricaded up to a height of about 4 feet. The respondent's son succeeded in climbing over or under this barricade, and with the object of descending to the court, jumped onto a brick conduit pipe, which served to ventilate the furnace room. This conduit pipe was not sufficiently strong to support the boy's weight and he fell into the conduit and was found there dead two days later.

The Court held, reversing the judgment of the Court of King's Bench, appeal side, that the respondent could not recover there being no fault on the part of the appellant, both the door, which was only intended to be used for ventilation and the conduit pipe were used in a way which could not have been reasonably antici-

(b) On a charge of carnal knowledge of a girl under fourteen under Cr. Code sec. 301 as to which there was no statutory requirement of corroboration in a material particular implicating the accused, it was held in Ontario that a child born to the girl as a result of the criminal intercourse with the accused might be exhibited to the jury at the trial and its likeness to the accused pointed out in proof that the accused was the parent of the child; but it was said that it is preferable that witnesses should also be called to testify to the points of likeness. *R.* v. *Hughes*, 17 Can. Cr. Cas. 450, 22 O.L.R. 344. See also *Udy* v. *Stewart*, 10 O.R. 590.

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pated by the defendants. Also there was no evidence of fault under art. 1053 Que. C.C. or a breach of art. 3831 (R.S.Q. 1909), the Industrial Establishments Act, and that art. 1055 Que. C.C. was inapplicable to the circumstances of the case.

[*Quebec R. Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, distinguished. See Annotations 5 D.L.R. 328; 31 D.L.R. 233.]

APPEAL by defendant from the judgment of the Court of King's Bench, appeal side, in an action to recover damages for the death of plaintiff's son while seeking to desert from his post in defendant's factory. Reversed.

John Hackett, K.C., and *E. F. Newcombe*, K.C., for appellant.

Guérin, for respondent.

IDINGTON, J. (dissenting):—I think this appeal should be dismissed with costs.

CASSELS, J.: I concur with ANGLIN, J.

ANGLIN, J.:—I am, with great respect, of the opinion that the judgment of the trial Judge dismissing this action was right and should be restored.

Four grounds of liability are urged on behalf of the plaintiff:—(1) Actual fault on the part of the defendant, entailing liability under art. 1053 Civil Code, as found by the Court of Appeal; (2) Presumed fault of the defendant, based on its having had the care of the thing which caused the death of the plaintiff's son, as found by the Court of Review; (3) Fault under art. 1055 C.C. because the slabs covering the flue were in bad condition; (4) Breach by the defendant of the Industrial Establishments Act (art. 3835 R.S.Q., 1909) in employing a boy under 16 years of age who did not read and write fluently and easily, and also of the requirements of art. 3831, which prescribes that all such establishments shall be built and kept in such a manner as to secure the safety of all employed in them.

The evidence makes it reasonably clear that the plaintiff's son was killed as the result of climbing over a barricade placed to prevent the use as a means of egress of a doorway, left open for the purpose of ventilation, and then jumping on a smoke flue a few feet below and to one side, which apparently gave way under the impact allowing him to fall nine feet to the bottom of the flue and incidentally to break his leg, which probably rendered futile any effort on his part to escape. His partly calcined body was found two days later in the broken flue.

The adequacy of the barricade to prevent any person mistaking the doorway in question as intended for use as an exit or accidentally falling through it admits of no doubt. There is not a vestige of evidence that the defendants had any reason to anticipate that anybody—even a lad running away from his

work—would use the doorway as the unfortunate Despins did, or would jump down on top of the smoke flue as he almost certainly must have done. The doorway in question opened on a courtyard, the bottom of which was some 8 feet below its sill, and from which there does not appear to have been any access to the street, unless by some very indirect route. I am unable to find actionable fault on the part of the defendants in regard to the condition of either the doorway or of the smoke flue. Both were made use of for a purpose and in a manner which it cannot be said the defendants should reasonably have anticipated. There is, in my opinion, no evidence to warrant either a finding of fault under art. 1053 C.C. or a breach of art. 3831 (R.S.Q., 1909) of the Industrial Establishments Act. I also agree with the Judges who have held art. 1055 C.C. inapplicable to the circumstances of this case.

The employment of the plaintiff's boy may have been—probably upon the evidence in the record must be assumed to have been—in contravention of art. 3835 of the Industrial Establishments Act. Moreover, there may be very good reason for grave disapproval of the conduct of the defendants' foreman in regard to imposing extra work on the boy. But I cannot find that either one or the other of these matters was a determining cause of the accident which befell him. The only reasonable inference from the evidence seems to me to be that the sole determining cause of that accident was the boy's own rash act; and, while that may not be attributed to him by the defendant as a fault (art. 3835 (d)), it excluded the existence of fault on the part of the defendant being a contributing cause.

It seems quite clear also, although no point is made of it, that keeping the boy at work during the night was a direct contravention of art. 3835 (a). But this again was not a determining cause of the accident.

There is nothing to shew that the appellant's factory fell within any classification made by the Lieutenant-Governor in Council under art. 3833.

Where a master employs young boys and girls in any dangerous work he must no doubt take reasonable precautions to safeguard them against increased risk due to their inexperience and incapacity to protect themselves. He must keep a watchful eye on mischievous boys and guard them against such dangers as he does, or should, anticipate they may incur. *Robinson* v. *W. H. Smith* (1901), 17 Times L.R. 235, illustrates the principle. But a factory is not a kindergarten and injury sustained from causes not arising out of the employment and from conditions which a

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prudent master would not anticipate as at all likely to occasion it even to a youthful employee does not import fault.

The fact that the plaintiff himself was a party to the illegal employment of his son and incurred a statutory penalty for that offence (art. 3850) probably presents a serious obstacle to his maintaining this action so far as it rests on a breach of the Industrial Establishments Act.

Finally, there is no ground for a presumption of fault under art. 1054 C.C. The damage was not caused by anything which the defendant had under its care. The sole proximate or determining cause, as already stated, was the act of the unfortunate boy himself. On this aspect of the case I agree with the views expressed by Martin, J.

The appeal should be allowed. The defendants are entitled to their costs in the Court of Review, the Court of Appeal, and this Court, if they think it proper to exact them. There is not a little in the circumstances which leads me to express the hope that they will not do so.

BRODEUR, J. (dissenting):—The question to be decided in this case is whether or not the Dominion Glass Co. must be held responsible for the death of Armand Despins, the son of the plaintiff.

Armand Despins was a young boy of 14 years and some months who worked at night in this company's factories. On June 18, 1919, his foreman, after severely rebuking him for his lack of attention to his work and telling him that he would be dismissed if he did not do better, nevertheless, gave him a piece of work of more than ordinary importance to do, because of the absence of a workman. It was very hot in the factory that night. After working a couple of hours, Despins said to one of his young companions that he was tired and intended to give up his position. He had this comrade give him his overcoat. In order to escape the notice of the foreman he did not leave by the ordinary door, but climbed onto a gangway leading to an opening which gave access to an enclosed courtyard. This opening was several feet above the level of the court. He was obliged to jump and fell on a hot air conduit which, although covered with several bricks, must have given way under his weight for his body was found in the conduit two days later.

The Superior Court dismissed the action holding that there was no fault on the part of the defendant. The Court of Review awarded $500 damages. Two of the Judges of this latter Court were of opinion that the defendant had committed a breach of law concerning the employment of illiterate boys in

its factory and that there was a presumption of fault under art. 1055 of the Civil Code. Demers, J., was of opinion that there was responsibility under art. 1053 C.C.

The Court of Appeal confirmed the judgment of the Court of Review, but did not subscribe to the theory that art. 1054 C.C. and the case of *Quebec Ry. L. H. & P. Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662, 26 Rev. Leg. 244, invoked by the majority of the Judges in the Court of Review, could be applied. Two of the Judges, Martin and Flynn, JJ., dissented from this judgment.

It is apparent that there has been much divergence of opinion in the Courts below; and in spite of the fact that the judgment only awarded a condemnation in money amounting to $500, this divergence of opinion is sufficient to justify the defendant in appealing to this Court.

I believe for my part that there is responsibility both under art. 1053 of the Civil Code and under the Act concerning employment of illiterate boys in industrial establishments. I concur in the opinion expressed so succinctly and clearly by Demers, J., when he says:—"A man, when he employs young children, must remove all danger in or near his establishment. He must expect that such children will wander all over the premises; if they did not do so, they would not be children. This unfortunate accident could and should have been prevented."

An employer must take all the required precautions to avoid accidents which may happen to the workmen in his employ. The jurisprudence goes even so far as to hold him responsible even in cases where accidents result from imprudence on the part of the workman himself. (Dalloz 1881-2-79; 1884-2-89; 1879-2-204). This obligation of the employer is still more onerous when the workman is a child who is ignorant of danger and has neither the prudence nor the experience necessary to protect himself. (Dalloz 1879-2-47; 1886-2-153; 1887-2-208; 1890-2-239).

In the present case the defendant, the Dominion Glass Co., should have closed this opening so that the young boys in its employ could not pass through it. If, as the defendant pretends, this door served merely to ventilate the building, a grating might have been placed in the upper part of it. Furthermore, the hot air conduit was not covered with materials sufficiently strong for those workmen—and there must have been such—who had to enter this court of the factory, and might be called upon at any moment to cross the conduit; and then it would have had to be sure that the covering was sufficiently strong for that purpose. It seems evident, on the contrary, from the

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evidence, that certain parts of this covering had been weakened by the intense heat and gases that passed through the conduit.

But the defendant alleges fault on the part of the child, who had no right to enter this court where the conduit was. But the statute forbids it to invoke such negligence on the part of the victim. The Act, in art. 3835 of the Revised Statutes, says that, "No employer shall employ in an industrial establishment any boy or girl less than sixteen years of age who is unable to read and write." These children must hold certificates signed by the Inspector of Industrial Establishments and show them to the employer who must keep copies thereof (arts. 3835 b. and 3835 e, R.S.Q.), and art. 3835 d. provides that if an employer hires a boy who does not hold this certificate, "He cannot in case of accident avail himself of any fault on the part of the victim." This is all very clear.

Armand Despins was not yet 15 years old when the accident happened. He should not have been employed by the Dominion Glass Co. unless he had a certificate that he knew how to read and write. Such a certificate was never issued and the defendant did not have a copy of it in its possession. Therefore, it cannot invoke this young boy's negligence.

But, it is said that the plaintiff, who is the father of the child, was obliged by law to have this certificate signed by the inspector (art. 3835b). It is true that the Act declares that he must do so "in so far as possible"; but this obligation on the part of the father only exposes him to a fine, and cannot be invoked to diminish the responsibility of the employer, which is declared as clearly as possible.

For these reasons, the appeal must be dismissed with costs.

MIGNAULT, J.:—In an attempt to desert his post in the appellant's factory and escape the notice of the foreman, the respondent's son, less than 16 years old, went on the night of June 18, 1919, to an annex of the factory where there was a door on the second floor opening into a sort of court. This door was securely barricaded up to a height of about 4 ft. Arriving there, the respondent's son—no one saw him, but these are inferences which the circumstances justify—seems to have succeeded in climbing over or under the barricade, and with the object of descending to the court, jumped upon the brick conduit or pipe three feet below, and a little to one side of the door, which served the purpose of ventilating the furnace-room. This conduit was not sufficiently strong to hold the child's weight—nor indeed was that its purpose—and he fell into the conduit and

was found there dead 2 days later. This is the accident for which the respondent holds the appellant liable.

The Superior Court dismissed the respondent's action, but he later obtained a judgment for $500 in the Court of Review, where the majority of the Judges, finding that there was no fault on the part of the appellant, nevertheless condemned the latter by virtue of the rule of legal responsibility laid down by the decision of the Privy Council in *Quebec R. Co.* v. *Vandry*, 52 D.L.R. 136, [1920] A.C. 662. On appeal to the Court of King's Bench, the judgment of the Court of Review was confirmed, but the *considèrant* dealing with the question of legal responsibility resulting from the mere fact that a thing happened, was struck out, the opinion being that the defendant had been guilty of fault. Two of the Judges, Martin and Flynn, JJ., caused their dissent to be recorded.

I am quite of the opinion of all of the Judges of the Court of King's Bench that the reason based on the Privy Council decision in *Quebec R. Co.* v. *Vandry*, was unfounded in the circumstances of the case. I may be permitted to add, with all possible deference, that there are few judgments that have been more abused. The Privy Council in this case interpreted art. 1054 of the Civil Code, doing away with the traditional theory of fault and, in cases of damages caused by a thing, rendering the person who had charge of that thing responsible by law, even with no consideration of fault, unless such person shewed that he could not prevent the occurrence which caused the damage. We are bound by this decision, but I would be very careful to avoid stretching it, for it makes a visible change in a domain where the doctrine of necessity for fault as the basis of civil responsibility seemed to be clearly established. And in the case with which we are concerned, it cannot be said that the damage was caused by the door. It was in spite of the door and its barricade that the child succeeded in getting out of the factory. The fact which caused the damage was, therefore, not the thing belonging to the appellant, but the act of the child himself, and in order to succeed the respondent must prove a fault on the part of the employer which caused the accident.

I am of opinion that the respondent has failed to prove such fault. The appellant had taken all the steps which prudence could suggest to prevent accidents happening to persons passing near the door which was intended, not as a means of egress, but only to ventilate the factory. The door was securely barricaded and it was not the insufficiency of the barricade which caused the death of the respondent's child; that unfortunate

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circumstance was due to the fact that the child jumped upon the hot air conduit which was not intended to be subjected to such usage. It is urged that the appellant should have placed a sign at the door forbidding people to go out that way. If the barricade did not deter the child, a sign would have been equally ineffective and it has been proved that no one attempted to pass through that door before this child did so. In my opinion, the appellant cannot be accused of any fault.

The respondent invokes the Act relating to industrial establishments, R.S.Q., 1909 art. 3839 and following, which, as amended by the Act ch. 50 1919 (Que.), forbids the employment of children under 16 years of age in these establishments unless they know how to read and write quite fluently, providing that in case of accident, the employer cannot avail himself of fault on the part of the victim (art. 3835 d). This does not mean that an employer who has not been guilty of fault can be condemned but only that an employer who has been guilty of fault cannot allege in partial justification the fault of the child. Here, if the employer was not at fault there is no basis for civil responsibility and it is not of immediate importance whether the victim was or was not imprudent. It is argued that the employment of a child under 16 years, who does not know how to write, is forbidden by law. Supposing that it is so, and that the child's father, who profited by the employment of his son, could set up its illegality against the employer, it was not the employment of the child which caused the accident. The employer may have incurred the penalty provided by the Act but an employer who has not been guilty of fault cannot be made responsible for an accident of which a child has been the victim, merely because he employed the latter in contravention of the law.

I would maintain the appeal and dismiss the action with costs of all courts.

Appeal allowed.

NORTHERN CREAMERIES Ltd. v. ROSSINGTON PRODUCE Co.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, and Beck, JJ.A. March 16, 1922.

COMPANIES (§IV.D—60)—POWERS OF OFFICERS—MANAGING DIRECTOR OF TWO COMPANIES—UNLAWFUL USE OF MONEY OF ONE COMPANY TO BUY PROPERTY FOR OTHER—RIGHT OF COMPANY TO LIEN ON PROPERTY SO PURCHASED.

Where the manager of a company uses moneys of the company to purchase property which he turns over to another company of which he is also managing director, the first company is entitled to a lien on the property so purchased; there having been no valid declaration of a dividend out of which the payments could have

been made, and the circumstances of the company being such that any declaration of a dividend would have been ultra vires the company, such payments will be held to have been unlawfully made out of the funds of the company.

[See Annotation on Company Law of Canada, 63 D.L.R. 1.]

APPEAL by plaintiff from the trial judgment dismissing an action claiming a lien on certain property. Reversed.

The facts of the case are fully set out in the judgment of Beck, J.A.

S. W. Field, K.C., for appellant.

G. H. Steer, for respondent.

SCOTT, C.J. concurred with STUART, J.A.

STUART, J.A.:—The plaintiff company was organized under the laws of Alberta and in 1919 and apparently for sometime prior to that year had been carrying on business in the City of Edmonton. One A. P. Baker, was the manager of the company and a principal shareholder. He was the only shareholder in Edmonton. In the evidence in the case a certain agreement, dated April 24, 1919, between Baker and the Henningsen Produce Co. a Montana company, was produced and filed as an exhibit. It was introduced by counsel for the defendant, who had called Baker as a witness. It contained recitals to the effect that there had been issued 273 shares of the plaintiff company and that Baker was the owner of or controlled all these shares. As against the defendant, at least, it may be taken that this was the situation. The plaintiff company which was in liquidation during the litigation, did not raise any question as to the truth of those recitals and it seems to have been assumed that they were correct although I doubt whether, strictly speaking, as against the liquidator of the plaintiff it can be said that the facts stated in the recitals were ever really proven. Baker was never asked specifically about the facts stated in the recitals although he did say that the Northern Creameries Ltd. was practically himself and that he had full power to transact all business. By the agreement between him and the Henningsen Produce Co. the latter agreed to purchase one-half of the 273 shares for $16,332.65 and the receipt of this sum in cash was acknowledged. Baker agreed to guarantee these purchasers a dividend of 30% on their shares and certain provisions were made for securing this dividend by Baker. The agreement also contained this clause:—"The vendor (Baker) shall remain in full control and management of Northern Creameries Ltd. provided however the vendor must not alter the plant other than putting in the necessary repairs without first consulting the

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purchaser and obtaining its consent in writing to such alterations."

There was no evidence of the existence of any third shareholder in the Northern Creameries Ltd. although there was a suggestion that one Hendricks was to hold some or all of the purchased shares in trust for the Henningsen Produce Co. of which he was an officer.

Neither was there any evidence as to who were the directors of the Northern Creameries Ltd. or of any meetings ever held by directors.

The Northern Creameries Ltd. seem to have had a creamery which it operated or controlled. Just where this was situated is not clear although there was a suggestion in the evidence that it was situated on a farm belonging to one Geddes at a place called Rossington.

On June 2, 1920, the defendant company was incorporated. The incorporation was in charge of Mr. Matheson a solicitor. The capital of the company was $20,000 divided into 200 shares of $100 each. The signers of the memorandum of association were Baker for 10 shares, Downie, who was the bookkeeper for the Northern Creameries Ltd. for 5 shares and one Chrishop for one share. The company seems to have been organised by Baker for the purpose of acquiring the farm belonging to Geddes and a store with its contents situated thereon.

It is only in keeping with the general meagreness of the evidence on all crucial points that such documents as did pass between Geddes and the Rossington Produce Co. were not put in evidence with the exception of the transfer of the real estate. It was said by Matheson that the bill of sale of the chattel property by Geddes could not be found and that it was never registered. Geddes was never called as a witness and we have only the oral testimony of Matheson and Baker, without the assistance of any documents at all, except the transfer, to shew the real nature of this transaction.

Obviously, Baker, Downie and Chrishop were the first directors of the company. But according to Matheson there never was any organization meeting. When asked for the Minute Book of the company he said that "there were minutes drafted up but as a matter of fact in connection with the organisation of the company it was extremely difficult to get these parties together and the agreements in which this stuff was to be turned over were not signed at the time that the transfer and bill of sale were made out and the minutes were drafted up but they were never signed up, there were never any meetings of

the company in connection with it." But he admitted that the draft minutes would prove nothing because "there were never any meetings held."

Certain so-called share certificates of the Rossington Produce Co. were put in evidence. These certificates, which were all dated as late as September 30, 1920, certified respectively that Adrain Geddes was the holder of 48 shares, that Abel P. Baker was the holder of 90 shares, and that Chrishop was the holder of one share. They were signed by Geddes as president and Downie as secretary of the company. But, taking Matheson's evidence, which was uncontradicted, there never was a meeting to appoint any such officers and that Matheson gave a correct impression of the looseness of the affair is confirmed by the fact that these certificates bear no seal. Quite apparently, the company was never properly organized for business beyond the issue of the certificate of incorporation. The share certificates, bearing no seal as required by the articles of association, are of no value as evidence as against the Rossington Produce Co. They may furnish some corroboration of what was arranged by Baker individually with the others but they furnish no evidence of any act of the company. Indeed, as stated, according to Matheson, the company never acted in its corporate capacity at all.

But Geddes did transfer to the company certain real estate, being doubtless the farm and store building above mentioned, and the transfer which was dated June 26, 1920 was registered on the 29th of that month. The consideration is expressed to be $5,600.

Now, turning to the oral testimony, we have some information, of course, as to the agreement with Geddes. But it must be remembered that the transaction was between the Rossington Produce Co. and Geddes. By what means the company could have acted in this matter is a serious question, as it never had a meeting even of the provisional directors if we take Matheson's evidence as correct. So that there is no evidence of Baker's authority to deal with Geddes on behalf of the company. At any rate, there does not exist any written agreement between Geddes and the company. There is no evidence that shares were ever properly issued to him, although Baker says that he was being paid partly in shares and partly in cash for his property. Matheson's further account of the way things were done is as follows:—"I talked to Baker, I took all my instructions from Baker, now Geddes came in and he was in the office (i.e. the solicitor's office) as I recall it only once; he might perhaps have

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been in twice but he was in a hurry both times: he signed up the transfer something he should not have done and would not have done—but apparently everything was all right at the time and he had received some money from Baker, on account, perhaps, I don't know but I would not like to say that Geddes understood the whole thing because, as a matter of fact, I was pretty hazy about the thing myself and I could not get them together to go into it and find out just what was what and I would not like to say that Geddes was there (this refers to a question as to whether Geddes was present when Baker gave instructions) and I could not say he understood the whole transaction."

Matheson gives a vague account of the transaction. He said that "Geddes was turning in his farm, a house, the buildings and the store buildings for $10,900"; and "There was a cheese factory that the Northern Creameries had control of and Baker was turning that in together with a truck and some other things that belonged to the Northern Creameries, cash register and so on, he was turning that in for $3,500 which amounted to $14,400 for the two transactions." It will be observed that $14,400 is the par value of the shares represented by the so-called share certificates plus Downie's 5 shares subscribed for in the memorandum.

When asked how this $14,400 was to be paid, Matheson said "They were to take fully paid-up shares in the Rossington Produce Co." But, as I have observed, there is no evidence that the company, acting properly as such, ever agreed to this.

Referring to the Ford truck, and the cash register, Matheson said: "At the time I was turning it in I was just looking up some notes and I suggested I had in my notes that the shares would be made to the Northern Creameries but subsequently Baker told me that he had moneys coming from the Northern Creameries and that the shares would be issued direct to him but it was the Northern Creameries' stuff at the time."

Perhaps it would be as well now to mention at last that this action is about some money which Baker used in paying Geddes and which the liquidator of the Northern Creameries Ltd., the plaintiff, now claims to have been also "Northern Creameries stuff at the time."

Now, as to Baker's testimony. When asked what Geddes was getting for his property he said "He was to turn in the store and farm at a stated price that the stock would be issued for and he was to take so much stock and we were to take so much stock. I was taking stock and Downie was taking stock

and Geddes was taking stock. The store and farm was to be taken over I think at $6,000 and whatever the stock in the inventory was, 4800 odd dollars." When asked how this purchase price was to be paid he said "For my share I paid what I had coming out of the Northern Creameries and the balance I paid in money and I also gave two notes to square up." He said Geddes "was to get it (the purchase price) in money stock issued for the whole thing and we were to take so much stock and he was to take so much stock." He said he thought it was to be 48 shares but later on he intimated that what was coming to Geddes over and above the 48 shares was paid in cash. He finally got down to saying that he, Baker, paid Geddes this cash himself and that he, Baker, took shares in the company for it.

Now this cash which he paid Geddes was money which came from the Northern Creameries Ltd.

The plaintiff claims that it was paid by Baker as manager of the plaintiff company at the time in breach of trust and that, therefore, the plaintiff company is entitled not merely to make Baker pay it back (which apparently would be a futile proceeding and Baker has not been sued) but that the plaintiff company has a right to follow the proceeds of the money and get a lien on the farm and store in the hands of the defendant company as having really been acquired by means of the money thus used in breach of trust.

The plaintiff company went into liquidation on November 22, 1920 the winding-up order declaring it to be insolvent.

Baker's operations in managing the plaintiff company and the condition of its affairs at the time (June 1920) when he organised the defendant company are left by the evidence in considerable obscurity. On this account, the question whether the money taken by Baker, which was claimed by him to have been a dividend on his stock, was or was not paid out of capital may have to be decided, as between the parties, by the application of some rule as to the burden of proof.

There is nothing except a recital in the agreement of April 24, 1919 between Baker and the Henningsen Produce Co., above referred to, to shew what the capital stock of the plaintiff company was. In that recital it is stated to have been $40,000 consisting of 400 shares of $100 each. As the defendant company introduced this document, I think it may be taken that the plaintiff company, at least, is entitled to say that it is shewn that such was the nominal capital. But whether the recital that 273 of these shares had been allotted and fully paid up is

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to be taken as proof by either side that such was the fact I have grave doubt. Certainly the defendant cannot say that in its favor that fact has been proven. There is nothing to shew who were the directors of the company. Nobody was asked that question, not even Baker. Baker said "practically the Northern Creameries was myself" in spite of the agreement of April 24, 1919 produced by himself in which he is shewn to have sold one-half of the 273 shares to the Henningsen Produce Co.

It is a grave question, in my mind, whether the clause from that agreement above quoted to the effect that Baker should remain in full control and management of the company should be given so wide an interpretation as to empower him to declare dividends by his own fiat. The articles of association of the plaintiff company contained a clause saying "the company in general meetings may declare a dividend to be paid to the members according to their rights and interests in the profits and may fix the time for payment."

Even if the clause in the agreement referred to might conceivably be treated as a general proxy from the Henningsen Produce Co. to Baker to vote for it at shareholders' meetings, to which I am unable to assent, yet still according to the article quoted there must have been a general meeting of the shareholders before a dividend could be properly declared. And Baker said that there never was such a meeting either of the shareholders or of directors, whoever the latter were.

Baker said that in the summer of 1919 the plaintiff company, through himself as manager, had paid the Henningsen Produce Co. the sum of $4,800 as the dividend up to the end of July of that year upon that company's shares but that he had left his share of that dividend with the company. He said that of this $4,800 the sum of $1,541.80 was paid in cash by cheque but that the balance of the dividend was paid by writing off an account as paid which the Henningsen Produce Co. owed the plaintiff company for butter. But whether this transaction of a cross credit for the balance of the dividend as against the butter account was ever entered in the books of the company he could not say. One, Patroquin, who was auditor for the plaintiff company from its incorporation till its liquidation, was not asked about this matter at all.

Then a sheet from the ledger of the plaintiff company was produced which contained an account called "Rossington a/c (to be distributed)". This shews that there were issued by the plaintiff a number of cheques which were charged as debits

in this account. These items are all in 1920 and are as follows "April 19 to check on a/c A. G. $500; May 4 to check on a/c of A. G. $1,000; May 20 to cash on a/c A. G. $1,000; June 29 to check A. Geddes $1,000; July 1 to Ck. A. Geddes $500."

It appears that one of the sums of $500 represented a sum paid by Downie for his shares in the defendant company and is offset by a cross credit entry. Apparently, this account was used as a temporary means of keeping track of a number of transactions and the proper bookkeeping entries were supposed to be made later as implied in the phrase "to be distributed."

It appears, therefore, that sums of money totalling $3,500 were paid by the plaintiff company by cheques direct to A. Geddes and that these were charged against the Rossington Produce Co. in this account because that company were supposed to be paying Geddes partly in cash for the property he was to transfer to it. It will be observed that the last cheque for $1,000 was paid on June 29, after the company had been incorporated, but that the other cheques were all paid before the incorporation. June 29th was the date of the registration of the transfer of the land from Geddes to the company.

Downie was the bookkeeper for the plaintiff company who made these various entries and he said that in issuing the cheques for $3,500 in all and in making the entries he simply followed the instructions of Baker.

Now Baker claimed that these cheques, which were, in fact, issued to Geddes as payee were for his deferred share of the dividend from the plaintiff company of which the Henningsen Produce Co. had received their share viz.: $4,800 a whole year before.

It thus appears that Baker as manager of the plaintiff company, issued cheques of that company to Geddes to the extent of $2,500 in payment for a property which the latter was to transfer to a company not yet organised. Of course, if it was really and rightfully his money that was his affair and did not concern the plaintiff company.

It is still left obscure as to how Geddes was paid. Baker said he was to get $6,000 for the farm and $4,800 odd for the stock in trade of the store. He received or was intended to receive $4,800 in shares in the defendant company but where all the cash came from is not clear. The account in question only shews $4,000 paid him but there may have been other payments from other sources.

Baker's theory, then, of these transactions is this, that the $3,500 was due him as a dividend from the plaintiff company,

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that he used it to buy stock in the defendant company but that instead of putting it into a bank account of that company and then issuing a cheque by that company to Geddes the short cut was taken and the cheques representing Baker's dividend were made out directly to Geddes.

How Baker got the balance of his so-called dividend i.e. $1,300 is not very clear. I do not pretend to comprehend completely the account (ex. 4) above referred to. Although it is headed Rossington a/c it begins 6 weeks before the defendant company was incorporated. It is, apparently, a list of entries of transactions carried on by Baker in anticipation of the incorporation. Possibly the "Rossington" refers to the store kept by Geddes at Rossington. The balance of debts over credits in the account was $5,064.20. And the account is balanced by a credit entry reading "Aug. 31 transferred to A. P. Baker personal a/c $5,064.20" although there is, after 3 other entries in October, one of which is "To 1 Ford Truck $1,119" and the other two of which are erased, a final debit entry again, thus,:—"Nov. 13 bal. transferred from A. P. Baker $5,064.20."

Patroquin the auditor said that the first entry of $5,064.20 represented a transfer to Baker's personal account of the balance, and that "it was money due Northern Creameries for Rossington." Baker had said that it "did not amount to that much." Whether the Ford truck item of $1,119 was also part of the so-called dividend moneys I am not sure. Possibly it was, and, if so, Baker was taking, as part of his dividend, not only the cash for $3,500 but this truck and seemingly also a safe. This latter we were told, I believe, on the argument had been returned. Matheson's evidence above referred to apparently confirms this. However, the contest is now over merely the $3,500.

The first question to determine is whether there ever was a real dividend at all. It seems to me that the only proper inference to draw from the evidence which I have set forth is that there never was any real dividend. It must be remembered that Baker had guaranteed the Henningsen Produce Co. a dividend of 30% and had given security to them that they would receive it. What was more natural, therefore, than that he would do his best to appear to be fulfilling the guarantee. But the only evidence of what they received is to the effect that they got a cheque for $1,541.80 and that a certain account against them, the amount of which is nowhere stated, and about which neither the auditor Patroquin nor Downie the bookkeeper said anything at all, was not collected from them. Then Baker did

not take anything for himself on account of his shares for a year and then only when he began organising another company to which he began transferring property of the Northern Creameries.

There was no meeting of directors or shareholders and, as Patroquin said, no minute anywhere of the declaration of the dividend. In these circumstances, my opinion is that Baker cannot be heard to say that there was ever a dividend declared at all, or, if it is to be treated as a dividend, then, I am of opinion that owing to the way the thing was done, the burden lies upon Baker, and upon those who hold through him viz.: the defendant company, of proving that the dividend was not paid out of capital.

There is a passage in the judgment of Stirling, J. in the case of *Leeds Estate Building & Investment Co.* v. *Shepherd* (1887), 36 Ch. D. 787, 57 L.J. (Ch.) 46, 36 W.R. 322, at pp. 804 *et seq.* which, in my opinion, supports this view. He refers there to the failure of the directors to observe the formalities prescribed by the articles of association for the declaration of a dividend. He said, p. 805:—

"They never required the statement and balance-sheets to be made out in the manner prescribed by the articles; 2. they failed properly to instruct the auditor or at all events to require him to report on the accounts and balance-sheets in the mode prescribed by the articles and 3. they were content throughout to act on the statements of *Crabtree* without inquiry or verification of any kind other than the imperfect audit of the account by *Locking*... Those accounts and balance-sheets did not truly represent the state of the company's affairs; and that being so I think that according to what is laid down in *Rance's Case* the onus is laid upon them to shew that the dividends were paid out of profits. This upon the evidence before me they fail to do."

The decision in that case and in *Rance's* case (1870), L.R. 6 Ch. App. 104, 40 L.J. (Ch.) 277, 19 W.R. 291, were based on the fact that the directors had acted on imperfect information and had not done, at a meeting, what they should have done. But in the present case, in a company where by the articles a dividend is to be declared at a general meeting, i.e. of the shareholders, the defect goes deeper still. There never was any meeting at all. True the Henningsen Produce Co. had given Baker great power of control but as I have before said, I am not prepared to admit that that document was a general proxy for a shareholders' meeting. I do not think it was in-

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tended for that purpose. Even if it was, there was no formal meeting called. Even if they had given a general proxy, they were entitled to notice of a meeting and they got none. And even, again, if it was, it simply placed Baker in a still graver fiduciary position and this, I think, helps still further to cast the burden on him of proving that the so-called dividend was not paid out of capital.

Now, was that burden properly met? It was attempted to be met by a question addressed by counsel for the defendant company to Patroquin, the auditor, thus:—

"Q. From your knowledge of the financial affairs of the company were these cheques (i.e. those for the $3,500) paid out of capital? A. I would say no." And also by questions directed to Baker thus:—

"When this money was taken from the Northern Creameries Ltd. in May, June and July 1920 by you as dividends as you say, did that impair in any way the capital of the Northern Creameries? A. It did not, no. Q. Had you any knowledge that by taking this money the capital of the Northern Creameries Ltd. was reduced below the amount of the subscribed capital? A. It was not at that time."

Now, it is true that there was no cross examination by counsel for the plaintiff of these two witnesses upon these answers. But, my opinion is that in a matter of this kind such bald questions and answers were not sufficient to meet the burden or to throw it on the other side. Where a company was carried on and business was done by Baker, its manager, in the way revealed in the evidence I have detailed, I do not think such bald testimony as to what must, after all, be a conclusion of fact from the examination of accounts and valuations of assets can be taken as of any value at all. As was done in the cases above cited, I think the accounts and a statement of the affairs of the company should have been produced in Court. The fact that they were apparently dispensed with along with the required meeting of shareholders before the so-called dividend was declared is all the more reason why they should not be dispensed with in Court when the question comes up for real adjudication. I think it would be altogether dangerous for the Court, after learning how the business of the company was in fact conducted, to ascribe any evidentiary value at all to such testimony.

My opinion, therefore, is that we ought to conclude that these payments in question were made out of capital. The trial Judge who dismissed the action made no finding on the question, but

he rested his decision upon a point of law which would not have arisen at all if he had made a finding to the contrary. He dealt merely with the question of notice, and in his short oral judgment at the close of the argument he said "I think your statement of the law is correct, Mr. Steer, that there is no notice unless it is a matter in which there is a duty upon the officer to communicate and I will dismiss the action except insofar as the counterclaim is admitted."

Before approaching this question, I think one important aspect of the facts must be emphasised. The money of the plaintiff company, wrongfully taken as I have held by Baker, was never received by the defendant company. Indeed, $2,500 of it was paid over to Geddes before the defendant company came into existence at all and, therefore, before Geddes transferred the property to the defendant. So far, therefore, as that portion of the money was concerned, it is impossible to say that the defendant ever had any rights with regard to it. Nor do I think the position is substantially different with respect to the $1,000 paid to Geddes on June 29 after the incorporation. That money never passed through the hands of the defendant company. Baker is spoken of in one question by defendant's counsel as "manager of the Rossington Produce Co." but there is no other reference in the evidence to his holding that position. I am unable to discover anything giving Baker any authority at all to act as manager of the defendant company. Matheson's uncontradicted testimony is that there never was a meeting to organise anything. The position is that Baker was a director, but only a provisional director, as were also Downie and Chrishop by virtue of their signatures of the memorandum.

I think it would be going too far for this Court to take what were evidently mere ideas in the brain of Baker as acts either of one company or the other. No doubt in a small company in conducting its regular business after organization, a good deal may be permitted in the way of dispensing with formality but when it comes to organisation, to the issue of shares, to the purchase of property and payment for it in shares, then, in my opinion, we must not be so lenient. I fail, therefore, to find anything done which can properly be called an act of the defendant company at all.

In my opinion, when Geddes received the $2,500 from Baker, before the defendant company existed, though no doubt upon some personal understanding as to what was to happen, and received it as part payment of the purchase price of his land, the land became charged with a lien for that amount in Baker's

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favor and consequently in favor of the Northern Creameries Ltd. whose money had been so improperly used. And inasmuch as the defendant company even when incorporated never did any act which could be called the act of the company and never received the other $1,000, I think the position is the same with regard to that sum as well.

Now Geddes was not a subscriber to the memorandum of association of the defendant company. How, then, did he ever become a shareholder therein? I am unable to discover how he ever did. There was no contract ever signed so far as appears between him and the company and none ever filed by which he could pay for his shares otherwise than in cash. There was no meeting of directors which could decide to issue him shares or to make any such contract with him. He signs the so-called share certificates as president but how he became so is a mystery. In fact, he never became president. And, in my opinion, those share certificates thus signed and with no seal are mere pieces of paper.

Then Geddes transferred the land to the company, but he transferred it with a lien attaching to it in favor of the plaintiffs for $3,500. What is there that happened that can destroy that lien? It is said that the defendant company were purchasers for value without notice. But what value did it give? No cash was ever paid by it. There is nothing but the so-called issue of shares to Geddes. But no such shares were ever issued to him. The company never made any contract with him and it never met by its officers or otherwise to make such a contract and no document was ever signed. Therefore, Geddes, if he is a shareholder, is liable still to pay in cash for the balance of his shares. And if he is not, which I think is the true situation, then the defendant company gave him nothing at all. It is true that by what I have called a mere process in the brain of Baker it was decided that Baker was paying the defendant company for his shares and the money he paid for them was being paid by that company to Geddes. But surely there is a limit beyond which the Court should not go in assuming the validity of transactions of this kind. And the facts here are, in my opinion, far beyond the limit. Even Baker never properly became a shareholder except for the shares he subscribed for in the memorandum. He never made any application for shares to the company. The company never met to decide to sell shares to him.

There may be creditors of the defendant company who acted on the faith of the memorandum and certificate of incorpora-

tion. But there was never anything else on record to mislead them. As against them, Downie must perhaps lose his $500 and Baker his $1,000 for the shares for which he subscribed and Chrishop his $100 for one share. But, in my opinion, there is nothing more.

The crux of the situation lies, as I see it, in the remark of Matheson, the solicitor, in his evidence that the signing of the transfer by Geddes was something which he should not have done. Therein lies the trouble. But I think there would have been no real difficulty for the reasons I have given in the way of declaring a lien on the real estate in the plaintiff's favor for the $3,500 except possibly for one circumstance. Geddes was supposed to have sold not only real estate but also the stock-in-trade in the store. It was a bulk sale and, as Matheson's evidence shews, there was some question of the Bulk Sales Act, 1919, (Alta.) ch. 38, 1st. session. He said that he warned Baker and Downie that the money paid to Geddes would have to be distributed to the creditors of Geddes. This suggests the possibility that the $3,500 was allocated as a payment, not on the land but on the stock-in-trade on which of course, there would now be no lien. But, as the matter stands I do not think that we should find any difficulty here. The sale of the land, the store and the stock was one transaction as Baker's evidence shews. The transfer expresses that money was paid for it to the extent of $5,600. The bill of sale was lost, but I think the proper inference is that it, too, made no reference to shares but to cash. There might, in the view I have taken, be some question as to the rights of Geddes and the defendant company as between them, but as between these two companies, I think the transaction should be treated as a single one. The defendant company got the whole stock-in-trade for which it has given no value at all. It gave no cash and the issue of shares was a sham and a nullity as against the plaintiff as was also the so-called issue to Baker. It is true, that Baker's subscription for 10 shares is under the law a real issue of shares. But that was not an act of the company which could be treated as an issue of shares for value without notice because it was something which was contemporaneous with the actual birth of the company.

My opinion, therefore, is that we do not need to be troubled by any question of notice at all. There is nothing whatever to shew that any creditors of the defendant company ever acted on the faith of that company's ownership of the real estate and in any case the record does not shew that the defendant com-

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pany is in liquidation or otherwise than completely solvent, although, I think there was some hint of that on the argument. As for the defendant company, instead of its having given value for something which is to be taken away from it, the fact is that it got value viz.: the stock-in-trade for which it, so far, has given nothing at all.

I would, therefore, allow the appeal with costs, set aside the judgment below and give the plaintiff a judgment declaring a lien in its favor upon the real estate transferred to it by Geddes and giving the plaintiff the costs of the action including those of the first trial which by the judgment in the former appeal were directed to abide the event of the second trial.

BECK, J.A.:—This is an appeal from the judgment of Ives, J., dismissing the plaintiff's action.

One Baker was manager of and a shareholder in the plaintiff company and also manager and the principal shareholder in the defendant company.

In substance, the plaintiff company, through a liquidator under the Provincial Winding-up Ordinance, claims that Baker used certain moneys, the property of the plaintiff company, wherewith he purchased property which was turned over to the defendant company and claims a lien on that property for the amount of such moneys.

The plaintiff company was incorporated under the Provincial Companies Ordinance by memorandum of association. Its articles of association contained the following provision:—

"126. The company in general meetings may declare a dividend to be paid to the members according to their rights and interests in the profits and may fix the time for payment."

It appears that in the plaintiff company Baker was the holder of all the shares except a small number, probably two or three, for the purpose of conformity with the provisions of the Companies Ordinance requiring at least three incorporators. There never were any meetings of the shareholders or of the directors. Baker assumed to exercise the powers of the company as if he were the sole shareholder.

The defendant company was similarly incorporated on June 2, 1920, under the Provincial Act, 1913, (Alta.) ch. 20, 2nd. session. The incorporators were Baker, his wife and one Downey.

A third company comes into question—the "Henningsen Produce Co. Inc." a company incorporated under the laws of the State of Montana. One Hendricks was the manager of this company.

There was put in evidence an agreement dated April 24, 1919, between Baker as vendor and the Henningsen Produce Co., as purchaser. This agreement recited that the plaintiff company had an authorised capital of $40,000., i.e., 400 shares of $100. each; that 273 shares had been allotted and fully paid; that Baker controlled these 273 shares; that Baker was desirous of selling and the Henningsen company of purchasing one-half of these shares, i.e., 136½ shares. The agreement witnessed that in consideration of $16,332.65 paid by the purchaser to the vendor, the receipt whereof is acknowledged, it was agreed (1) That the vendor should assign to the purchaser the 136½ shares; (2) That the vendor guaranteed the purchaser a profit of 30% of the par value per annum of the stock and as security for the guarantee the vendor agreed contemporaneously to assign the remaining 136½ shares to the purchaser and deposit them in escrow with the Imperial Bank. (3) This guarantee was to continue in force until the profits on the shares should repay the Henningsen company the full amount paid by it for the shares.

The other provisions do not seem to be material to the issue.

The plaintiff company owned and operated a creamery—land, buildings, plant, equipment, &c.

The defendant company was formed for the purposes of an arrangement made between Baker and one Geddes. Geddes owned a store and contents and a farm at or near a place called Rossington. The arrangement was that the defendant company should be formed and that Geddes should turn this property into the company, receiving payment partly in shares of the company. The store buildings and the farm were transferred at the price of $5,600. Geddes got for everything stock to the nominal value of $4,800 and apparently $5,000 in cash, paid by cheque of the plaintiff company as follows:—

1920 April 19 (20), $500, May 4 $1,000, May 15 $1,000, May 20 (referred to as June 19) $1,000, June 29 $1,000, July 5 $500: $5,000.

Baker says of these several cheques that they were payments to Geddes on account of the farm, store and contents; that they ought to have been charged to Baker himself; he, Baker, being entitled to moneys from the plaintiff company by way of dividends payable to him in 1919, i.e., up to the end of July, 1919.

Now the claim of the plaintiff company is that $4,800 of the $5,000 shewn above as paid to Geddes was improperly and unlawfully taken by Baker out of the funds of the plaintiff company and being in truth and in reality the monies of the plaintiff company and having been paid as consideration for the

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Geddes property transferred to the defendant company, the whole transaction being with full knowledge of the defendant company through both Geddes and Baker, the plaintiff is entitled to a lien on the Geddes property in the hands of the defendant company to the sum of $4,800.

The question first to be determined then is—Was the $4,800 the money of the plaintiff company or the money of Baker?

Baker says, as I have stated, that he was entitled to it as his share of dividends payable to him by the plaintiff company up to the end of July, 1919.

It is clear that there was no meeting of directors, no meeting of shareholders and consequently no declaration of a dividend. The auditor of the company says in general terms that the $4,800 was not paid out of capital. He was not cross-examined on this as undoubtedly plaintiff's counsel ought to have done, but nevertheless it seems clear, on all the evidence, that it was impossible to pay that amount out of the funds of the company without impairing the capital of the company.

The extraordinary resolution to wind up was made on November 3, 1920.

The value of the assets and the amount of the liabilities as ascertained in the course of the liquidation proceeds are approximately as follows:—

ASSETS.

Buildings, $5,000; Mortgage, $4,300; Margin, $700; Machinery; equipment, automobiles, trucks, office furniture & supplies, &c., $9,870; 50 acres of unimproved land near Peace River or Spirit River, worth perhaps $5 an acre, $250: Total assets $10,820.

Forward $10,820.

LIABILITIES.

Preferred claims (probably wages), $757, bal. $10,063; Liability to bank (said to be secured—in what form is not stated) $7,000, bal. $3,063; Total liabilities to creditors (This latter sum perhaps including the preferred claims and the bank's claim), $34,800.

But the liquidator says there will in all probability be nothing for the unsecured creditors, i.e., unless something is produced by the present litigation.

There is some evidence that if the company's business could have been sold as a going concern the land, buildings and plant, &c. might have been worth as much as $25,000.

But, on any view of the evidence, it seems to be quite plain that the plaintiff company (put into liquidation on November

3, 1920) must have been insolvent when the several payments were made to Geddes, i.e., during April, May, June and July, 1920. If, as is claimed by Baker, it should be taken that these payments ought to be looked upon as made in July, 1919, the presumption certainly is very strong that the company was even then insolvent. When here I say insolvent, obviously it was so without regard to the liability of the company to its shareholders. As has already been stated, shares in the plaintiff company to the face value of $27,300.00 had already been issued. There was clearly less than nothing to recoup the shareholders. If, as is evidently the case, it would have required at least the realized value of the total assets of the company to pay its liabilities and the alleged dividend of July, 1919—(apparently $9,600)—it seems an absurdity to say that that dividend was not paid out of capital on any view of what that expression means. See Palmer's Company Law, 10th ed. pp. 215 *et seq.*

On the grounds then that the action of Baker as manager in assuming in July, 1919, that he would pay a dividend, was not a valid declaration of a dividend, there having been no meeting of directors or shareholders and consequently no resolution declaring a dividend, and that the finances of the company were then in such a condition as to make the declaration of a dividend an act *ultra vires* of the company, it is clear that the payments by Baker to Geddes which are in question were unlawfully made out of the funds of the plaintiff company. Nevertheless, it seems clear that none of these irregularities or unlawful acts, even if attributable to the company, can affect or raise any liability against Geddes. (Palmer, pp. 73; 44) inasmuch as there is no reason to suppose that he had any knowledge of the irregularities or improprieties.

In consideration of these moneys—together with further considerations—Geddes transferred his property to the defendant company. Had the property been transferred to Baker, without doubt the plaintiff company could have followed the moneys into the property aand obtained a declaration of a lien for the amount of these moneys upon the property in Baker's hands.

Geddes having, in pursuance of arrangement with Baker, transferred the property to the defendant company—it being Baker's contribution to the capital of the company—and that company now holding the property, that company became bound to pay for the property in the terms of the agreement under which it became the transferee of it. It has purported to do so except to the extent of by the issue of shares, however irregularly does not matter, it seems to me, because it is bound to do re-

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gularly what it purported to do. But the question is whether the defendant company has become the owner of the property under such circumstances that it is to be charged with knowledge of the existence of a right of lien in favor of the plaintiff company for the $4,800 and has, therefore, taken it, subject to a declaration in this action of such lien.

Baker was the managing director of the defendant company with obviously the completest knowledge of his own misdoings. Is the defendant company to be charged with his knowledge?

If he were a mere director or a secretary it would seem not. See cases cited Palmer, p. 235.

But it seems to me that notice to a managing director is effective. See *Dr. Jaeger's Sanitary Woollen System* v. *Walker & Sons* (1897), 77 L.T.R. 180.

There were some other items in question in the action but they appear to have been disposed of in some way or another.

The result, in my opinion, for the reasons I have indicated, should be that the appeal should be allowed with costs, the judgment dismissing the action set aside and judgment entered declaring a lien upon the property transferred by Geddes to the defendant company for the sum of $4,800 with interest from August 1, 1920, and costs with appropriate directions for the realizing of the lien.

Appeal allowed.

KOBOLD v. ALLEN.

Manitoba King's Bench, Galt, J. April 5, 1922.

LANDLORD AND TENANT (§ IIID—95)—LEASE OF THEATRE—DEPOSIT OF SUM AS GUARANTEE—CONSTRUCTION OF COVENANT—OPTION OF LANDLORD TO HOLD OR APPLY IN REDUCTION OF RENT IN DEFAULT—RIGHT TO JUDGMENT AGAINST LESSEE.

A lease of a theatre contained a covenant that the lessees were to pay to the lessors a certain sum of money, to be held by the lessors as a guarantee that the lessees would carry out the terms and provisions of the lease, and with the understanding that so much thereof as should not be necessary from time to time to make good the covenants and conditions of the lease, should be applied in payment of monthly instalments of rental. The Court held that lessors could either appropriate the sum so paid in whole or in part to defaults from time to time of rent, or abstain from doing so at their own option, and that notwithstanding the deposit of such guarantee the lessors were entitled to sue for and obtain judgment for the amount of rent in default.

APPEAL from the referee in an action to recover an amount claimed to be due under covenants contained in a lease. Judgment for plaintiff.

E. F. Haffner, for plaintiffs.

C. E. Finkelstein, for defendants.

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KOBOLD v. ALLEN.

Galt, J.

GALT, J.:—The plaintiffs G. A. Kobold and V. C. Kobold, sue Barney Allen, Jay J. Allen and Jules Allen for the sum of $6,549.58, alleged to be due under covenants contained in a lease between the parties made at the city of Winnipeg and dated June 10, 1918, whereby the plaintiffs lease to the defendants premises known as the Dominion Theatre, together with fixtures and apparatus, goods, chattels and effects, as set forth in the said lease, for a term of 5 years to be computed from March 29, 1919, at an annual rental of $12,000 to be payable in equal monthly instalments each in advance on the 29th day of each and every month during the said term, and together with one-half of taxes levied or charged against the said premises. The lease contains the following provision:—

"Provided the lessees are to pay to the lessors and do hereby covenant and agree so to pay prior to the commencement of the term hereby demised, the sum of $6,000 in the following manner: the sum of $600 at the time of the execution of this agreement, receipt of which is hereby acknowledged, the sum of $600 on June 29, 1918, and the 29th of each month thereafter up to and including January 29th, 1919, and also the sum of $600 on February 28, 1919. Such sum of $6,000 is to be held as a guarantee that the lessees shall carry out in all respects the terms and provisions hereof, with the understanding that the same, or so much thereof as shall not be necessary from time to time to make good the covenants and conditions of the lessee herein contained, shall be applied in payment of monthly instalments of rental commencing on September 29, 1923."

It will be noticed that if the rent and taxes were paid punctually down to September 29, 1923, the $6,000 expressed to be regarded as a guarantee would be sufficient to pay off the remaining instalments of rent to the end of the term.

There are other references in this lengthy lease to this so-called guarantee, for instance, in clause 14, which deals with the situation in case of destruction of the premises by fire, there is this provision:—

"In such event the lessors covenant with the lessees that the lessors will forthwith on demand repay to the lessees such portion of the rental as may have been paid in advance over and above the amount payable up to the time of the destruction of the said building, including in the amount to be so repaid all unused portion of the amount paid by the lessees to the lessors as a guarantee, as set out in para. 3 hereof."

And in para. 15:—

"Provided that if the term hereby granted shall be at any time seized or taken in execution, or in attachment, by any

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creditor of the lessees or their assigns, or if the lessees or their assigns shall make any assignment for the benefit of creditors or becoming bankrupt or insolvent shall take the benefit of any act that may be in force for bankrupt or insolvent debtors, the rent for the succeeding 6 months shall immediately become due and payable, and the said term shall immediately, at the option of the lessors, become forfeited and void; notwithstanding all unused portion of the amount paid by the lessees to the lessors as a guarantee, as set out in para. 3 hereof shall be and remain the property of the lessors absolutely."

Under the provisions of this lease the $6,000 was duly paid by the defendants to the plaintiffs before the commencement of the term. Thereafter the lessees occupied the premises and paid their monthly rental with reasonable promptitude until September 29, 1921. Since that date the defendants have paid nothing with the result that more than $6,000 is in arrear for rent and taxes.

The defendants filed separate but similar statements of defence setting up various objections to the plaintiffs' claim, the principal defence being as follows:—

"In the further alternative this defendant says that if any lease was entered into between the plaintiffs and the defendants (which this defendant does not admit but denies) the defendants deposited with the plaintiffs the sum of $6,000 and that the said sum of $6,000 was under the terms and conditions of the said lease to be applied to make good the covenants and conditions of the lease and one of the covenants and conditions was the payment of rent and that the said sum of $6,000 under the terms of the said lease are more than is necessary to pay up all arrears owing to the plaintiff under the terms of the lease."

The plaintiffs moved before the Referee in Chambers for leave to sign judgment under R. 625, supporting their motion by the affidavits of Victor C. Kobold and his solicitor. The defendants opposed the motion, relying upon an affidavit made by the defendant Barney Allen. In this affidavit, Barney Allen refers to the payment of the $6,000 guarantee, and states that pursuant to clause 11 of the said lease the defendants assigned the lease to an incorporated joint-stock company, incorporated under the laws of the province of Manitoba, and that he has further been informed by his co-defendants that the plaintiffs approved of the said assignment of the said lease. The plaintiff's motion was dismissed by the referee but no written reasons appear to have been given for the order.

The plaintiffs by their statement of claim and affidavits in support have fully brought themselves within the terms of R. 625. On the other hand, Mr. Finkelstein, on behalf of the de-

fendants, argues that the points raised in the statement of defence are at least sufficient to entitle the defendants to defend the action. Mr. Finkelstein relied upon three points as follows:—(1) That the lease has been assigned by the defendants to a company. But this of itself would not free the defendants from liability and there is not sufficient evidence before me to prove such assignment, or any consent by the plaintiffs, as required by the lease; (2) That the Court has no jurisdiction over the defendants who reside in Toronto. There is nothing in this objection either. The defendant Barney Allen describes himself in his affidavit as being "of the City of Winnipeg," and even if all three defendants resided in Toronto the plaintiffs would be entitled to sue them here under R. 290, clauses (b) and (e) of the King's Bench Rules; (3) That the plaintiffs hold in their hands the sum of $6,000 which they are entitled to apply and should be held bound to apply in order to remedy any default or defaults which might be made by the defendants until the said sum of $6,000 should be exhausted. It is obvious that if the defendants are entitled to take this stand in reference to the $6,000 guarantee the plaintiffs might have been compelled to lose the whole benefit of the guarantee 6 months after the commencement of the term, and would have to rely on the personal liability of parties resident in Ontario, a construction which is at variance with the whole tenor of the lease. No authorities were referred to by counsel on the argument but I think the point which I have to decide is clearly covered by *Commercial Bank of Australia* v. *Official Assignee of Wilson*, [1893] A.C. 181, 62 L.J. (P.C.) 61, 41 W.R. 603. The headnote is as follows:—

"Where a bankrupt and others had become guarantors to the appellants of a principal debtor's liability for the sum of £6,250, and three of the guarantors thereafter entered into agreement with the appellants that their liability should be limited in this way, that there should be substituted for it a deposit of £3,000 in the bank, to be carried to a suspense account, with power to the appellants to appropriate that sum whenever they thought fit in discharge pro tanto of the principal debt:—

Held, that such deposit did not, until appropriation, operate as payment, and that the appellants were entitled to prove for the full amount of their debt against the estate of a bankrupt co-surety, who was not a party to the above agreement."

In delivering the judgment of the Privy Council the Lord Chancellor says, at p. 185:—

"The arrangement which the agreement embodies appears to their Lordships to amount to this—that the liability of the

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guarantors who were dealt with by that agreement should, in lieu of their personal liability to pay the entire sum guaranteed in case of default of the principal debtor, be as between them and the bank limited in this way, that there should be substituted for it the deposit in the bank of a sum of money less than the whole amount, but which should afford a complete security to the bank quoad the amount to which it extended.. Accordingly the sum of £3,000—taking the promissory notes, they having been paid, as equivalent to cash—was deposited in the bank to a suspense account. The bank no doubt had power when it thought it prudent to do so to appropriate that sum to the payment of the principal debt pro tanto, and as soon as they made such appropriation it would undoubtedly operate as payment. They never have made such appropriation."

In the present case, I think Mr. Haffner is right in his contention that the plaintiffs could either appropriate the $6,000 guarantee in whole or in part to defaults from time to time, or abstain from doing so at their own option. I think their position is satisfactorily illustrated by the case to which I have referred. I must, therefore, allow the appeal and give leave to the plaintiffs to sign judgment for the amount claimed, with costs throughout.

Appeal allowed.

Re YAWOSKI.

Manitoba King's Bench, Macdonald, J. December 30, 1921.

BANKRUPTCY (§ IV—36)—JUDGMENT CREDITOR—CERTIFICATE OF JUDGMENT REGISTERED—NO EXECUTION OR OTHER PROCESS LODGED WITH SHERIFF —RIGHT OF CREDITOR TO CLAIM PRIORITY FOR COSTS.

A judgment creditor who has registered a certificate of judgment, but who has not lodged with the sheriff an execution or other process against the property of a bankrupt, is not within sec. 2 (hh) of the Bankruptcy Act, nor does sec. 11 (1) (b) apply to such certificate of judgment, and such judgment creditor is not entitled to claim priority for costs incurred in obtaining the judgment.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

APPEAL from the trustee in bankruptcy dismissing a claim for priority for costs incurred in securing a judgment against a bankrupt, debtor. Affirmed.

C. K. Guild, for judgment creditor.

H. P. Grundy, for the trustee.

MACDONALD, J.:—This is an appeal from a disallowance by the trustee in bankruptcy of the above debtor, of the claim of A. A. Feldman, a judgment creditor of the above debtor, claiming priority for costs incurred in securing a judgment against the said debtor.

The appellant brought action in the Court of King's Bench against the debtor which action was defended, and on February 17, 1921, the plaintiff (this appellant) recovered judgment against the said debtor and the costs incurred and taxed against the debtor amounted to $324.63.

On February 22, 1921, the judgment creditor registered a certificate of judgment, and on February 28, 1921, the debtor made an assignment.

The plaintiff then claimed priority for costs incurred in securing judgment and the trustee disallowed his claim and from this disallowance the judgment creditor now appeals.

The appellant bases his claim to priority under sec. 11, sub-sec. (1) (b) of the Bankruptcy Act, 1919, ch. 36, which reads:—

"(1) Every receiving order and every authorised assignment made in pursuance of this Act shall take precedence over—(b) all other attachments, executions . . . . but shall be subject to lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing, attaching, or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property."

Sub-section 3 of sec. 11 further provides that:—

"If an authorised assignment or a receiving order has been made, the sheriff or other officer of any court having seized property of the debtor under execution or attachment or any other process, shall, upon receiving a copy of the assignment certified by the trustee named therein, or of the receiving order certified by the registrar or other clerical officer of the court which made it, forthwith deliver to the trustee all the property of the execution debtor in his hands, upon payment by the trustee of his fees and charges and the costs of the execution creditor who has a lien as in this section provided."

The contention of counsel for the judgment creditor is that under sec. 11, sub-sec. (1) (b), this creditor is entitled to priority and that a judgment creditor who has registered a certificate of judgment comes within this section. He contends that the registration of the certificate of judgment has the same effect as the issuing of an execution placed in the sheriff's hands and that the district registrar is the sheriff under the definition as in sub-sec. (hh) of sec. 2, which reads: "Sheriff includes bailiff and any officer charged with the execution of writ or other process." He compares the effect of registration of certificate of judgment to the judicial writ of execution, founded on the Statute Westminster II (1285, ch. 18), known as the writ of elegit by which it became in the election of the party having

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recovered judgment either to have a writ or *fiere facias* on lands and goods or else one-half of the land of the judgment debtor in specie until judgment satisfied and the sheriff under this writ delivers a right of entry but not actual possession, and if the execution creditor cannot enter without force he should proceed by ejectment. Furthermore, this writ was directed to the sheriff whereas a certificate of judgment is not directed to any officer and is only a charge upon the lands of the judgment debtor which charge must be enforced by process of law and the district registrar has no part in the direction or control of the proceedings and cannot by any stretch of interpretation be within sub-sec. (hh) of sec. 2 of the Bankruptcy Act. Now, can sub-sec. (1) (b) of sec. 11 be made to apply to such a certificate of judgment?

The lien for costs can only exist in favour of the execution creditor who has first lodged with the sheriff an execution or other process against property.

There has been no execution or other process lodged with the sheriff by this execution creditor and he is not, therefore, entitled to a lien for his costs, and the appeal from the trustee must be dismissed with costs against the judgment creditor.

Appeal dismissed.

DENMAN v. TOUSAW, HART & ANDERSON and BELL TELEPHONE Co., mise-en-cause.

Quebec Superior Court in Bankruptcy, Panneton, J. June 5, 1922.

BANKRUPTCY (§ III—29)—STOCK CERTIFICATE WRONGFULLY TRANSFERRED INTO NAME OF BANKRUPT—RIGHT OF PERSON OWNING TO CLAIM AS AGAINST CREDITORS.

When a person deposits a stock certificate with instructions to sell a certain portion of the shares, and the person with whom such certificate is deposited fraudulently has the balance of the stock transferred to his own name, and subsequently makes an assignment under the Bankruptcy Act, the trustee is not entitled to retain such shares for distribution amongst the creditors of the bankrupt, but must hand over such share certificate to the person who has been wrongfully deprived of them.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

PETITION praying for the return of certain shares of stock wrongfully transferred by the bankrupt to his own name.

Elliott & David, for Denman.

Beullac & Mailhiot, for trustee.

P. Beullac, K.C., for Bell Telephone Co.

PANNETON, J.:—Petitioner alleges that on February 20, 1922, he deposited with the debtors a stock certificate of 20 shares of the Bell Telephone Co., with instructions to sell 10 shares out of the 20 covered by said certificate, he further alleges that the debtors disposed of the 10 shares above mentioned and have

accounted for the proceeds thereof to the petitioner, and that the balance of the shares covered by said certificate was in the possession of the debtors when they became bankrupt, and is still in their estate. He alleges further that the debtors have illegally appropriated the 10 shares which were not disposed of, and had them transferred to their own name in the books of the Bell Telephone Co., and that the said transfer is illegal, null and void.

Petitioner prays that he be declared the sole proprietor of the said 10 shares of the Bell Telephone Co. which appear to be in the debtor's estate, and that all transfers of the said shares in favour of the debtors be declared null, void and set aside, that the trustee and the mise-en-cause be ordered to hand over and re-transfer the said shares to the petitioner, with costs against the estate.

This petition is contested by the trustee, who denies and ignores the principal allegations of the contestation, and further states that the petitioner herein is not entitled to the possession of the ten (10) shares of stock of the mise-en-cause of the par value of $100 each and seeking to obtain possession of such stock is tantamount to seeking an undue preference against the other creditors of the estate of the said debtors; that the 10 shares of stock in question are the property of the estate herein upon the proceeds of which all creditors are entitled to share; that the 10 shares of stock in question are not the identical shares claimed to have been delivered by the petitioner to the debtors herein, and that the petitioner at most is only a creditor of the said debtors for the value of the 10 shares of stock claimed by him, even assuming that the allegations of his petition be true.

The proof establishes that petitioner on February 20, 1922, has delivered to the debtors a certificate for 20 shares of the Bell Telephone Co., bearing Number 14241, with instructions to sell 10 shares of it, and that the debtors transferred the said certificate to themselves in the books of the Bell Telephone Co. and obtained 2 certificates of 10 shares each said certificate bearing respectively the Numbers 17565 and 17566. They sold one of the certificates accounted to petitioner for the price of the 10 shares covered by that certificate and kept in their hands the other certificate for the other 10 shares, which certificate has been ever since and is still in the possession of the debtors and trustee.

Considering that said certificate which the trustee has still in his hands represents the balance of the shares covered by the original certificate and that the debtors, by attempting to appropriate illegally to themselves the said shares, have not

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destroyed the ownership of the same in the name of the petitioner, but simply changed the written title to said shares illegally to themselves with the consent of the mises-en-cause; that the petitioner has proved the facts alleged in petition.

The Court declares that petitioner is the sole proprietor of the said 10 shares of the Bell Telephone Co., and the transfer above mentioned of the said shares in favour of the debtors are declared null, void and set aside, and the trustee and the mise-en-cause are ordered to hand over and re-transfer the said shares and certificate to petitioner, with costs against the estate.

Judgment accordingly.

BURNETT v. KARANKO.

Manitoba King's Bench, Dysart, J. February 16, 1922.

ELECTIONS (§ IV—91a)—PETITION—BOND FOR SECURITY FOR COSTS—MANITOBA MUNICIPAL ACT R.S.M. 1913, CH. 133, SEC. 202—CONSTRUCTION—OBJECTION AS TO VALIDITY OF BOND—JURISDICTION OF JUDGE TO HEAR.

Section 202 of the Manitoba Municipal Act, R.S.M. 1913, ch. 133, which provides that "an objection to the security, (required by sec. 198 of the Act) shall be decided preliminarily by the said Judge," goes only to the sufficiency of the bond and not to its validity, and an objection to the validity of the bond required on an election petition is not one which can be made before a County Court Judge, but must be made before a Judge of the King's Bench.

STATUTES (§ IIA—95)—CONSTRUCTION—INTENTION OF LEGISLATURE—OMISSION OF DETAILS—JUDGE GIVEN FULL POWER TO DEAL WITH SUBJECT-MATTER—POWER OF JUDGE TO SUPPLY DETAILS OMITTED.

The Municipal Act R.S.M. 1913, ch. 133, in so far as it relates to election petitions, and the security for costs incidental thereto, having left the whole matter as fully as it has in the hands and power of the designated (County) Judge, must be taken, to have intended that he alone has power to supply the deficiency or omission of the statute, in not naming an obligee in whose favour the bond is to run, and he alone has the responsibility and authority of accepting a bond in lieu of cash, and of selecting such a bond as will satisfy him that it is a good and sufficient security. Such bond is not invalidated by the fact that the County Judge is himself designated as obligee, or by the addition of his successor as an obligee.

APPLICATION for an order prohibiting a County Court Judge from proceeding further with an election petition. Dismissed.

A. C. Campbell, for petitioner; *F. Heap*, for respondent.

DYSART, J.:—This is an application for an order to prohibit His Honour Judge Paterson of the County Court from proceeding further with the election petition herein.

The petition seeks to declare invalid the election of the respondent to the reeveship of the Rural Municipality of St. Clements. Security for costs was duly given by a bond which is objected to as being invalid on a number of grounds, but chiefly on the ground that it runs "unto his Honour Judge Paterson,

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Judge of the County Court for the Judicial Division of Selkirk, or the Judge of the said Court for the time being, and to the above named respondent, Stephen Karanko."

This bond was deposited with the Judge and acknowledged by him in terms which virtually implied its approval.

The question is: Is the bond such as is prescribed by the Act? If not, then no further proceedings on the petition should be taken because the time has elapsed for furnishing of the security.

The provisions of the Municipal Act, R.S.M. 1913, ch. 133, relating to election petitions and the security to be given in connection therewith are, in so far as they affect this question, briefly as follows:—

Section 192 provides that:—"A municipal election may be questioned by an election petition"—which by sec. 196—"shall be presented to a judge of the County Court for the judicial division in which the municipality is situate."

Section 198 provides that the petitioner shall give "security for all costs, charges and expenses which may become payable by him to any witness . . . . or to any respondent"—which security under sec. 199—"shall be to such amount . . . . as such Judge directs, and shall be given either by a deposit of money or by bond." If the bond is thought to be insufficient on any of the grounds mentioned in sec. 201, the objection may be under sec. 202 "decided preliminarily by said Judge."

Section 204 provides that " if no security be given as prescribed . . . . no further proceedings shall be had on the petition."

It is contended and admitted that the Judge of the County Court for the district is *persona designata* and that he alone has power to deal with the petition of the security. It is also contended, and I think rightly, that the objections to the security referred to in sec. 202 go only to the sufficiency of the bond and not to its validity. This contention is supported by the authority of *Pease* v. *Norwood* (1869), L.R. 4 C.P. 235, 38 L.J. (C.P.) 161, 17 W.R. 320. This application, therefore, is not one which could be made before a County Court Judge and is properly made in this Court.

As to the minor objections taken to the bond, I am of the opinion that the defects complained of do not materially affect the bond inasmuch as they are due to clerical carelessness so clearly evident that the ordinary rules of interpretation will cure them.

The main objection taken to the bond, however, is that it is made to run in favour of obligees who are neither expressly nor

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impliedly contemplated by the Act. The statute itself is silent as to the obligee, and to cure the omission.

Mr. Heap, for the respondent, argues that the bond should run in favour of the Crown. This argument, based as it is on English decisions, is not convincing for the reason that the English statute contemplates not a bond but a recognisance.

Mr. Campbell for the petitioner urges that the naming of the obligee in the bond is a matter left by implication to the designated Judge.

Undoubtedly there are omissions to be supplied and it is agreed that a deposit of money for instance or the delivery of the bond should be made to the said Judge although the statute is silent. The form of the bond is not designated, but it is to be supplied on general principles and presumably under the approval of the said Judge. May we not go one step further and allow the said Judge to approve or designate the obligees? If we deny this latter, the provisions regarding the bond become nugatory, when as a matter of general principle they should be supported if possible.

In Craies' Statute Law, 4th ed., at p. 106, it is stated:—

"It has already been stated, if a matter is altogether omitted from a statute, it is clearly not allowable to insert it by implication, for to do so would, as James, L.J., said in *Re Sneezum* (1876), 3 Ch. D. 463, 45 L.J. (Bcy.) 137, 'not be to construe the Act of Parliament, but to alter it.' But where the alternative lies between either supplying by implication words 'which' as the Court said in *Jubb* v. *Hull Dock Co.* (1846), 9 Q.B. 443, 115 E.R. 1342, 15 L.J. (Q.B.) 403, 'appear to have been accidentally omitted,' or adopting a construction which deprives certain existing words of all meaning, it is usual to supply the words."

And again at p. 108:—

"If a statute is passed for the purpose of enabling something to be done, but omits to mention in terms some detail which is of great importance (if not actually essential) to the proper and effectual performance of the work which the statute has in contemplation, the Courts are at liberty to infer that the statute by implication empowers that detail to be carried out."

Applying the above principles to the case in hand, we see that Judge Paterson is the only person designated to receive and deal with the election petition and the security for costs incidental thereto. The nature of the security, the amount of it, the receipt of it, the disposition of it, is for him. In lieu of cash, he may accept a bond. No details of this bond are given nor is any form suggested. The statute on this point is wholly silent. A bond, however, is a very common form of obligation. It con-

sists of a definite promise in writing under seal on the part of some person, who is called the obligor, to pay some other person, who is called the obligee, a definite sum of money, subject, however, to conditions which might void the obligation. There can be no bond without an obligee. By prescribing a bond the statute has impliedly prescribed an obligee but it has not named one. The question is—How shall we ascertain the proper person to be the obligee? I am of the opinion that the statute having left the whole matter so fully in the hands and power of the designated Judge must be taken to have intended that he alone had power to supply the deficiency or omission of the statute, and that he alone has the responsibility and authority of accepting a bond in lieu of cash, and in so accepting such a bond, he alone must have the authority to select such a bond as will satisfy him that it is good and sufficient security in lieu of the alternative deposit of money. In this case Judge Paterson has virtually approved of the obligees to the bond and I am, therefore, of the opinion that the bond must be considered valid in its present form.

But a further objection is taken. It is argued that even assuming that Judge Paterson is the proper obligee, the bond has been made invalid by the addition of Judge Paterson's successor. It is urged that this successor cannot by any construction of the statute have any authority to deal with this matter. If this is true, as it undoubtedly is, then it may be answered that the naming of his successor as an obligee is idle language and, therefore, harmless. On the same footing is the objection to the addition of the respondent as an obligee. But this surely cannot be fatal inasmuch as the bond is to secure the costs of the respondent and the addition of his name along with Judge Paterson as obligee might be said to ensure him greater certainty of enforcing the bond. Neither of these objections therefore, to my mind, is fatal.

The application for the order for prohibition will, therefore, be dismissed with costs.

Application dismissed.

Re PHILLIPS AND LA PALOMA SWEETS Ltd.

Ontario Supreme Court, Middleton, J. October 20, 1921.

COMPANIES (§VC—194)—PRIVATE COMPANY—SEIZURE OF SHARES BY SHERIFF—SALE—PURCHASE—REFUSAL TO TRANSFER—APPLICATION FOR MANDATORY ORDER—R.S.O. 1914, CH. 178, SECS. 2 (c) (1), 56 (1).

The directors of a private company will not be forced by mandatory order to record the transfer of shares in the company seized by the sheriff under an execution and subsequently sold to a third party. [See Annotation, Company Law in Canada, 63 D.L.R. 1.]

MOTION for a mandatory order directing the proper officers of an incorporated company, to record a transfer of shares of

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RE PHILLIPS AND LA PALOMA SWEETS LIMITED.

Middleton, J.

the company's stock and to issue a proper share-certificate to the applicant, who purchased from the sheriff.

G. Hamilton, for the applicant.

H. T. Beck, for the company.

MIDDLETON, J.:—By letters patent issued on the 26th July, 1917, Bistrey's Limited was incorporated pursuant to the provisions of the Ontario Companies Act, the letters of incorporation containing the provision that the company shall be a private company, and the following provisions shall apply thereto: "(1) The shares of the company shall not be transferred without the consent of the board of directors." The number of shareholders is limited to 50, and any invitation to the public to subscribe for shares, debentures or debenture stock, is prohibited.

On the 25th June, 1918, the name of the company was changed to La Paloma Sweets Limited. The capital stock of the company consisted of 4,000 shares of $10 each. According to the certificate produced, 1,103 shares have been issued, of which one Ginoff appears to hold 100.

On the 1st June, 1921, an execution against Ginoff having been placed in the hands of the sheriff, the sheriff served a notice, based upon the writ of execution, seizing the shares standing in his name, and in due course, on the 27th June, this stock was sold to Phillips by the sheriff, Phillips having paid to the sheriff $955 for the $1,000 of stock. Phillips then requested that the transfer to him should be recorded, but this was refused by the company, upon the ground that, according to the terms of the charter, the stock could not be effectually transferred without the consent of the directors, and that the directors did not desire to admit Phillips as a shareholder. Phillips asserts that the stock is worth at least $12 per share, or 20 per cent. above par, and expresses his readiness to transfer the stock to any nominee of the company or its directors at an advance upon its cost to him sufficient to compensate him for his trouble and expense with a reasonable profit.

What motive led to the purchase of the stock is not disclosed. Phillips is not an execution creditor, and does not appear to have been interested in the matter before he purchased the stock.

Under the statute (the Ontario Companies Act, R.S.O. 1914, ch. 178) a "private company" is one in which, *inter alia*, "the right to transfer its shares is restricted," (sec 2 (*c*) (*i*)); and, by sec. 56 (1), shares are to be transferable "in such manner and subject to such conditions and restrictions as by this Act . . . (or) the letters patent . . . may be prescribed."

The provision in the charter is, therefore, valid.

It is elementary law that an execution creditor, apart from

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some statutory provision, has no greater right than the execution debtor, and that the sheriff's sale can only give to the purchaser the right and title of the debtor; so here the applicant has no greater or other right than the execution debtor unless he can point to some statute assisting him.

The case law is collected and discussed in Lindley on the Law of Companies, 6th ed., vol. 1, p. 647, and it is there stated as the result that when by the constitution of the company the consent of the directors is required, "the power of assenting or dissenting to a transfer is reposed in them as trustees, and they must exercise that power accordingly, and not capriciously. At the same time, if their consent to a transfer is necessary, and, in giving or refusing their consent to a transfer, they act *bonâ fide*, with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with . . . . If the directors refuse their consent to a transfer they are not bound to state their reasons for refusal. . . . ; if their conduct is questioned the onus of proving that they have acted improperly is on the person complaining of their conduct."

In the case of a private company the situation is not essentially different from a partnership, and it is almost impossible to imagine any case in which the Court would interfere unless some flagrantly improper motive could be shewn, *e.g.*, an attempt by the directors to force a sale to themselves at a gross undervaluation. No suggestion of *mala fides* is here made.

Reliance is placed upon the provisions of the Execution Act, R.S.O. 1914, ch. 80, sec. 12 *et seq.* That statute provides only for the seizure and sale of "transferable shares." That, I think, does not include shares which can be transferred only with the consent of the directors, but applies only to shares which the debtor can freely transfer. The provision found in the Companies Act, sec. 60 must be regarded as subordinate to the wider provision in sec. 56 (1), and cannot be intended to conflict with the power which it gives to restrict the right to transfer.

It is said that this will leave an execution creditor of a shareholder in such a company without remedy. I do not think that that is so, as a receiver may be appointed to receive all dividends payable. Apart from the statute, this was the only remedy of the creditor of one member of partnership. *Motion dismissed.*

HOLLISTER v. PORCHET.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. December 24, 1921.

VENDOR AND PURCHASER (§ IE—28)—OPTION ON LAND—PAYMENT OF OPTION MONEY—NECESSITY—CONDITION PRECEDENT—EXISTING DEBT TO BE TAKEN AS PAYMENT—NO EXPRESS AGREEMENT—INFERENCE OF COURT.

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Options are strictly construed, and the Court will not infer an agreement that an existing debt should be taken to be the cash payment on the option in the absence of an express or implied agreement to that effect, and the payment of the option money being a condition precedent, the vendor may at any time withdraw the offer, unless payment is either made or waived before acceptance.

[*Davidson* v. *Norstrant* (1921), 57 D.L.R. 377, applied.]

APPEAL by defendant from the trial judgment in an action for damages for breach of an option contract on land. Reversed.

A. McLeod Sinclair, K.C., for appellant.

W. S. Morris, for respondent.

SCOTT, C.J. (dissenting):—In my opinion the option in question upon this appeal cannot be construed as one which required the plaintiff to pay $200 at the time he received it. It must be construed either as one requiring him to pay $100 at the time he received it and $100 within one month thereafter, or as one requiring him to pay $200 in instalments of $100 payable within 1 and 2 months from its date. The nominal consideration of $1 mentioned therein is of no importance, as its non-payment by the plaintiff would not alone deprive him of his right to exercise the option.

If the plaintiff was bound by the terms of the option to pay $100 at the time he received it, I am of opinion that the course of dealing between the parties was such that its payment must be presumed.

Two days before the option was given the defendant went to the plaintiff's farm to purchase some seed grain and hay. During their negotiations for the purchase thereof the purchase by the plaintiff of defendant's farm was discussed. The plaintiff desired an option thereon which the defendant refused. The defendant purchased some wheat and hay from the plaintiff, the price of which was not then agreed upon, but it is shewn that their market value at that time was about $105. The defendant admits that he then told the plaintiff that he had enough money to pay the purchase-money but that he needed it and he asked him to let him have the goods and that he then promised that when he got the money he would pay him. The plaintiff states that he then told the defendant that he was to take the wheat but that he could not afford to sell it on time and that the defendant could take it and do the best he could. Both admit that they were hard up for money at that time. The reasonable conclusion from what occurred at that time is that the defendant was to pay for the goods as soon as he could obtain the money therefor.

The defendant returned to the plaintiff's farm on the day before the option was signed and took away the remainder of the wheat he had purchased. The purchase by plaintiff of

defendant's farm was then again discussed and they appeared to have then agreed upon the terms of the option.

The two transactions between the parties were so intimately connected that notwithstanding the denial of the defendant that he so understood and, notwithstanding the fact that nothing appears to have been said at the time the plaintiff received the option as to the payment of the $100, it must have been in the minds of both parties at that time that the amount due by the defendant for wheat and hay should be so applied. The fact that the defendant did not demand its payment at that time points strongly to that conclusion. Why should he have demanded it at that time when if he had received it, he would have been in honour, as well as legally bound, to immediately refund it to the plaintiff?

The defendant, having sold the property to another before any payment of any further payment by the plaintiff became due under the terms of the option, must be held liable for damages to the latter. In my view, the damages awarded him should be reduced from $2,000 to $1,600. The plaintiff accepted the option subject to the condition that, if the property was sold by a certain firm before January 15, 1919, the defendant should pay him $1,600. That firm appears to have been acting as his selling agents. The property was sold by the defendant personally before that date. If the plaintiff agreed to accept that amount in full for his damages if it were sold by the defendant's agent, I see no reason why he should receive a greater amount when it was sold by the defendant personally.

I would allow the appeal only upon the question of the amount of damages awarded the plaintiff and dismiss it in all other respects.

The plaintiff should have four-fifths of the costs of the appeal.

STUART, J.A.:—I think it clear beyond all question from the evidence in this case that the parties never agreed as to the price to be paid for the wheat and hay. The plaintiff and his witnesses admit this without any doubt whatever. It follows that what the defendant was bound to pay for the wheat and hay was a reasonable price. As to what that should be fixed at the defendant was certainly entitled to have something to say. Up to the giving of the option the price had not been settled. And the very grave question which occurs to me is this—Has it ever been settled by anybody yet? Of course if the plaintiff were to sue for a certain sum, say $105, the Court would be bound to decide if that was a reasonable price. But even in the Court the defendant should have his

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hearing. If the plaintiff sued without rendering a bill and letting the defendant know what he was charging him, he at least might have trouble about costs. But, at any rate, he never did, so far as the evidence shews, communicate to the defendant the amount he was charging. So the situation is reduced to this, that the Court was at the trial asked in effect first to declare, without any such case being directly presented to it for adjudication, that $100 or $105 was a reasonable price for the wheat and grain and then to find that the parties impliedly agreed that this reasonable price, though not fixed till the trial of this action, should be set off and taken as payment on the first $100 of the option. With very much respect to any contrary opinion I think that is going further than there is anything to justify.

Then I cannot find on a reading of the evidence that there was ever any communication between the parties on the subject which would effect that meeting of minds which is essential to the formation of a contract. The evidence as to the two deals being substantially concurrent is, I am bound to say, rather obscure and uncertain and in any case I think it could only be on some such theory of the two forming practically one transaction that any implied agreement as to payment by set-off could be based. The subject-matters of the two bargains were not similar or necessarily related in any way.

Moreover, on the construction of the document itself, which no one has asked to have reformed, I think it ought to be held that it means that the whole $200 was to be paid down. It speaks of "$100 per month *now paid.*" It is all very well to say that the parties obviously meant that the payment was to be made monthly. Perhaps they did intend that in fact. But is that what the document means by what it says as a matter of legal interpretation?

I cannot assent to the method of inquiring into what the parties intended. The action is brought on a written contract referring to a subject-matter, contracts with respect to which must be in writing. The task before the Court is to interpret the writing as it stands. Passages apparently in conflict must be reconciled if possible. How else can we reconcile the expression "$100 per month" with the expression "now paid the receipt whereof is hereby acknowledged" otherwise than by saying that the expression "per month" does not refer to the date of payment, because that is fixed by the word "now" which can have no ambiguity, but to the amount to be paid, viz., $100, for each month the option was to run, that is, $200 in all? It is all very well to feel morally certain that the parties really meant something else but the problem is not

what the parties meant to say but what the words they used in their written contract must be interpreted as meaning. No claim is made that the words "now paid" should be expunged by a ratification of the agreement. Then what right has the Court to ignore them if they can, by any reasonable interpretation of the whole agreement, be reconciled with the rest of its language?

I think the true interpretation of the document upon which the action is based is that the $200 was payable at once.

And even if it was not then certainly at least $100 was payable at once and I can find no agreement that that sum was to be taken as paid.

It would appear to me as if the plaintiff, having done the defendant what he thought was a favour in selling him grain and hay upon credit, felt that he was in some way in a dominant position. But he was not in a dominant position. If the payment of the $200, or, if it is preferred, the $100, was a condition precedent, and I think it was, then it was as much the business of the plaintiff to fulfil the condition as it was of the defendant to ask for its fulfilment. The parties stood on an equal footing, and still do so, as to the necessity for the perfecting of the contract. If the defendant is to be reproached for not asking for the money, is not the plaintiff to be also reproached for not paying it or speaking about it?

As to the question of waiver I agree with the way my brother Hyndman has put it. When the plaintiff walked out with the document in his pocket the contract was either perfected or it was not. For the reasons I have given I think it was not. Then was the offer of the $500 due to anything else than a fear in the mind of the defendant that he was possibly already bound, and to a desire to get any such possible difficulty out of the way? I cannot safely conclude from the evidence that it was due to anything more. And even supposing it was due to a *belief* that he was bound, if that belief was unfounded, as I think it was, how can his offer in such state of circumstances cause him to become bound or be treated as a waiver of the condition, the fulfilment of which was necessary in law to make him bound? If it had been accepted his mistake in law might have prevented him, doubtless, from recovering it back. But, in my opinion, the offer he made cannot be looked upon as such an acting upon the contract as if it were perfected and on foot as to constitute a waiver of the condition. If Hollister had previously intimated his acceptance of the option and the defendant had gone on and done acts of negotiation on the basis that the option had been properly accepted and taken up, then such

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action would, no doubt, have constituted a waiver. But a mere offer, before any intimation of acceptance of the option, of a sum to induce the plaintiff to give up any rights he might have under it when there was, as the various opinions in this case show, every reason to feel doubtful whether there might not be some ground of right in Hollister, is in my view a different thing altogether. As my brother Hyndman practically says, waiver implies an intention to go on with an agreement while tacitly or expressly foregoing, i.e., not insisting upon, some condition thereof which prior thereto should have been fulfilled by the other party.

I wish to point out, however, that it seems obscure in the evidence whether the offer was before or after the contract was entered into with Gothard. Apparently it was after a verbal agreement had been made but before the contract had been signed. But I think this point is immaterial.

I desire also to add that even assuming liability in the defendant I still have some doubt, notwithstanding, and indeed to some extent on account, of the discussion in *Stover* v. *Gold* (1919), 48 D.L.R. 620, (affirmed 57 D.L.R. 64, 60 Can. S.C.R. 623), as to the measure of damages which should have been allowed. The plaintiff at most lost an optional *right to purchase*. It seems to me that the assessment of the value of that right is the true method of ascertaining the damages. Of course if the true interpretation of the decision in *Stover* v. *Gold, supra*, is otherwise, we are entirely bound by it but I have some doubt as to just how far the judgments in that case were intended to go. It seems to me, to refer to the particular facts of this case, that there is no conclusive reason to believe that Hollister could ever have sold to Gothard at all. Gothard might not have wanted to deal with him, and there is nothing to show that Hollister would ever have found him as a purchaser. The value of land might also suddenly have dropped, as it often does just when it is seen that a crop has failed. The sale to Gothard no doubt was some evidence of the value of the right which *ex hypothesi* Hollister lost but I doubt if it should be treated as conclusive.

I would allow the appeal with costs and dismiss the action with costs.

BECK, J.A.:—A very careful perusal of the evidence satisfies one that there was no agreement between the parties that the debt owing by Porchet to Hollister for wheat and hay amounting to apparently over $100 should be applied in payment of the down payment of $100 for the option given by Porchet to Hollister. Time, an indefinite time, had been given by Hollister to Porchet for payment of the debt for the wheat

and hay and it is very doubtful whether the precise quantities of either or the precise price of either or the total indebtedness for both had been agreed upon.

Hollister will not go so far as to say that there was any agreement to that effect; he says he did not expect to pay the $100 when he went to the office of Mr. Colwell, the real estate agent, who drew the option agreement. He had said on examination for discovery that he took it for granted that the debt was to be payment of the down payment of $100 for the option, but that he thought there was no agreement that the debt should be considered as payment for the option money of $100. His attempt to explain these expressions during examination at the trial does not satisfy me. Furthermore, both Hollister and Porchet agree that before the option was drawn up Porchet was trying to get more—$500 is mentioned—for the option. Colwell says that Porchet was protesting in his presence to Hollister, that he was not getting enough cash. It seems clear that this referred to the cash for the option and not to the amount of the cash payment in the event of the option being ultimately taken up. Porchet says that nothing was said in Colwell's office about the debt for the wheat and hay being taken as payment for the down payment of $100 on the option, he says: "In fact I would have closed the deal that quick, if he had mentioned it." After telling of his trying to get more than $200 for the option in Colwell's office Porchet goes on to say:—

"Q. And then you wanted more. How did it end up then? You signed this document didn't you? A. Yes, I signed the document. I signed the document expecting to get $100 cash when the document was signed and when Mr. Hollister took the document—I do not know whether I handed it to him or Mr. Colwell. I suppose I did likely because I likely read it over and naturally I am not sure as to that. I handed it to Mr. Hollister and he put it in his coat pocket and walked out. I made up my mind his option was no good because I had not received a cent of money on the option and I made up my mind if I sold the place I would not give him any interest. Q. Did you ask him for the money? A. I made so much fuss about it before I signed the document there was absolutely no use afterwards. I was angry anyway because he left me sitting there, with the option in his pocket. Q. Did he at any time tell you that that $100 was paid on account of what you owed him for the wheat? A. He never did as far as my memory carries me."

So that Porchet, who was trying hard to get $500 in cash and finally consented to take $200 in cash is sought to be held to an option for which he received nothing at all in cash, with the result that, if he is held not bound, each party is left neither

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richer nor poorer than before, and if he is held bound Hollister, without payment of a cent, makes several thousands of dollars at the expense of Porchet. The justice of the case is clearly not with the plaintiff.

Options are strictly construed. See *Lowes* v. *Herron* (1911), 3 Alta. L.R. 438, and authorities there cited.

Naturally the present case called for a consideration of the case of *Davidson* v. *Norstrant* (1921), 57 D.L.R. 377, 61 Can. S.C.R. 493, an appeal from this Court (1920), 51 D.L.R. 205, 15 Alta. L.R. 252. In that case the payment of the cash consideration for the option was held by a majority of the Judges of the Supreme Court of Canada to have been a condition precedent, which, however, might be waived. I find no evidence of waiver.

In my opinion it is impossible to infer any agreement that the debt should be taken to be the cash payment on the option; all the evidence seems to me to be the other way, and, in my opinion, nothing short of an agreement, express or implied, would be sufficient to result in the one cancelling the other.

With these additional observations I concur in the result arrived at by my brother Hyndman.

HYNDMAN, J.A.:—This is an action for damages arising out of a written instrument expressed to be between the parties hereto but signed and sealed by the defendant only, made on May 28, 1919, whereby the defendant agreed to give to the plaintiff an option to purchase the north-west quarter of sect. 6, tp. 16, rge. 24, west of the fourth meridian in this province, the portion of said document essential to the determination of the issues raised being as follows:

"Agreement made May 28, 1919, Between: Gus Porchet, Farmer, of the Village of Vulcan, Alberta, hereinafter called the 'vendor' . . . of the first part, and Ernest M. Hollister, farmer, . . . of the Village of Vulcan, Alberta, hereinafter called the 'purchaser' . . . of the second part. —One $1.00 (dollar) and,—

Witnesseth that in consideration of the sum of one hundred $100 dollars per month from the date of the agreement..... dollars, now paid by the purchaser to the vendor (the receipt whereof is hereby acknowledged), the vendor hereby gives to the purchaser an option irrevocable within the time for acceptance herein limited, to purchase, free from encumbrances, all that certain parcel of land situate in the Province of Alberta, more particularly described as follows:—north west quarter of section six (6) township sixteen (16) range twenty-four (24) west of the fourth meridian and the south east quarter of section twelve (12) township sixteen (16) range twenty-five (25) west of the fourth (4th) meridian.

The purchase price of the said property shall be the sum of sixteen thousand $16,000) . . . dollars, which on the acceptance of this option shall be payable as follows:—Nine thousand five hundred ($9,500) dollars cash; assuming a mortgage of about two thousand seven hundred ($2,700) dollars, and the balance three equal annual payments, due December First (1st) of each year commencing 1920, together with interest at the rate of 6 per cent. per annum on so much of the said purchase price as remains unpaid from time to time.

Provided that neither the signing of this option, nor the payment of any sum paid by the purchaser for this option shall bind the purchaser to complete the contract for purchase; and upon the expiration of this option he shall not be in any way liable or responsible for any further payments, nor for any damages, for failure to carry out the said option.

The sum of two hundred ($200) dollars paid by the purchaser to the vendor as consideration for the giving of this option shall, upon the completion of this agreement, be allowed as part payment of the purchase money, but in the event of the purchaser deciding to complete the contract to purchase, interest on deferred instalments of the purchase price shall be computed from the date of this option.

The option hereby given shall be open for acceptance up to, but not after, the 27th day of July, 1919.....and may be accepted by a letter delivered to the vendor, or mailed postage prepaid and registered addressed to the vendor at"

On the back of the document is endorsed the following memorandum signed by the defendant:

"It is hereby agreed if sold by Flood, Whicher & Elves of Vulcan before June 15th, 1919, that the vendor agrees to pay the purchaser the sum of sixteen hundred ($1,600) cash from the proceeds of said sale.

[Sgd.] G. A. PORCHET, Vendor."

It is common ground that the one dollar consideration expressed was not in fact paid nor was any portion of the $200, unless $100 part thereof was settled by the cancellation by the plaintiff of an indebtedness of "about" $100 owing by the defendant to the plaintiff under the following circumstance:

The day before the agreement the defendant purchased from the plaintiff 40 bushels of wheat and about 1,500 pounds of hay. The exact price of these goods was not definitely ascertained but it can be safely concluded that $100 or probably $105 would be the value. No definite actual figure was settled upon. The sale was one on credit, though no specific time for payment was mentioned. It is clear that prior to the time of the option it was an indebtedness between them.

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Probably on the same day, but after the wheat and hay transaction was closed, the parties discussed the matter of an option on the defendant's land and the following day went to the office of a Mr. Colwell in Vulcan and both instructed him as to the drawing-up of the written agreement. Only the defendant signed and sealed it and it was witnessed by Colwell. As stated, no money whatever passed. According to the defendant he complained that he was not getting enough cash for the option and Colwell swears that he overheard considerable conversation to the effect that defendant so complained. But it is admitted that no mention was made of the $100 indebtedness for wheat, etc. Also that no demand was made on the plaintiff for $100 or $200 or any money. The parties left the office, the option agreement reposing in the pocket of the plaintiff.

On June 3 following, without any intimation to the plaintiff, defendant sold the land on terms for the consideration of $19,200 to one Jesse Earl Gothard and about June 9 verbally offered the plaintiff $500 "to let the thing go back" and according to the defendant "for the sake of keeping peace between old neighbours, that is all." On the same day the defendant had his solicitor write the following letter to the plaintiff:

"9th June, 1919.

I have been instructed by Mr. G. A. Porchet to inform you that he withdraws any offer he has made you for the sale of the N.W. ¼-6-16-24-4 and the S.E. ¼-12-16-25-4.

Mr. E. M. Hollister, Vulcan."

This was the last communication between them so far as appears by the evidence and on September 16, 1920, the plaintiff brought action, for recovery of damages, claiming $3,200 being the difference between the purchase-price in the option and the price at which the land was later sold to Gothard.

The main defence raised is that on May 28, 1919, the defendant verbally offered to give the plaintiff an option to purchase the said land open for acceptance for 2 months conditionally on payment by the plaintiff to the defendant on the signing of such option of the sum of $200 cash, the price of said lands to be as stated in the agreement upon the understanding that he was to receive as a consideration therefor upon the signing thereof the said sum of $200 in cash and that the same was not to take effect or to be operative or enforceable until such payment and that the said consideration was not paid, and that on June 9, 1919, the defendant withdrew his offer to give an option and notified the plaintiff thereof in writing.

The important questions for determination seem to consist of three, viz.:—(1) Was the payment of the $100 or $200 a condi-

tion precedent and did failure on the part of the plaintiff to comply therewith give the defendant a right to withdraw the offer; and (2) If so, was the $100 paid by the plaintiff setting off the indebtedness referred to against such sum; and (3) In any event was payment of such consideration waived by the defendant?

Dealing with question (2) first: The trial Judge, though he does not expressly say so, apparently regarded the payment of $100 at the time of the agreement as a condition precedent but found in favour of the plaintiff on the ground that the said indebtedness must be taken to have been set off against the first $100 called for by the option. He says:

"He gave the option. He admits he owed the plaintiff $100. The plaintiff says he *took it for granted* that the $100 would be set off against the $100 payment. The defendant said nothing. He walked out of the office and made up his mind that the option was not any good. That is not the conduct which can result in the defendant repudiating his contract in my view. If he wants to repudiate he must do so openly and unambiguously so as not to mislead the other party. His conduct might very readily lead the plaintiff to understand that the $100 debt which the defendant owed should be set off against the $100 payable on the option."

Whilst it does seem reasonable to suppose that the parties might very conveniently settle this particular transaction in the way indicated by the trial Judge still, with great respect, I am unable to grasp how it can be said in the absence of a proved agreement, express or implied, that it should be considered paid in this way. A careful reading of the whole evidence reveals nothing to me as proof that there was at any moment an agreement to this effect. There is no doubt that time or credit was given to the defendant before the option came into existence, and that defendant was in need of money. It is, therefore, not unreasonable to expect that the option money would have been of considerable advantage to him to have at the moment and that was a reason for the granting of the option. An "understanding" on the part of the plaintiff is not enough unless there was a similar understanding by the defendant and that their minds met on the point. Now had that been the idea of both it seems to me that it would have been expressed in some manner directly or indirectly. But there is no such expression and it can at most be only surmised.

It must be noted also that even at the trial the exact amount of the debt was not correctly determined and as a matter of fact appears not to have been $100 but $105. It seems really

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impossible to say that the amount of the debt was finally settled. I do not think it can be said that the proximity of the transactions should make them really one matter of business so that the one should naturally be set off against the other.

The trial Judge lays considerable stress on the conduct of the defendant in leaving the office without saying anything about the consideration. I am unable to see, however, upon what principle it can be said that the defendant was under any responsibility to safeguard the rights of the plaintiff who must be assumed to know and appreciate his duties. If plaintiff expected to have his claim set off there should have been something said or done from which it could clearly be deduced that this was the arrangement.

If I am correct then in my conclusions as to the non-payment of the $100 then the question (1) arises—Was the payment a condition precedent?

It seems to me that the decision of at least the majority of the Judges in the Supreme Court of Canada in *Davidson* v. *Norstrant, supra*, settles the law in respect of the necessity of payment of the option money as a condition precedent and is applicable to the facts of the case at Bar. As I read the judgments in that case there was unanimity among the Judges, excepting Idington, J., that unless the consideration was nominal merely then either the payment must be made or waived before acceptance, otherwise the vendor may at any time withdraw the offer. Davies, C.J. rested his judgment mainly on the ground that it was the agreement and intention of the parties that the document could not be effective or binding until after the purchaser obtained the consent of his colleagues and that after such consent was obtained without unnecessary delay he notified the purchaser and offered to pay the first money due including the $100 and that it was not imperative or necessary that the $100 should be paid at the time of signing of the agreement. He also thought that considering the smallness of the down payment in comparison with the magnitude of the purchase-price the character of the transaction and the conduct of the parties that such down payment was waived.

Anglin, J. says at p. 395 (57 D.L.R.):

"I cannot assent to the contention that the facts that the agreement is under seal, and that it contains a recital of the payment of the sum of $100 are conclusive in the appellant's favour. Neither can I regard that sum as merely a nominal consideration."

He also holds that assuming that the payment of the $100

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was a condition precedent, communication of withdrawal was necessary before acceptance by defendant.

Duff and Mignault, JJ. both held that the payment of the $100 was a condition precedent and that payment was not waived and that, therefore, the vendor was entitled to withdraw the offer.

In the present case it cannot be said that the consideration was nominal, as I think there was reasonable ground for saying so in the *Norstrant* case. Consequently, applying the *dicta* of the majority of the Judges in that case unless it can be said that payment was waived, then it must follow that non-payment up to the date of withdrawal by the defendant of this offer is fatal to the plaintiff's claim.

There remains the question of waiver. The only ground upon which it was urged that the defendant waived payment was because he offered plaintiff $500 for a release. At the time this offer was made he had already sold to Gothard and so far as he was concerned he had practically put it out of his power to carry out his contract. It seems to me that waiver implies an intention to carry out an agreement whilst foregoing some condition therein. Obviously there could have been nothing of the kind in the mind of the defendant. Waiver is based on intention with full knowledge of the facts.

A clear and unequivocal intention must be shown by the evidence. *Crump* v. *McNeill* (1918), 14 Alta. L.R. 206.

The plaintiff says he (the defendant) wanted "the thing to go back" and the defendant says he was anxious to preserve "peace between neighbours." It would appear to me that his sole object was to escape a possible lawsuit and there is nothing from which it can be fairly said that he, at any time, waived any rights which he may have had.

I would, therefore, allow the appeal with costs and dismiss the action with costs.

CLARKE, J.A. (dissenting):—I concur with Scott, C.J. except that I would deduct from the $1,600, allowed for damages, the balance of $100, owing by the plaintiff on the price of the option.

Appeal allowed.

CANADA WEST SECURITIES CORP. v. CITY OF WINNIPEG.

Manitoba King's Bench, Mathers, C.J.K.B. February 27, 1922.

TAXES (§ IF—85)—BUILDING USED EXCLUSIVELY AS A PLACE OF WORSHIP—EXEMPTION—CHANGE OF CONGREGATION—PERIOD USED FOR REMOVING AND MOVING IN FURNITURE—WINNIPEG CHARTER 1918 STATS., CH. 120, SEC. 278 (6)—CONSTRUCTION.

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Mathers, C.J.K.B.

A building is used exclusively for the regular place of worship of a religious denomination within the meaning of sec. 278 (6) of the Winnipeg charter, 1918, ch. 120, and is not liable to assessment, although owing to a change in the congregations no actual service is held therein while one congregation is removing its furniture, and the other after receiving possession is moving in its furniture, and otherwise preparing the building for its church services, which are commenced at a later date.

ACTION for a declaration that certain lands were exempt from taxation and their sale for taxes illegal. Judgment for plaintiff.

A. B. Hudson, K.C., for plaintiff.

J. Preud'homme, for the city of Winnipeg.

MATHERS, C.J.K.B.:—The plaintiff corporation is the owner of the old Knox Church site at the corner of Ellice and Donald Sts. in this city, and bring this action for a declaration that ever since 1915 this land has been exempt from taxation under sec. 278 sub-secs. (6), (7), (8), (9) and (10) of the Winnipeg Charter, 1918, ch. 120, and that the assessment of the said lands during the year 1917 for general, municipal and school taxes was illegal as was also their subsequent sale for the taxes on December 8, 1919.

The action was tried upon admissions of fact. The material admissions are that the land is used exclusively as the site of a building called and known as Knox Church and does not exceed two acres in extent. On February 1, 1916, the plaintiff leased the land in question to the trustees of the Knox Presbyterian Church for a period of 9 months from that date, to be used as a church building only. At the end of the term granted by the lease the tenancy was continued on a monthly basis as provided in the lease until April 1, 1917. From February 1, 1916, until March 18, 1917, the lands and buildings thereon were used exclusively as the regular stated place of worship of the Presbyterian Church for church and Sunday School and other similar church purposes. The last services held by the congregation of the said church was on March 18, 1917, and forthwith thereafter the congregation moved into and used exclusively as its regular stated place of worship new premises situate on the corner of Edmonton St. and Qu'Appelle Ave.; which premises appear as exempt from taxation in the assessment rolls of 1917. The Presbyterian Church trustees retained possession of the lands and buildings until April 2, 1917, for the purpose of removing therefrom the furniture, furnishings and fixtures belonging to the congregation and during this last-mentioned period the lands and buildings were not otherwise used.

On April 2, 1917, the plaintiff rented the lands and buildings to the trustees of a congregation of religious denomination known as Penticostal Assemblies of Canada, to be used as a church

building, and on that date the trustees of the Knox Presbyterian Church delivered the keys of the building to one of the last-mentioned trustees. These trustees proceeded forthwith to instal furniture, furnishings and fixtures in the said building and to effect certain alterations and repairs to make the same suitable for the purpose of the last-mentioned congregation and were thus occupied during all the period from April 2, 1917, to April 14, 1917. On this last-mentioned date the first services of the last-mentioned congregation were held in the said building. Thereafter, during the balance of the year 1917 and until the present time, the land and buildings have been used exclusively for the regular stated place of worship of this said last-mentioned religious denomination and for other church and Sunday school purposes. During the period from April 2 to April 14 the last-mentioned congregation were using and holding services in the building known as the old Jewish Synagogue at the corner of King St. and Henry Ave. in the city of Winnipeg and not elsewhere.

The general assessment roll of the city for the year 1917 was completed by the assessment commissioner and signed by him on March 5, 1917. In this roll the land was not marked exempt. The Board of Valuation and Revision was appointed March 29, 1917, for the hearing of appeals and duly gave notice of such appointment. On the day fixed the Board heard and decided several appeals in respect of parcels of land but not the land in question and on April 3 changed and altered the roll and completed its sitting as a Court of Revision and on April 14 reported to the Mayor-in-Council of the city. The plaintiff received no notice of the assessment of the lands for 1917 or of the removal of the exemption for that year and no appeal against such assessment was made by them.

The short point to be decided is whether or not the lands in question were exempt from taxation at the time of their assessment in 1917. It is admitted that their use was such as to entitle them to exemption when the assessment roll was completed and signed by the commissioner on March 5. It is said, however, that the crucial date is not that on which the roll was signed but on which it was finally revised. The contention of the city is that the assessment roll was finally revised on April 10. The charter provides, in effect, that it shall be held to be finally revised at the expiration of 7 days from the decision of the Board with respect to any complaint, which was April 3. It is argued that between April 2 and 14 the land was not used exclusively for the regular stated place of worship of a religious denomination and other church purposes and consequently was

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not exempt at the time of the final revision of the assessment roll and hence was properly assessed.

The fact is that the Presbyterian congregation held regular services in the building until March 18. There is no question, therefore, that it was exempt up until that time. From March 18 until April 2 the trustees of the Presbyterian congregation were still in possession and were not using the property or the building thereon for any other purpose than that of removing their furniture from it to their new building. On the very day that the Knox Church trustees ceased to use it, it was leased to the trustees of the Penticostal congregation who received the key and possession directly from the trustees of the Knox Church congregation. These trustees at once commenced moving in their furniture and otherwise preparing the building for their own church services, the first of which was held on April 14.

Section 278, sub-sec. 6 of the charter says that:—

"No assessment or taxation shall be imposed by the city in respect of buildings commonly called churches, which are used exclusively for the regular stated places of worship of any religious denomination and for church purposes, or in respect of any buildings upon the church site exclusively used for Sunday school and other similar church purposes."

It is contended that because the Penticostal congregation had not actually begun the holding of services in the church when the assessment roll was finally revised, the building was not then 'used exclusively for the regular stated place of worship' of the congregation. The term 'exclusively' does not mean that the services of the congregation must be held in that particular place to the exclusion of all other places. It means, I take it, that it must not be used for any other purpose than a place of worship for the congregation.

Before a congregation can hold its services in any vacant building there must, of necessity, be some interval occupied in moving in furniture and otherwise preparing the building. According to the contention of the city, if the interval required to move in occupied but one day and if the city by any chance happened to complete its assessment on that day the building could lawfully be assessed, although during the other 364 days of the year it was admittedly used exclusively for the regular stated place of worship of the congregation. I do not agree with counsel for the city that exemption only begins after the first church service is held. The section does not say so. All it requires is that it is used exclusively for the regular stated place of worship of the congregation. On April 2, this property became the regular stated place of worship of this congregation and it

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continued to be so used and, in my opinion, was so used on April 10 within the meaning of the charter.

The plaintiff is entitled to a declaration that the land and buildings referred to were exempt from assessment for general, municipal and school taxes during the year 1917, and that the sale of the said land for taxes by the said city for the said year was illegal and void, and for an order requiring the defendants, the sinking fund trustees, to deliver up the tax sale certificate to be cancelled, with costs of the suit.

Judgment accordingly.

GUNDERSON v. RUR. MUN. OF CALDER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

HIGHWAYS (§ IVA—126)—DEFECT IN HIGHWAY—DUTY OF MUNICIPALITY UNDER RURAL MUNICIPALITY ACT, R.S.S. 1920, CH. 89—FAILURE TO PROPERLY INSPECT—NEGLIGENCE—INJURY TO TRAVELLER—DAMAGES.

Under section 196 of the Rural Municipalities Act, R.S.S. 1920, ch. 89, there is a definite duty cast on a municipal council to keep the public bridges and the approaches thereof in repair, and if the council makes default in the performance of this duty the municipality is liable for resulting damage. The collapse of the approach to a bridge under the weight of a team of horses using the highway in a proper manner, is conclusive evidence that the highway is not in proper repair, and is also *primâ facie* evidence that the duty of keeping it in repair has been neglected by the council, and where the evidence shows that the approach has not been properly inspected for a period of four years, it establishes negligence for which the municipality is liable.

[*City of Vancouver* v. *Cummings* (1912), 2 D.L.R. 253, 46 Can. S.C.R. 457; *Jamieson* v. *City of Edmonton* (1916), 36 D.L.R. 465, 54 Can. S.C.R. 443; *Douglas* v. *City of Regina* (1918), 42 D.L.R. 464, 11 S.L.R. 255, applied. See Annotation 34 D.L.R. 589.]

APPEAL by plaintiff from the trial judgment in an action for damages for injuries caused by plaintiff's team falling through the approach to a bridge on a public highway. Reversed.

L. McK. Robinson, for appellant.

A. B. Mann, for respondent.

HAULTAIN, C.J.S., concurred with LAMONT, J.A.

LAMONT, J.A.:—In this action the plaintiff claims damages for loss suffered by reason of his team falling through a bridge or the approach thereof on a public highway. The bridge in question spans a stream which, in the spring time, usually carries down a considerable volume of water, 6 to 8 ft. in depth. It was erected some 12 years before the accident. On May 7, 1920, the plaintiff's servants were driving the plaintiff's team and buggy along the highway. As the horses were about to step on the bridge, the earth forming the approach gave way and the horses were precipitated into the water, with the result

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that one was drowned and the other injured. The plaintiff contends that there was a duty resting upon the defendants to keep the highway in a proper state of repair; that they neglected their duty, and that their negligence was the cause of his loss. The defendants contend that the collapse of the approach of the bridge was due to its being undermined by the water, which that spring flowed in unusually large quantities down the stream; that they had no notice or knowledge that it was being undermined, and could not reasonably have anticipated that such would happen. The trial Judge took this view, and gave judgment for the defendants. The plaintiff now appeals to this Court.

Section 196 of the Rural Municipalities Act, R.S.S. 1920, ch. 89, provides as follows:—

"196. Every council shall keep in repair all public roads, highways, streets and lanes, and also all public bridges, culverts, dams and reservoirs and the approaches thereto . . . . and in default of the council so doing the municipality shall be civilly liable for all damage sustained by any person by reason of such default."

Under the above statutory enactment, there is cast upon the council the definite duty of keeping the public bridges and the approaches thereof in repair. If the council make default in the performance of this duty, the municipality must compensate any person who suffers damage by reason of such default. It follows, therefore, in my opinion, that negligence on the part of the council is the foundation of the municipality's liability.

Counsel for the municipality built his argument upon the principle, and contended that, as negligence was the ground of the defendants' liability, the plaintiff must affirmatively establish negligence on the part of the council; and that, to do so, he must shew that the municipality had notice of the want of repair, or that the defect had existed for such a length of time that notice thereof should be imputed to it; and that, in the present case, the defendants had no notice of the undermining of the approaches and no circumstance had been shown from which the conclusion could reasonably be drawn that the council should have suspected it.

That the onus rests on the plaintiff to show that the municipality knew, or should have known of the want of repair has been laid down in numerous cases in Ontario and Manitoba.

Castor v. *Corpn. of Uxbridge* (1876), 39 U.C.Q.B. 113; *Rice* v. *Town of Whitby* (1898), 25 A.R. (Ont.) 191; *Ayre* v. *Corpn. of Toronto* (1879), 30 U.C.C.P. 225; *Rushton* v. *Galley* (1910),

21 O.L.R. 135; *Bell* v. *City of Winnipeg* (1919), 29 Man. L.R. 401.

Dicta to the same effect are found in *McGregor* v. *Township of Harwich* (1899), 29 Can. S.C.R. 443.

The more recent cases in the Supreme Court of Canada, however, seem to take a different view from those above cited as to what is necessary to make out a *primâ facie* case.

In *City of Vancouver* v. *Cummings* (1912), 2 D.L.R. 253, 46 Can. S.C.R. 457, Idington, J., in giving the judgment of the majority of the Court, at pp. 258-9, said:—

"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 or 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 acquainted with such possible occurrences, and if it has done so can possibly answer the presumption."

And in *Jamieson* v. *City of Edmonton* (1916), 36 D.L.R. 465 at p. 474; 54 Can. S.C.R. 443, Duff, J. said:—

"It is also strictly unnecessary to pass upon the question whether or not the plaintiff by proving the existence of the nuisance thereby establishes a *primâ facie* case; although, as it is quite evident that the legislature in passing the enactment has assumed that in the ordinary course highways can be kept in a reasonable state of repair by the exercise of such diligence as may properly be expected from the municipality, there seems to be sufficient ground for holding that proof of the existence of a nuisance does in itself constitute a *primâ facie* case throwing upon the municipality the burden at least of going forward with evidence."

In *Douglas* v. *City of Regina* (1918), 42 D.L.R. 464, 11 S.L.R.

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255, this Court adopted the principle enunciated in the two cases last mentioned, and held that, at p. 467:—

"While a roadway out of repair raises a presumption of a breach by the city of its statutory duty, that presumption may be rebutted by shewing that every reasonable means had been taken to keep the roadway in a safe condition for traffic."

In that case, the city established that it made regular and proper inspections of the sewer in question without finding any defect, and that, had it inspected it immediately prior to the accident, no defect could have been discovered in the roadway. The city was, therefore, held not liable.

Apply these principles to the facts of the case before us. The collapse of the approach to the bridge under the weight of the plaintiff's horses, using the highway in a proper manner, is conclusive evidence that the highway was not in proper repair. It is also *primâ facie* evidence that the duty of keeping it in repair had been neglected by the council. The onus of meeting this *primâ facie* case was on the defendants. To meet it they had to show that, by their officers or servants they had inspected the bridge at reasonable and proper times and that proper inspection did not disclose anything from which it could be suspected that the approaches were being undermined or rendered defective in any way. For instance, had they established that in the fall preceding the accident, after all the heavy rains had passed, the bridge had been inspected and the approaches were found to be in good repair and not undermined, and that nothing had occurred between that time and the accident from which danger might reasonably be anticipated, it seems to me the *primâ facie* negligence arising from the fact that the approach collapsed would be rebutted. But what are the facts? The proper inference to be drawn from the evidence is that the approach collapsed through being undermined by the water. William Mitchell was the defendants' councillor for Division 6, in which the bridge in question was located, and had the supervision of it. He says that the only way to ascertain if the approaches are being undermined is to get down under the bridge and examine them at the point where the water would wash away the earth. He further says that 8 years before the accident both approaches were undermined; that he examined the approaches at that time and gave orders to have them repaired, but that he had not made an inspection from underneath the bridge since that time, although he inspected the bridge from the top each year. About 4 years ago a Government inspector examined the bridge and the approaches, and found all in good order. Since that time no one, so far as the evidence discloses,

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had examined the approaches from underneath the bridge to ascertain if any injury was taking place. The failure of the defendants to have the approaches examined from underneath within the last 4 years, in my opinion, constitutes negligence on their part. Not having made an inspection for 4 years, the defendants cannot establish that the approaches had not been undermined before the spring freshet of 1920. For all we know, part of the undermining may have taken place at any time after the last inspection, and the waters of the spring of 1920 may have only completed what was begun several years before. Had the defendants inspected the foundations of the approach any time during the years preceding the accident, they might have discovered that it was being badly undermined. The onus was upon them to show that the approach was not undermined prior to the spring of 1920, and they have not shown it. They have failed, therefore, to rebut the *primâ facie* case raised against them, and must be held liable for the plaintiff's loss. This loss the trial Judge found to be $439.75.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for $439.75 and costs.

TURGEON, J.A.:—I agree that this appeal should be allowed with costs. The case made out by the appellant at the trial was such that the onus was cast upon the respondents to show that they had not been negligent in the performance of the duty imposed upon them respecting this bridge by sec. 196 of the Rural Municipality Act, and in my opinion they have failed to discharge this onus. Judgment should be entered for the appellant in the sum of $439.75, the amount of the damages as calculated by the trial Judge, together with costs.

MCKAY, J.A. concurred with LAMONT, J.A.

Appeal allowed.

JOHANESSON v. CANADIAN PACIFIC R. Co.

Manitoba King's Bench, Dysart, J. April 12, 1922.

JUDGMENT (§ IIA—60)—RES JUDICATA—APPLICATION OF PRINCIPLE.

The principle of *res judicata* applies notwithstanding that the second action is different in form from the first, or that the plaintiff in the second action is virtually or actually a defendant in the first. So long as any point of fact or law was put in issue—whether pleaded or not—and was tried in the former action in which the present parties were on opposing sides, it does not matter that the decision on those points may not be sound, or was reached on insufficient or false evidence, or on erroneous views of the law, or because of some matter omitted which might have been supplied, or has since been discovered,—so long as that decision stands on the records unattacked or unappealed from, it stands with all that is necessarily involved and included in it; as *res judicata;* as matter finally and conclusively settled between these parties and their privies.

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The Court held applying the above principles, that in an action brought to recover the value of certain boxes of fish, which were allowed to spoil *in transitu*, through the alleged negligence of the defendant, that the earlier action settled not only the question of the freight charges, but that it also settled every point of fact or law which necessarily entered into consideration of the Court in determining exactly what were the terms of the contract, what were the particulars of the breach, and how that contract and breach affected the defendant's rights to recover freight charges, and that all these points must be *res judicata*.

APPLICATION in pursuance of an order of the referee.

F. Heap, for plaintiff.

L. J. Reycraft, K.C., for defendant.

DYSART, J.:—This is an application made in pursuance of an order of the referee for the purpose of determining how far issues raised by the pleadings in this action are *res judicata*.

The action itself is brought to recover the value of 253 boxes of frozen fish which were accepted by the defendant on stated terms for transportation from the plaintiff in Winnipeg to the Raney Fish Co. at Cleveland, Ohio, and which through the alleged negligence of the defendant and its agents were allowed to spoil *in transitu*.

The loss of the fish has already given rise to litigation. An action was commenced by the plaintiff on July 17, 1918, but by the time the case had reached the trial stage the plaintiff had discontinued his statement of claim and the trial resolved itself into a contest over the question of whether or not the defendant was entitled to collect freight charges for the transportation of the fish. The pleadings had by this time dwindled to a counterclaim for the freight and a defence thereto.

Omitting what is not pertinent to this inquiry, the said counterclaim alleged that:—"the plaintiff is indebted to the railway company in the sum of $679.41, being charges for the said shipment of fish over the railway lines of the defendant railway company and connecting lines:" and the defence to the counterclaim set up that:—"the Canadian Pacific Railway received the fish in question in this action from the plaintiff consigned to the Raney Fish Co., and the said delivery was made to and accepted by the railway company upon terms requiring them (amongst other things) to properly salt and otherwise care for the fish during transit; but the said railway company wrongfully neglected to do so. In consequence of said negligence and breach of contract the said fish became bad and unsalable during transit . . . . and the plaintiff has suffered loss and damage to the extent of $4,000, being the value of said fish, and other incidental losses in connection therewith."

The case was tried before the Chief Justice of the Court of

King's Bench who delivered a written judgment in which, after setting out at length his findings and reasons, he concluded that:—"the company's contract was to carry the goods safely and not having done so, it has not fulfilled the contract on its part and has, therefore, no right to recover the carrying charges."

The specific question submitted by the referee's order to this Court for determination is:—"Which, if any, of the matters of fact and law decided and adjudicated in said former action are by virtue of the judgment and reasons therefor in the said former action, binding, as *res judicata* upon the parties hereto so as to dispense with proof or adjudication thereof in this present action and so as to estop the parties from denying or controverting the said matters in this action by evidence or otherwise?"

Although in the ordinary case of ascertaining what is *res judicata* it is usual to look to the grounds of the earlier decision and, if necessary, to extrinsic evidence, still, in this case, we are restricted by the terms of the submission to the "judgment and the reasons therefor." Nevertheless as the judgment and reasons set forth with sufficient amplitude all the facts and circumstances that seem necessary for the full and complete inquiry, neither party would seem to be prejudiced by the limitation.

The judgment of the Chief Justice recites the issue of the original statement of claim, the filing of defence and counterclaim for freight, the discontinuance of statement of claim by the plaintiff, the signing of judgment by default on counterclaim, the subsequent setting aside of said default judgment on terms, the entry of defence to the counterclaim, the trial of the case on the counterclaim and defence thereto. These recitals conclusively settle what proceedings were taken in the earlier action, and for our purposes they especially make it clear that the earlier action went to trial not in the statement of claim and statement of defence, but upon the counterclaim and defence thereto. The conclusiveness of these recitals is shown in many authorities but in none more definitely than in 23 Cyc., p. 1292, which lays down that:—

"The recitals of a judgment are conclusive evidence in regard to the form of action, the time of bringing the suit, the various proceedings taken in it, and the disposition finally made of it; but not in regard to facts affecting the substantial rights of the parties except in so far as they were at issue and adjudicated."

Before proceeding to any close inquiry as to exactly what matters were adjudicated in the former action, let us first set

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forth the principles that must guide us in such inquiry. The question of *res judicata* is dealt with generally in the leading text-books and specifically in a large number of cases. In 13 Hals. sec. 463, it is stated that:—

"A party is precluded from contending the contrary of any precise point which, having been once definitely put in issue, has been solemnly found against him. Though the objects of the first and second actions are different the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties. And this principle has been applied when the point involved in the earlier decision, and as to which the parties were estopped was one rather of law than of fact."

And again, sec. 464:—

"The parties are estopped by the findings of fact involved in the judgment; as to the determination of questions of law, the true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgment of a competent court. But the conclusiveness of the determination rests upon the same principles in each case. The doctrine of *res judicata* is not a technical doctrine applicable only to records: it is a fundamental doctrine of all courts that there must be an end of litigation."

And further sec. 465:—

"A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties . . . actually was so put in issue or claimed."

In Broom's Legal Maxims, 7th ed., at p. 263 [8th ed., at p. 270] Lord Ellenborough is quoted with approval as laying down in *Outram* v. *Morewood* (1803), 3 East 346, that:—

"it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel . . . . the estoppel precludes parties, and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them . . . . has been, on such issue joined, solemnly found against them." "According to the practice of every Court, after a matter has once been put in issue and tried, and there has been a finding or verdict upon that issue, and thereupon a judgment, such finding and judgment are conclusive between the same parties on that issue. In all Courts it would be treated as an estoppel." [quoting from *Finney* v. *Finney* (1868), L.R. 1 P. & D. 483, 37 L.J. (P) 43.]

So also in 23 Cyc., p. 1288-9:—

"A judgment rendered by a court having jurisdiction of the

parties and subject matter, whether correct or not, is conclusive and indisputable evidence as to all the points or questions in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action, in so far as it settles and determines questions of fact as distinguished from abstract propositions of law."

And at p. 1290:—

"The estoppel of a judgment cannot be extended beyond the particular facts on which it was based; it determines only such points or questions as are sufficient to sustain the legal conclusion that judgment must be given for one or other of the parties in the particular form and amount in which it was rendered not additional matters, unnecessary to the decision of the case, although they may come within the scope of the pleadings, unless they were actually litigated and passed upon."

Also at p. 1300:—

"The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not."

In Taylor on Evidence, 11th ed., sec. 1684, it is laid down that:—"Though a judgment *inter partes* is . . . admissible for or against parties or privies, where the same subject-matter is a second time in contrary between the same parties . . . In no case will it be regarded as quite conclusive of the rights in dispute, unless it be pleaded as a matter of estoppel."

From the foregoing authorities and from numberless decisions, it is clear that the principle of *res judicata* has its roots stuck deep in the necessity of having some end and finality to litigation over the same matters between the same parties; that the principle has its sanction not in superficial or technical considerations, but in the inherent jurisdiction of Courts of law; that it is of wide and general application, and that it applies, notwithstanding, that the second action is different in form from the first, or that the plaintiff in the second action is virtually or actually a defendant in the first. So long as any point of fact or law was put in issue—whether pleaded or not—and was tried in the former action in which the present parties were on opposing sides, it matters not that the decision on those points may not be sound or was reached on insufficient or false evidence, or on erroneous views of the law, or because of some matter omitted which might have been supplied or has since been discovered—

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so long as that decision or judgment stands on the records unattacked or unappealed from, it stands with all that is necessarily involved and included in it—as *res judicata*—as matter finally and conclusively settled between these parties and their privies.

Applying the foregoing principles to the case in hand, we come irresistibly to the conclusion that the earlier action between these parties settled not only the question of the freight charges but that it also settled every point of fact or law which necessarily entered into consideration of the Court in determining exactly what were the terms of the contract, what were the particulars of the breach, and how that contract and breach affected the defendant's rights to recover freight charges. The freight was the main issue but in attempting to establish a right to freight, the defendant necessarily had to show the terms of a contract entitling it to freight. The plaintiff in resisting the claim brought out other terms which imposed on the defendant a special duty of taking care of the fish and then produced evidence to show that the defendant and its agent had negligently violated that duty. All the points then of the contract and of the breach, together with necessary inference of fact and conclusions of law, that are involved in that earlier judgment must be *res judicata*.

For the purpose of making a careful comparison between the issues raised in this action, and "the matters of fact and matters of law decided and adjudicated in the said former action." I have analyzed and summarized those "matters" as I find them in said "judgment and reasons therefor." In doing so I have applied in every instance the tests of identity and of necessity, and am of the opinion that the summary which follows sets forth those and only those "matters" which were necessarily decided in the earlier action, and are among those raised by the pleadings in this:—

(1) On April 29, 1918, the plaintiff loaded into a refrigerator car in Manitoba, 253 boxes of fish consigned to the Raney Fish Co. at Cleveland, Ohio, and on the same day the defendant accepted said car and agreed to carry the fish to their destination;

(2) At the time of the delivery and acceptance, the fish were frozen and in good order and condition, and the bunkers in the ends of the said car were properly filled with crushed ice and 15% salt;

(3) The terms and conditions on which the fish were to be carried were specified in a bill of lading or shipping order issued at the time to the plaintiff; those included an order im-

posed by the plaintiff on the defendant to "re-charge with ice and 15% salt in transit when necessary";

(4) It was found that the recharging in transit became necessary every twenty-four hours;

(5) The car was transported over the defendant company's railway lines to Chicago, thence over the Nickle Plate line to Cleveland, Ohio, reaching there on May 7, 1918;

(6) Notice of the arrival of the fish was on the day of their arrival given to the consignee, as contemplated by the terms of the bill of lading. The effect of the giving of this notice was to terminate at the end of 48 hours thereafter the defendant's liability as insurer, that is, it set a time, 48 hours thereafter for the termination of the period of transit. That termination would occur some time on May 9;

(7) The fish were inspected on the date of arrival and were found to be "in the same condition as when shipped";

(8) The bunkers on the car were not recharged either on May 7, 8, or 9, nor were any other steps taken to insure the preservation of the fish;

(9) On May 11 the fish were found on inspection to be soft and slimy. This process of deterioration had on that day so far advanced that it must have begun before May 9, that is before the period of transit and the defendant's liability as insurer had ceased;

(10) The omission to recharge the car with ice and 15% salt was negligence, and was the cause of the loss of the fish, and constituted a breach of duty for which the defendant or its agent was responsible to the plaintiff;

(11) The Nickle Plate Railway was by the terms of the bill of lading or shipping order the agent of the defendant and for its negligent breach of duty the defendant was responsible to the plaintiff.

In the foregoing summary there is not, in my opinion, a single finding of fact or conclusion of law, but what is necessary to support the judgment of the Chief Justice, not one that may be withdrawn without removing a necessary pillar on which that judgment rests. The terms of the contract; the performance of it; the negligent breach of those terms in that performance, constituting the performance an imperfect one, the legal responsibility of the defendant to the plaintiff for the consequences of that negligent breach so far as consequences extended to the freight charges—these were all necessarily passed upon as a premise for the final conclusion of the Court that:—

" . . . the defendant's contract was to carry the goods

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safely, and not having done so, it has not fulfilled the contract on its part . . . ''

What now are the issues raised in this action, and how far do they coincide with ''matters'' set forth in our summary? The first 6 paragraphs of the statement of claim show the delivery of the same shipment of fish, by the same plaintiff to the same defendant, for transportation to the same consignee, on the same terms, including the special order for recharging the bunkers with ice when necessary; the same necessity of recharging once in every 24 hours; the same proper packing and good frozen condition of the fish, the same condition for terminating by notice the period of transit, and liability as insurer; the same failure to recharge; the same negligent breach of contract; and the same loss of destruction of the fish attributed to the same cause. These allegations of fact are all framed with an eye to keep them within the language of the judgment, and, in fact, they are nothing but a summary—in language different from mine—but still a summary of the findings and conclusions embraced in that judgment. Paragraph 7 pleads that the matters and facts alleged in the first 6 paragraphs were all adjudicated in the said earlier action, it distinctly pleads *res judicata*, which, by its reply to the statement of defence, it supplements by setting forth in full the particulars of the said judgment. By para. 8 the plaintiff introduces an alternative cause of action based upon the defendant's liability as warehouseman. Paragraph 9 gives details of the quantity and value of the said fish, and their containers, while paragraph 10 asks for damages $3,762.57, the ''value of said fish and boxes.''

The statement of defence ignores completely the plaintiff's allegations of *res judicata*. It devotes much attention to the alleged facts set out in said paras. 2 to 6, not by either denying that they were decided in the earlier action, or if decided not directly decided, or not necessarily decided. No, it passes this phase over in silence, and directs its attack at the existence of the facts themselves, and to this purpose it levels a veritable broadside of denial—general, specific and contingent. By failing to deny the allegations of para. 7 the defendant must be taken to admit them, and by reference paras. 2 to 6 also. Having silently admitted plaintiff's statement that the allegations in said paras. 2 to 6 are *res judicata*, what effect can it hope to secure by its boundless denials of those facts? This self-contradiction, however, I will not further consider, as I prefer to rest the case on grounds of substantive merit, rather than on nice technical effect of pleadings.

On the arguments before me, defendant's counsel took the

position; (1) That none of the issues raised in this action are *res judicata;* and (2) That if any of them are, then all are. In support of his first point he urged that in the former action the issues that were brought up by the plaintiff and decided in his favour were for the purpose of defeating the defendant in its attack on plaintiff, in other words, that they were used by plaintiff as a shield, that, in this case, the same issues cannot be brought in by the plaintiff for the purpose of establishing his claim in his attack on defendant, in other words, they cannot be used as a sword. On the best consideration I can give this argument, I cannot see its force. There is no magic in the terms "shield" and "sword." If there is merit in this argument, it must stand scrutiny. Measured by the principles of *res judicata* above laid down, the plaintiff in this action must rely on many facts and matters that are common to this action and the former. It is true that in defeating defendant in the former action, plaintiff had to raise certain issues that are raised here, had to adduce evidence in support of them, and finally got a decision in his favour on them. But what of that? Facts are facts. If he has established them, they are established. For what purpose they were originally established seems to me of no importance whatever when we come to consider the question of whether or not they are established. I dismiss this argument as ineffective.

The second position taken by the defendant is—all or none, if any of the issues raised here are *res judicata* then all are, including the plaintiff's claim for the value of the fish. In other words he argues that the entire cause of action is *res judicata.* It is to be remarked here that in the earlier action the plaintiff in reply to the counterclaim, claimed damages of:—"$4,000, being the value of the said fish and other incidental losses in connection therewith."

This plea, however, was never put in issue, at least it was not decided, and its decision would have been extraneous to the big issue before the Court. The plaintiff's claim for the value of the fish is, therefore, not *res judicata.*

In this argument, defendant's counsel assumes that plaintiff may not bring more than one action in respect of one cause of action, or that he may not make use of the same cause of action to defend one suit and establish another. This assumption is not sound. A litigant is not bound to try all his rights in one action unless, at least, he can establish all his rights by the self-same evidence. The test is, will the same evidence completely support both actions? It is not enough that the larger part of the evidence is common to both actions—it is necessary to show that each action will rest on the evidence offered in the other.

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The principle is well illustrated in the frequently cited case of *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141, 53 L.J. (Q.B.) 476, 32 W.R. 944, where the defendant had by the same act of negligence both damaged the plaintiff's cab and also caused personal injuries to him. Having sued for and recovered damages in respect of the cab, the plaintiff sued again for the personal injuries. The majority of the Court of Appeal, applying the above test, held that the second action was not barred, and while fully recognizing the rule that where there is but one cause of action damages must be assessed once for all, they considered that since two distinct rights of the plaintiff had been infringed he had a separate cause of action in respect of each of these rights; and that although the cause of action was the same, yet to constitute the former recovery a bar to the later action "the circumstances must be such that the plaintiff might have recovered in the former suit that which he seeks to recover in the second;" and that "Where the test is whether the same sort of evidence proves the plaintiff's claim in the two actions, two actions may be brought in respect of the same facts where those facts give rise to distinct cause of action."

On the authority of this case, this second position of the defendant must clearly appear untenable.

In answer to the matters submitted to me for determination, I, therefore, declare that the matters of fact and matters of law brought into issue in this action by para. 2 to 6, both inclusive, of the plaintiff's statement of claim, were all adjudicated in the former action between these parties and are therefore *res judicata*—binding upon:—"the parties hereto, so as to dispense with proof or adjudication thereof in this present action, and so as to estop the parties from denying or controverting the said matters in this action by evidence or otherwise."

Consequently para. 8 of the statement of claim, in attempting to set up an issue which has been otherwise determined, is inconsistent with this determination and ought to be eliminated. Paragraphs 9 and 10 of the statement of claim allege and claim matters which were not adjudicated in the former action, and are open to litigation in this. It follows that all those portions of the defendant's statement of defence which are denials of the matters herein declared to have been adjudicated in the former action ought to be stricken from the records.

The costs of this application will go to the plaintiff in any event.

Judgment accordingly.

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Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 29, 1922.

INSURANCE (§ VIII—436)—EMPLOYERS LIABILITY—CONDITION—ACCIDENT—ASSIGNMENT OF EMPLOYER—CONDITION UNFULFILLED—GARNISHMENT—CONDITIONAL LIABILITY—SEIZURE UNDER GARNISHMENT—SEIZURE BINDING UNTIL CONDITION FULFILLED.

By a clause in an indemnity insurance policy, no action was to lie against the company to recover for loss under the policy, unless brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of judgment After an accident giving rise to an action the insured company made an assignment, and the liquidator obtained from the Court authority to retain a certain sum to cover the claim if an action was maintained and a judgment was subsequently obtained. The insurance company claimed that it was under no liability because the amount of the judgment had not actully been paid. The Court held that the insurance company owed a conditional debt and that a seizure under garnishment proceedings should be held to be binding until the condition rendering its obligation payable was fulfilled.

APPEAL by the widow of an employee accidentally killed under circumstances which entitled her to recover damages from his employers, from the judgment of the Quebec Court of Appeal, dismissing a seizure by garnishment, against an employer's indemnity insurance company. Reversed.

Dessaulles, K.C., and *Morris*, K.C., for appellant.

Lafleur, K.C., and *De Witt*, K.C., for respondent.

DAVIES, C.J.:—For the reasons stated by my brother Mignault, in which I concur, I would allow this appeal.

IDINGTON, J.:—The appellant is the widow of a man who, when working for the Asbestos and Asbestic Co., Ltd., on February 3, 1915, was accidentally killed under such circumstances as entitled her to recover on behalf of herself and children from his said employers (hereafter referred to as the "company") damages arising therefrom.

At that time, the said company held an insurance policy issued to it in the next previous December 29, by respondent assurance corporation (hereinafter referred to as the "corporation") to indemnify the said company against such risk to the extent of $2,000 out of a total of $10,000 provided for in the policy. The corporation was, immediately after the said accident, notified by the company of the same and the death of appellant's husband resulting therefrom.

Nothing having been done by either the company or the corporation, the appellant brought, on January 21, 1916, an action against the company to recover damages arising from the said accident.

On July 16, 1916, the company was put into liquidation under

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the Winding-Up Act of Canada. In November, 1916, the liquidator was granted by the Court at Sherbrooke authority to pay a dividend of 10%. On January 31, 1917, the liquidator also obtained from the Court authority to retain a sum of $2,000 to cover the appellant's claim in the event of the said action being maintained.

By an order of the Court on January 23, 1917, the corporation, which had elected to defend appellant's action, was permitted to plead thereto in the name of the company and, accordingly, on April 28, 1917, filed a defence.

The action came for trial on June 26, 1917, and resulted in judgment for the appellant of $5,000 with interest and costs against the company.

On or about January 9, 1918, the respondent corporation paid the appellant's costs of the action, but, notwithstanding the foregoing history and the attendant circumstances, refused to meet its obligations under the policy to pay $2,000 indemnity thus established as clearly its duty, so far as I can see, falling back on the condition that the company, before being entitled thereto, must first hand over to appellant the $2,000.

This I will presently revert to and deal with the legal aspects thereof in light of other conditions in the policy.

The appellant thereupon applied to the Court for authority to issue a writ of execution by means of attaching the money in the hands of the respondent corporation as garnishee and, on September 14, 1917, was granted same but the said corporation made its declaration to the effect that it owed nothing to the company. Thereupon, an order was made, after notice to the liquidator requiring him to contest same and his failing to do so, in the following terms:—

"Doth, therefore, grant the said motion to the extent following namely, the said plaintiff is hereby authorised to take in the place and stead of the defendant and liquidator the necessary suits and proceedings to recover from the said Employers' Liability Assurance Co., Limited, the amount of the judgment rendered in favour of the plaintiff against the company defendant and liquidator bearing date June 29, 1917; and, further, the said plaintiff is authorised on her own behalf and for and on behalf of her minor children, to contest the said declaration of the said garnishee, the whole with costs to follow the final result of such litigation."

Hence, the proceedings which ensued whereunder Weir, J., found entirely in the appellant's favour, notwithstanding that the respondent corporation set up the condition F. endorsed on the policy, reading as follows:—

"Condition F.: No action shall lie against the corporation to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after final judgment against the assured has been so paid and satisfied. The corporation does not prejudice by this condition any defences against such action it may be entitled to make under this policy."

The sole part of the said condition upon which said corporation now relies, or can rely, is that the defendant company had not paid the judgment by reason of the manifest impossibility of its doing so after going into insolvency and liquidation, though everything else for which the condition provided was duly fulfilled and the interest of the corporation fully protected as it stipulated for.

The Court of Appeal, however, reversed Weir, J.'s judgment on this ground alone.

Neither Court seems to have had its attention drawn to Condition "I," which reads as follows:—

"Condition I: If the business of the assured is placed in the hands of a receiver, assignee or trustee, whether by the voluntary act of the assured or otherwise, this policy shall immediately terminate, but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring. If the assured is a corporation, a change of title, or if a firm or individual, a change of title or of ownership, shall in like manner terminate this policy, unless such change is consented to by the corporation, by an endorsement thereon, signed by the manager."

I think this must be read along with Condition F., and so read I fail to find how effect can be given to the words in Condition I. just quoted, "but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring," unless the ceremony of the actual payment by the company itself of that established to be due is thereby impliedly to be held as dispensed with. They expressly reserve the liability. How can that liability be pretended to be preserved, if effect is to be given to the present contention, that the mere non-payment by the defunct company of the money is, under such impossible circumstances, to be held as a barrier in the way?

I can hardly imagine that the corporation deliberately contrived a trick by holding out a continued liability as being assured when in fact the term relied on had become simply impossible.

The non-payment might properly be relied upon as a protection

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against a dishonest scheme on the part of the insured, but when the personality of the insured had passed away, I cannot think it either honest or the true meaning of the policy read as a whole.

I agree that all else designed in Condition F. may well be needed for the protection of the corporation and must be observed, but this latter part as to the actual payment of the amount by the company, I think, has been eliminated or must be so if the stipulation in Condition I. for liability is to be given effect to.

I would allow the appeal with costs throughout against the corporation and give judgment for the $2,000 with interest thereon from the date of the judgment given the appellant.

DUFF, J.:—The responsibility of the respondent under the policy is conditional in the sense at all events that no action lies against them until loss has been actually sustained and paid in money. It may of course be argued that the loss insured against, that is to say, the loss in respect of which the respondents agreed to indemnify the Asbestos Company was a loss arising by reason of payment in money to the assured in satisfaction of a judgment; that payment in other words is not strictly a mere condition of the obligation, but part of the substratum of fact out of which the obligation arises. It does not, however, seem to me to be seriously open to doubt that the obligation constitutes a conditional indebtedness within the contemplation of art. 675 and that the insurance moneys were "due under conditions . . . not yet fulfilled" when the seizure was made.

That being so, it would follow that the appellant must succeed unless it should appear that the condition is one which could not be realised. I do not think this can be affirmed. A payment in part satisfaction would clearly, I think, give rise to a right of indemnity and that is a contingency which can not be put aside as beyond the bounds of practical possibility.

ANGLIN, J.:—I concur with MIGNAULT, J.

BRODEUR, J.:—I have reached the conclusion that the contestation of the declaration of the garnishee was well founded and should be maintained.

The plaintiff appellant had a judgment against the Asbestos and Asbestic Co. for damages resulting from an accident which had caused the death of her husband whilst in the company's employ.

The Asbestos and Asbestic Co. had, at the time the accident happened, a contract of insurance or indemnity with the company respondent, the Employers' Liability Assurance Co., whereby the latter undertook to indemnify it "against loss from the liability

imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any employee or employees of the assured."

This contract of insurance contained many conditions; for instance, the indemnity must not exceed $2,000 in case of death of the workman (clause A). If an accident happened, the insured must immediately notify the insurer (clause C); and the insured was not permitted to assume any responsibility towards the victim of the accident or to settle his claim without the formal consent of the insurer (clause E); if legal action should be taken against the insured in respect of such accident, it must hand over its case to the insurer in order that the latter might itself conduct the defence (clause D); the insured could not sue the insurer in respect of damages sustained by it unless it had first paid the victim (clause F); in the event of the insured becoming insolvent, the policy "shall immediately terminate, but such termination shall not affect the liability of the corporation as to any accidents theretofore occurring" (clause J).

These are some of the conditions which all tend to restrict the obligation of the insurance company and curtail the rights of the insured.

It is quite possible that insurance contracts in general may lend themselves to fraud; but in a contract like the present one can hardly presume that a workman would deliberately expose himself to mutilation in order to give his employer an opportunity to make a fraudulent claim against its insurer, especially when the victim lost his life, as he did in the present case.

The Asbestos and Asbestic Co., being sued by the plaintiff appellant, entrusted the defence to the insurance company which pleaded as it thought fit in the name of the Asbestos and Asbestic Co.; but the defence was thrown out and judgment was rendered in favour of the plaintiff against the Asbestos and Asbestic Co. for $5,000.

A writ of seizure by garnishment after judgment was issued in the hands of the insurance company in execution of the judgment and the latter appeared and declared on the oath of one of its principal employees that it owed nothing and *would not in future owe anything to the defendant.*

This declaration was made under art. 685 C.C.P., which reads as follows:—

"685—The garnishee must declare in what he was indebted at the time of the service of the writ upon him, in what he has become indebted since that time, the cause of the indebtedness, and any other seizures made in his hands. If the debt is not

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yet payable, he must declare when it will be. If his indebtedness is conditional or suspended by any hindrance, he must also declare it. He must furnish a detailed statement of the moveable property in his possession belonging to the debtor, and declare by what title he holds it."

That declaration was absolutely false and deceitful, for the insurance company was indebted to the Asbestos and Asbestic Co. under the contract of insurance which it had with the latter up to a sum of $2,000. This debt was perhaps not exigible because the defendant had not itself paid the amount of the judgment as required by clause F. But in any event the insurance company, which was quite familiar with the whole case since it had itself defended the principal action, should have declared that there was a conditional liability. Did it hope by this lying declaration to avoid its obligations towards a poor foreigner such as the plaintiff was, through her inability to assume the burden of another action? Happily the consular authorities of the plaintiff's country of origin came to her assistance, attorneys were found who were sufficiently conscientious, and she contested the garnishee's declaration.

If the garnishee had made a true statement of the facts, judgment could have been rendered in due course declaring the seizure being binding until the happening of the condition of the policy requiring previous payment by the insured (art. 690 C.C.P.). The plaintiff's attorney cross-examined the officer of the company who made the declaration, as he was entitled to do (art. 686 C.C.P.), and by this means the plaintiff obtained sufficient information to establish the existence of a conditional obligation binding the garnishee towards the judgment debtor.

It seems to me that after that the garnishee should have asked at once to be allowed to amend its declaration so as to make it conform to the facts and allegations which it advanced later when the declaration was contested. But no, it did not see fit to do this, so the plaintiff was obliged to contest the declaration in accordance with a ruling of the Court of Review:

"That the answers of a garnishee to the questions asked him by the seizing creditor, which are written at the end of his declaration, do not form part of the declaration, and that a judgment cannot be rendered on these answers *de plano*: the seizing creditor must contest the declaration." *Laframboise* v. *Rolland* (1885), M.L.R., 2 S.C. 75.

In her contestation the plaintiff asked that the declaration of the garnishee be declared false and deceitful and that the latter be condemned to pay her the sum of $2,000 which it owed to the Asbestos and Asbestic Co. under the insurance contract;

and she obtained authorisation at the same time from the Judge to exercise not only her own rights as plaintiff but also the rights of the Asbestos and Asbestic Co.

I must say that whilst the original action was pending the company defendant was put into liquidation. We do not know just why this step was taken, but it is to be presumed that it was on account of insolvency. However, no direct proof has been made of this fact.

The Superior Court maintained the contestation of the garnishee's declaration. Its judgment was reversed in appeal, when it was held that the garnishee owed a conditional debt. Nevertheless the dispositif of the judgment is to the effect that the contestation of the garnishee's declaration is dismissed and that the seizure is dismissed with costs, but without costs in the Superior Court.

The judgment does not seem logical to me. For the moment the Court recognised that there was a conditional debt owing it should have maintained the contestation of the declaration and declared the seizure binding. In fact art. 690 of the Code of Civil Procedure states specifically that if the moneys owing by the garnishee are only due subject to conditions which have not yet been fulfilled, the Court may order that the seizure be declared binding until the happening of the condition.

There were two points at issue in this contestation of the declaration, both in the Superior Court and in the Court of Appeal, namely, if the debt was exigible at once or if it only became due when the defendant itself should have satisfied the judgment that had been rendered against it in favour of the plaintiff.

The Superior Court held that the debt was due and exigible.

The Court of Appeal, on the contrary, was of opinion that the debt did not become exigible until the defendant had paid the plaintiff.

Though I accept this opinion of the Court of Appeal, I nevertheless maintain that the dispositif of its judgment is erroneous, in that instead of dismissing the seizure it should have declared it binding, and maintained the contestation of the garnishee's declaration.

I have come to the conclusion that the plaintiff was justified in contesting the declaration of the garnishee and that her contestation should be maintained and that the seizure should be declared binding until such time as the Superior Court declares that the condition stipulated in para. F. of the insurance policy has been fulfilled.

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The appeal should be maintained with costs of this Court and of the lower Courts against the respondent, except that in the Court of King's Bench each party shall pay its own costs.

MIGNAULT, J.:—The appellant obtained, on June 29, 1917, a judgment for $5,000 for damages against the Asbestos and Asbestic Company, Limited, as civilly responsible for the death of her husband while in its employment. During the proceedings, and before the filing of a plea, the company was placed in liquidation and William J. Henderson was appointed its liquidator. The respondent, thereunto obliged by an indemnity policy issued by it in favour of the company, contested the appellant's action in the name of the company, and several months after the judgment paid the appellant's costs of action. The present proceedings are to force the respondent to pay to the appellant the amount for which the respondent by its policy promised to indemnify the Asbestos and Asbestic Co., which, in the case of any one employee of the latter, was restricted to $2,000.

The appellant proceeded against the respondent by way of seizure in garnishment and the latter declared that it had not and was not aware that it would have hereafter in its hands, possession or custody, or in any manner whatsoever, any money, moveable effects or other things due or belonging to the Asbestos and Asbestic Co., the defendant.

This declaration was contested by the appellant and her contestation was maintained by the Superior Court, Weir, J. The Court of King's Bench, Guerin, J., dissenting, reversed the judgment of the Superior Court, and dismissed the contestation without costs in the Superior Court, stating, however, that the respondent had not disclosed in its declaration that it was subject to a conditional obligation towards the Asbestos and Asbestic Co. under its policy.

The reasons for which the appellant's contestation of the respondent's declaration was dismissed may be briefly explained.

By the conditions of the policy, the insured company, on the taking against it of an action for an accident to one of its employees, was obliged forthwith to hand over the papers served on it to the respondent, and was prohibited from making any settlement or payment to the injured employee or his representatives, and the respondent obliged itself to defend the action at its own cost. Condition "F" of the policy on which the respondent now relies reads as follows. (See judgment of Idington, J., p. 611).

The respondent successfully contended in the Court below that no liability exists on its part until the insured company has actually paid in money the amount which it has been condemned

to pay by a judgment, and the insured not having paid the appellant's judgment, the respondent now argues that it truly declared that it owed and would owe nothing to the company. In my opinion, the respondent's liability existed but was a contingent or conditional liability, and under art. 685 C.C.P. the respondent should have declared that it was conditionally indebted. Had it done so, under art. 690 C.C.P. the Court, on motion of the plaintiff, could have declared the seizure binding pending the fulfilment of the condition.

It follows that the respondent's declaration was not the one it should have made. This forced the appellant to contest it. In my opinion, however, the appellant cannot say that the respondent's obligation is payable or demand that the respondent be condemned to pay. So long as the Asbestos Company has not itself paid under the appellant's judgment, no demand of payment can be made against the respondent. But that does not mean that the appellant's seizure in garnishment should be dismissed as the Court of King's Bench dismissed it. Under art. 690 C.C.P. the appellant, on the contrary, is entitled to have the seizure remain binding until the condition is fulfilled, if it ever be fulfilled.

There seems to be some possibility that it may be fulfilled. In the record there is a judgment of Hutchinson, J., of February 7, 1917, authorising the liquidator, on his petition, to retain the sum of $2,000 to provide for the payment of the claim and costs of this appellant. Should the liquidator pay this money in part satisfaction of the appellant's judgment, the respondent will thereupon become liable to the Asbestos and Asbestic Co. under condition "F" of its policy. This right of the Asbestos Company against the respondent is now being exercised by the appellant by virtue of her seizure in garnishment, so that, if the payment be made by the liquidator she will be entitled to demand that the respondent make a new declaration under the seizure.

The parties were unable to inform us whether the liquidator still retains the sum of $2,000. Under the circumstances, and in view of the fact that the respondent did not make the declaration it should have made, I would give the appellant judgment declaring the seizure binding on the respondent until the condition rendering its obligation payable has been fulfilled. The appeal should, therefore, be allowed and the record remitted to the Superior Court for such further proceedings as may be necessary. Costs to the appellant in this Court and in the Superior Court, and no costs to either party in the Court of King's Bench. *Appeal allowed.*

Alta.

App. Div.

HAYDEN v. RUDD.

Alberta Supreme Court, Appellate Division, Stuart, Beck, and Hyndman, JJ.A. March 13, 1922.

CONTRACTS (§ IVF—371)—SALE OF STRAW ON FARM—PURCHASER TO HAVE RUN OF FARM FOR STOCK—CONSTRUCTION—OPTION—TIME OF ESSENCE—FAILURE TO PAY INSTALMENT OF PURCHASE MONEY AT TIME AGREED UPON—SALE OF STRAW TO ANOTHER—DAMAGES—RIGHTS AND LIABILITIES OF PARTIES.

An instrument in writing whereby one person agrees to sell and the other agrees to buy, the straw on a ranch as soon as threshing is completed, and to give the purchaser the run of the ranch for his stock from that date until seeding operations commence in the spring, and fixing a particular date in the fall at which a portion of the price is to be paid and securing the payment of such price by a note, is an option, and it is essential that its terms should be strictly complied with, and failure on the part of the purchaser to pay the purchase instalment agreed upon for more than 10 days after it becomes due, justifies the seller in concluding that he does not intend to carry out the agreement, and in selling the straw to another purchaser. Such contract is not within the Sales of Goods Ordinance, C.O. 1915, ch. 39.

APPEAL by plaintiffs and cross-appeal by defendants from the trial judgment (1921), 60 D.L.R. 483, in an action for damages for breach of contract. Appeal dismissed; cross-appeal allowed.

A. L. Smith, K.C., and *Clarence Smith*, for appellant.

H. D. Mann, for respondent.

STUART, J.A.:—My interpretation of the contract in this case is this, that it was a sale of goods not in a deliverable state at the time of the agreement together with an agreement for a lease of certain lands upon which the goods were intended even when delivered to remain and to be consumed by the purchasers. The defendant Rudd agreed to sell to the plaintiffs the straw remaining after his grain was threshed and to allow the plaintiffs to bring their stock upon his farm and there consume the straw up to a certain date in the following spring. The contract did not oblige the defendant to complete his threshing and thereupon to deliver possession of the land and straw at any particular time. Possession of the land, which obviously included possession of the straw, was to be given only "from as soon as threshing is completed this fall." No doubt the defendant was bound to thresh within a reasonable time and this would depend upon circumstances. It is also to be inferred from the terms of the contract that the property in the goods *i.e.* the straw was not to pass until the plaintiffs took possession because the contract contains an express provision that the straw was to be at the defendant's risk until the animals of the plaintiffs were placed on the land for if the straw was destroyed by hail or fire up to that time the contract was to be null and void.

The situation is, therefore, that we have a contract in which no definite time is fixed for one party, the seller, to do his part and fulfil his agreement viz: the preparation of the goods for delivery and the delivery, while there is a definite time fixed for the buyer to do his part, viz: pay a first instalment of the purchase price.

I am unable to assent to the proposition that the plaintiffs were never bound to buy simply because there was no express covenant to pay inserted in the agreement. They gave a note as "security for the performance of the contract." How could this be if they had made no contract? And, even without this, I think there still would have been an implied contract.

Now the Sales of Goods Ordinance (Ord.) Alta. 1911, ch. 39, says in sec. 12 sub-sec. (1):—"Unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale." If this section is not wholly applicable on account of the fact that the contract was not one purely for the sale of goods but included also an agreement for a lease, then the rule of equity as to the sale of an interest in land covers that part of the agreement and by that rule also a stipulation as to time of payment is not of the essence unless a contrary intention appears from the terms of the contract.

The case first cited in all the text books upon the subject of the time of payment being of the essence of the contract in a sale of goods is *Martindale* v. *Smith* (1841), 1 Q.B. 389, 113 E.R. 1181, 10 L.J. (Q.B.) 155. There the defendant sold the plaintiff some stacks of oats, this was the written contract "April 23rd, 1838. Sold to Mr. John Martindale of Catterlen, six stacks of oats for £85. John Smith gives John Martindale liberty to let the stacks stand if he thinks fit until the middle of August next; and John Martindale to pay John Smith for the stacks in twelve weeks from the date hereof." It was signed by the parties. In the beginning of July, the defendant told the plaintiff that if he, the plaintiff, did not pay on the 16th of that month (which would be the date fixed for payment *i.e.* 12 weeks from April 23) defendant would consider the contract at an end. The plaintiff did not pay on that day but afterwards requested time which the defendant refused to give adding that the plaintiff, as he had failed in payment at the time appointed by the contract, should not have the stacks. Two or three days afterwards the plaintiff tendered the money, which the defendant refused to accept. There was a second tender which was again refused and the defendant resold the stacks. The plaintiff brought trover and succeeded. Lord Denman, C.J., at pp. 395,

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396, in giving judgment on appeal said "In a sale of chattels time is not of the essence of the contract unless it is made so by express agreement than which nothing can be more easy by introducing conditional words into the bargain . . . Pothier in his *Traitè du Contrat de Vente* . . . cites the civil code for the proposition that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract; he can only exact by legal procedure the payment of the price due to him. *Non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur.*"

Now it is true that there the point mainly was whether the property had passed to the purchaser. It was because it was held to have passed that the plaintiff succeeded in trover. But the clear inference is that even if it had not passed the plaintiff could have succeeded in an action for a breach of the contract of sale. And it is to be observed that the defendant had given the plaintiff considerable warning beforehand that he must pay on the day fixed which the defendant in this case never suggested.

That case was thus referred in *Page* v. *Cowasjee Eduljee* (1866), L.R. 1 P.C. 127 at 145. "*Martindale* v. *Smith*, and other cases have determined that where there is an agreement to purchase property to be paid for at a future time and the money is not paid at the day the property remaining in the possession of the vendor he has no right to sell it and if he does the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action as where goods sold are left in the possession of the vendor and the purchaser will not remove them and pay the price after receiving express notice from the vendor that if he fail to do so the goods will be re-sold."

In *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1884), 9 App. Cas. 434, 53 L.J. (Q.B.) 497, 32 W.R. 989, where the question was whether failure to pay for one instalment of goods furnished a good ground for refusing to deliver a second instalment and where the House of Lords held that under the contract in question and the circumstances of the case, the failure furnished no such good ground Lord Blackburn said p. 444:—

"There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference) but it did not go to the root or essence of the contract nor do I think there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract or even a breach which involved in it the non-payment of money which there was

an obligation to pay must be considered to go to the root of the contract and he produced no such authority. There are many cases in which the breach may do so; it depends on the construction of the contract."

In *Bishop* v. *Shillito*, 106 E.R. 387 (n), another case cited in the books upon the point of time for payment being of the essence of the contract in a sale of goods the jury found as a fact that the delivery of the goods and the payment (which was to be by re-delivery of certain outstanding bills of the vendor) were to be contemporary and the jury found that to be the fact. So that the case is not of very much assistance. Another case commonly cited is *Ryan* v. *Ridley & Co.* (1902), 8 Com. Cas. 105, but there the decision was that where by a contract for the sale of perishable articles it is provided that payment is to be made "by cash . . . . in exchange for" shipping documents the buyer is under an obligation to pay within a reasonable time after the shipping documents are tendered to him.

I do not know, however, that the principles laid down in these cases or their general applicability to the case before us will be by anyone disputed. After all we are probably brought back to the simple words of the Sales of Goods Ordinance above quoted. Whether the time fixed for payment is of the essence depends upon the terms of the contract. But I feel free to say this that after some careful search I have found no case in which the time for payment has been considered as of the essence where the time fixed was not also the time for delivery of the goods or the documents of title therefor. Indeed I have already referred to every case cited in the annotated editions of the Sales of Goods Act such as Chalmers, and others and it is significant I think that no case parallel to the present one seems to have come up unless it be *Martindale* v. *Smith*, *supra*.

Coming then to the terms of the contract itself I am unable to gather therefrom that the parties ever intended to agree that the time for payment was to be of the essence of the contract so as to make payment on November 1., a condition precedent to the defendant's obligation to deliver.

As I understand the section of the Sale of Goods Ordinance, it does not mean that the Court is entitled to enquire into the general circumstances of the case and to decide that, in such circumstances, the time for payment ought to be of the essence, or that it would be a natural thing for the parties so to agree. Rather it means that you must look at the terms of the contract and discover therefrom what the parties had agreed upon, that is, whether they did really by their contract, not indeed expressly, but at least impliedly, agree that time should be essential.

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In some of the cases, indeed, prior to the passing of the Sale of Goods Act it is stated that while in other mercantile contracts time for payment is of the essence yet in contracts for the Sale of Goods it is not so unless it is expressly so agreed. The section does not use the word "expressly" so that it is no doubt open to the Court to find from the contract that the parties had impliedly so agreed.

But, I am unable to discover even such an implied agreement, and as stated by Brett, M.R., in *Sanders* v. *Maclean* (1883), 11 Q.B.D. 327 at p. 336, 52 L.J. (Q.B.) 481, 31 W.R. 698, I think "the Court has no right to import anything into a contract which it would not be clear to every reasonable man must have been present to the minds of both contracting parties and agreed to by both." In certain contracts, no doubt, the Court has made it practically a rule of law that time is of the essence viz: mercantile contracts other than sales of goods but that is obviously because the parties being merchants are held to have done business together upon a general understanding among mercantile men that payment is to be made strictly on time.

It seems to me to be quite clear that in fixing November 1, as the date of payment of the first instalment the parties merely had in mind that that would be about the date when the defendant would be ready to deliver the straw and possession of the land. No doubt it may be said in answer that if they had intended that payment of the first part of the price should only be made in exchange for delivery they could easily have said so. That is true but as pointed out in *Martindale* v. *Smith*, they could also easily have said so if they had intended the payment of the first instalment to be a condition precedent.

Moreover, we must remember that under the terms of the contract it was quite possible, if the defendant had happened to get his threshing completed, say on October 15, that the plaintiffs would have been clearly entitled under the contract to go into possession of the straw and the land on that date, that is, two weeks before November 1. How then could it be said that payment strictly on November 1 was a condition precedent to the defendant's obligation under the contract. True, he was possibly not bound to have his threshing completed by that time *viz*: October 15, although I am not at all sure, if he had had his crop in stook by September 15, and it was quite possible for him to have threshed at once, whether October 15, might not have been in some circumstances held to be the limit of reasonable time for completion of threshing.

The defendant said that he always had his threshing done by November 1, as a rule. That circumstance, is, in my opinion,

the real reason for the insertion of that date as the date for payment of the first instalment and not any implied understanding as to payment being a condition precedent.

Furthermore, I think the circumstance that the whole purchase price was not to be paid on November 1, also throws some light on the question. The defendant did agree to give some credit so that the November payment was only to be a partial one.

With respect to the promissory note also that seems to me to furnish a ground rather for an inference against any implied agreement as to time being of the essence. The defendant took a negotiable security practically for part of the first instalment. That, in my view of the matter, points strongly to the inference that the parties intended that the defendant was to be unconditionally bound to sell and that he was relying only on the plaintiff's covenant or at any rate implied agreement to pay for there is no covenant by the plaintiffs and also, as of course he could, upon his right of lien as unpaid vendor.

The defendant said in his evidence that the letter of October 14, led him to think that the plaintiffs never intended to complete their contract. On the contrary, it was a very plain indication that they intended to do so . And on the other hand, the defendant's reply to the plaintiff's enquiry as to whether the east field was now ready (i.e. on October 14) to the effect that that field "will be ready the 1st of November for sure," without any reference or assurance as to when the whole would be ready, was clearly calculated, in my opinion, to lead the plaintiffs to infer that the whole would not be ready by November 1. Of course, it may be that the defendant was not bound to have the whole ready by that date unless any later date would have been in the circumstances unreasonably late. But this contract seems to me to be one in which there was implied a clear obligation on the defendant to tell the plaintiffs at once, as soon as everything was ready, that they could now have possession. The inference to be drawn from the defendant's evidence is, that he was ready to deliver by November 1, if he had fulfilled his obligation to communicate at once he would no doubt have got an answer. From his point of view he was entitled to demand that they take possession because by that means only under the contract could the risk of fire be shifted to the plaintiffs.

In my opinion, this was not a contract which entitled the plaintiff without notice or communication of the kind I refer to or of any kind whatever, without demand of the payment of the price and without any refusal, as distinct from mere omission, to pay that price, to proceed forthwith and resell the

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goods and by his own act and volition and entirely *ex parte* to cancel the contract.

I cannot see any force in the suggestion that owing to the nature of the goods and of the market the parties must have understood that time for payment was of the essence. I rather fear that what is really meant is merely that time ought to be pretty much of the essence of the contract. But such an idea is contrary to sec. 12 of the Ordinance which leaves that matter to be determined by the terms of the contract. Otherwise, it would be made to depend not on the terms of the contract but on the nature of the goods and their situation and the state of the market which is exactly what the Ordinance does not say. And in any case the defendant could have protected himself by notice and communication such as was suggested in *Page* v. *Cowasjee Eduljee* in the passage quoted.

I think, therefore, the cross appeal against the finding of liability in the defendant should be dismissed with costs.

In view, however, of the opinion of the other members of the Court, it seems to be unnecessary for me to consider the plaintiffs' appeal with respect to the amount of damages as my decision would be ineffective.

BECK, J.A.:—This case was tried by Scott, C.J. He gave judgment for the plaintiff fixing the damages at $10. The plaintiffs appeal claiming that the damages ought to be increased to several thousand dollars. By way of cross-appeal, the defendant claims that the action ought to be dismissed, and I have come to the conclusion that the defendant is entitled to judgment to that effect.

The plaintiffs—six in number—base their claim upon an instrument in writing dated August 5, 1919, expressed to be made between the defendant of the first part and the plaintiff of the second. The instrument was in the words following:—

"Whereas the party of the first part is the owner of a ranch situate at Rockyford in the said Province of Alberta, and has agreed with the party of the second part to sell to them the said party of the second part the straw from 3,400 acres of wheat and from 200 acres of flax, part of his said ranch, and to give them the said party of the second part the run of all his said ranch for their stock (excepting the horse pastures) from as soon as threshing is completed this fall until April 1, 1920, or until the said stock will interfere with the seeding operations of the party of the first part in the spring of 1920.

Now this agreement witnesseth that in consideration of the premises, and in consideration of the sum of $1 of lawful money of Canada, now paid by the party of the second part to the party

of the first part (the receipt whereof is hereby by him acknowledged) he, the said party of the first part, hereby agrees to sell to the said party of the second part the straw from 3,400 acres of wheat and from 200 acres of flax on the ranch of the said party of the first part at Rockyford aforesaid, and to give them the said party of the second part the run of all his said ranch for their stock, except the horse pastures, from as soon as threshing is completed this fall until April 1, 1920, or until the said stock will interfere with the seeding operations of the party of the first part in the spring of 1920 at or for the price of five thousand five hundred dollars ($5,500) of lawful money of Canada, payable as follows:—

$2,750 on November 1, 1919, included in which is a note for $1,000 given by the party of the second part to the party of the first part on the sealing and executing of this agreement, on payment of which the said note is to be returned to the party of the second part, and the balance of $2,750 to be paid by accepted note at 90 days from November 1, 1919, with interest at 8% on the said accepted note. The above mentioned note for $1,000 is given as security for the due performance of the contract or agreement on the part of the said party of the second part, and it is agreed between the said party of the first part and the said party of the second part that should damage by hail or loss by fire happen to the said 3,400 acres of wheat and the said 200 acres of flax before the stock mentioned herein is placed on the land, then the said note will be null and void (as also will be this agreement), and shall be returned to the said party of the second part.

The party of the first part guarantees that there will be sufficient water on the said ranch for the stock of the said part of the second part.

This agreement shall extend to, and be binding upon the heirs, executors, administrators and assigns of the parties hereto."

The instrument was signed by all the parties under seal.

It was signed by the defendant and two of the plaintiffs at the time it was drawn up and some time afterwards was signed by the other four plaintiffs. A note for $1,000 was signed by those two plaintiffs at the time they signed the instrument and was then left with the defendant and was never signed by the remaining four plaintiffs.

On October 14, 1919, the plaintiff Hayden wrote to the defendant making two requests and saying in the course of his letter:

"We may not come north until it freezes up, on account of so much green feed grown here this fall."

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The defendant replied on October 18, saying:—

"Your letter of the 14th inst., to hand. I will build the lane down to the spring in the horse pasture as soon as I finish threshing.

The field past of the house will be ready, by the 1st., of November for sure."

On November 8 the defendant, having had no further communication from the plaintiffs or any of them, disposed of a portion of the pasturage to one Thompson.

On November 10, one of the plaintiffs telegraphed to the defendant:

"Have you threshed yet. Would the feed hold fat stuff (?) stock for any length of time."

The defendant replied by telegram the 11th November:

"Have sold feed to another party you and your associates did not live up to your agreement so I resold thinking you did not want the feed as you had paid no money by November first. I notified L. C. Hayden to this effect."

On November 10 the defendant's solicitors had written to the plaintiffs the following letter, enclosing the $1,000 note:

"We are instructed by William T. Rudd, of Rockyford, Alberta, rancher, to say to you that by reason of your default in payment and failure to otherwise carry out the terms of your contract with him dated the 5th day of August, 1919, that the contract is declared null and void and without effect. We therefore, on Rudd's behalf, enclose you the note dated at Rockyford the 5th day of August, 1919, and payable on November 1st, 1919, in favour of William T. Rudd at the Canadian Bank of Commerce, Rockyford, for $1,000."

With regard to returning the $1,000 note the defendant asked why he returned the note said:—

"Well, I thought before they came to me that they were chaps that could not raise the money and I did not want to be particularly hard on them. . . . If I had known they were taking the stand they were I would have tried to make them pay it."

It would appear likely that the defendant had given instructions for this letter and that the letter had actually been written before the defendant received the telegram of the same date, as the telegram was addressed to the defendant at Rockyford and bears the figures 1945, which I take to mean 19.45 o'clock, and the telegram in reply is dated the following day and the letter was written from Calgary.

The instrument was drawn by a solicitor employed and paid by the plaintiffs.

It is to be noted that the instrument, while it contains an ex-

press agreement by the defendant to sell, contains no express agreement by the plaintiffs to buy.

The $1,000 note, provided by the instrument to be given by the plaintiffs on the execution of the instrument, is therein stated to be "given as security for the due performance of the contract or agreement on the part of the plaintiffs." This provision, it seems clear, means that the note was to be security that the plaintiffs would, by November 1, 1919, pay $2,750 in cash and give an "accepted note" at 90 days from that date with interest at 8% per annum; for there was nothing else which, by the terms of the instrument, it was contemplated that they should do except actually pay the $2,750 note. The $1,000 note, a note which was not an "accepted note," could serve as "collateral security" no other purpose.

It seems to be admitted that by an "accepted note" was meant a note which would be accepted by a bank as good.

This view leads, it seems to me, to the conclusion that the instrument was an option; and being an option it was essential that its terms should be strictly complied with, that is, that the plaintiffs should by November 1, pay in cash $2,750 and give an "accepted note" for $2,750 with interest. See Hals. vol. VII, tit. Contracts, p. 414. *Lowes* v. *Herron* (1911), 3 Alta. L.R. 438, and authorities there cited.

If, on the other hand, the instrument is to be taken as a bilateral agreement then, too, I think the plaintiffs lost their rights under it because, owing to the nature of the subject matter of the agreement and the conditions relating to supply and demand in respect of it, time must be taken to have been of the essence of the agreement. I think it is a case in which it appears from the nature of the contract and the surrounding circumstances, that it was the intention of the parties that time should be of the essence of the agreement. Hals. vol. VII, tit. Contracts, p. 413. Fry Specific Performance, 5th ed., pp. 529 *et seq.*

From knowledge which is common and general in this farming country, it is evident to me that it must have been a matter of great moment to the defendant to know promptly on the first day fixed by the instrument—November 1—whether the plaintiffs intended to take advantage of it or on the other hand, whether the pasturage would be thrown back upon his hands and he at such an advanced and late date, in the season during which stockmen would naturally be looking for pasturage, would be compelled to find a new customer. There is much evidence scattered through the appeal book confirming what I have put as a matter of common knowledge among the residents of the

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Province. The express finding of the trial Judge confirms this interpretation of the facts.

The trial Judge, in the course of his reasons for judgment, says: "I am satisfied that the defendants' only reason for re-selling a portion of the crop and pasturage included in the agreement was that, the plaintiffs not having paid the $1,000 note at its maturity or given any excuse for its non-payment, he considered that they had abandoned the intention to carry out the agreement, and that he should resell in order to avoid loss as the market was falling. He appears to have been unable to resell the portion not included in the sale to Thompson; and about January 1 following, he allowed one of his men to pasture his stock on 640 acres without charge."

For the reasons indicated, I would dismiss the plaintiffs' appeal with costs, allow the defendant's cross-appeal with costs and dismiss the plaintiffs' action with costs.

HYNDMAN, J.A.:—I have had the advantage of reading the judgments of my brothers Stuart and Beck, and after the best consideration I can give the questions involved I am inclined to agree with the result arrived at by Beck, J.A.

It seems to me that strictly speaking the contract ought not to be considered as one falling within the Sale of Goods Ordinance, the agreement being one not only dealing with the sale of goods, but also granting certain rights and privileges with regard to real property, in that the defendant has granted certain pasturage rights. He also guarantees that there will be sufficient water on the ranch for the plaintiff's stock.

If I am correct in this, that the "Code" as to the sale of goods does not apply, then we are thrown back on the common law rules relating to contracts.

In 13 Corpus Juris, at p. 686, it is said that:—

"At law, the general rule laid down by many, particularly early authorities, is to the effect that a time stipulated in a contract for its performance is of its essence, unless a contrary intent appears from the face of the contract; that is to say if a person promises another to do a certain thing by a certain day in consideration that the latter will do something for him, the thing must be done by the date named or the latter is discharged from his promise. In equity, as a rule, time will not be regarded as the essence of the contract unless it affirmatively appears that the parties regarded time as an essential element of their bargain. But although time is not made of the essence of the contract by express stipulation, it may nevertheless be held to have been so intended from the nature of the contract." And again at p. 688:—

"Where the subject matter of the contract is of speculative or fluctuating value it is generally held that the parties have intended that time shall be of the essence." In a footnote there is cited the case of *Crossfield* v. *Gould* (1883), 9 A.R. (Ont.) 218, Spragge, C.J.O., at p. 234 said: "Then the subject of the contract is to be looked at; and if it be a matter of commercial enterprise the Court will be disposed to regard time as essential. A sale of mines is an instance of this. In *Prendergast* v. *Turton*, 1 Y. & C. Ch. 98, which was a case of contract for the sale of mining property, Knight Bruce, V.C., puts a contract for the sale of such property in terms which aptly describe such property as was the subject of the contract in this case: 'This is a mineral property' (substitute for this a timber limits property), 'a property therefore of mercantile nature exposed to hazards, fluctuations and contingencies of various kinds, requiring a large outlay, and producing a considerable amount of profit in one year and losing it in the next.'" And Burton, J.A., at p. 238 said:—

"This is, I think, a very clear case; and having regard to the peculiar nature of the property and the risks to which it is exposed, the large amount involved and the important consideration, that in commercial enterprises of this nature no doubt should be entertained of the inclination of the Courts to hold time to be of the essence of the contract. . . ."

Now, it seems to me that the nature of the property in the case at Bar ought to be regarded in much the same light as a timber limit or mining property. The contract was made in August at a time when it was impossible to tell with any certainty how the crops would turn out eventually for the season, and upon this knowledge much would necessarily have to depend to determine the value of the subject matter of the bargain. The price in the month of November might be much higher or lower than that stipulated for by the parties. The season to make arrangements for pasturage also is, necessarily, very short and a farmer or rancher must dispose of his pasturage for use during the current season or probably lose the value of it altogether.

The delay of the plaintiffs in coming forward at the appointed time, in my opinion, gave the defendant ample time reason to conclude that they intended to abandon the bargain, and the trial Judge found as a fact that this was the defendant's only reason for reselling as he did to avoid loss as the market was falling.

A careful perusal of the plaintiffs' letter of October 14 (ex. 3), and of defendant's telegram (ex. 4), also convince me that so far as the defendant at any rate, was concerned, he looked upon November 1 as the important date. He is advised in

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the letter that perhaps one of the plaintiffs might be there with some of his stock before November 1, as he was out of feed, and he replies that he will have the lane built for them by the first of the month for sure. The fact that they did not turn up on or before that date, and that he heard nothing from them for about 10 days afterwards, seems to me to amply justify him in thinking that they might never turn up at all, and had abandoned their agreement.

I would, therefore, dismiss the appeal of the plaintiff with costs and dismiss the action with costs and allow the cross appeal of the defendant with costs.

Appeal dismissed; cross-appeal allowed.

BEASANT v. NORTHERN LIFE INS. Co.

Manitoba King's Bench, Prendergast, J. April 27, 1922.

INSURANCE (§ IIIF—147)—COLLATERAL TO MORTGAGE—NOTICE TO BE GIVEN IN CASE OF ENLISTMENT—NO NOTICE ACTUALLY GIVEN—FACT OF ENLISTMENT KNOWN TO OFFICERS OF COMPANY—DEATH OF INSURED IN ACTION—RECOVERY ON POLICY.

A life insurance policy contained the following clause "that the insured may without the consent of the company engage in the active service of the militia of Canada, notice thereof to be given by or on behalf of the insured within ninety days after the date of his so engaging, and will also pay such extra premium during such service as the company shall fix."

The insured enlisted in the Canadian Expeditionary Force, went overseas and was killed in action. No actual notice was given of the enlistment, although it was admitted that the "agency manager for the part of Manitoba where the policy issued knew of the enlistment of the insured"; it was also shown that the matter of the enlistment had been mentioned in two letters to the treasurer of the insurance company, written by the party who held no office in the company, and who had sold certain lots to the insured in connection with the insurance, which was taken as collateral security. The Court held that there was no evidence that the proper notice was given, as required by the policy.

ACTION by the widow of an insured, for an accounting and for the balance due under an insurance policy. Action dismissed.

J. L. M. Thomson, for plaintiff.

H. A. Bergman, K.C., and *G. L. Lennox*, for defendant.

PRENDERGAST, J.:—On January 25, 1912, Arthur William Beasant, then a resident of this city, borrowed from the defendant company $1,000, which he secured by mortgage on certain lands in the Morse Place subdivision, and at the same time took out a $1,000 life insurance policy from the said company subject to payment of annual premiums of $33.25 and payable to themselves (the company) as collateral security for the said mortgage —the balance, if any, to be paid to the insured's wife.

On December 10, 1915, Beasant enlisted in the Canadian Ex-

peditionary force, went overseas, and was killed in action in Belgium on September 29, 1918.

The annual premium of $33.25 had been fully paid all along up to the time of Beasant's death, as admitted by the company.

Beasant's widow, both as executrix and under her own name, now sues for an accounting on the mortgage and insurance, payment to her of the balance found due and proper discharges.

The company's defence is to the effect that under the terms and conditions therein incorporated, the insurance policy has lapsed and become void by virtue of the insured's failure to give them notice of his joining the active service of the militia and to pay an increased premium of $150 fixed by a resolution of the directors, passed August 15, 1915, as the premium to be paid by policy holders who had enlisted as stated, and whose policies had been issued prior to July 31, 1914.

The terms and conditions upon which the defendants rely are: (1) In the body of the contract itself, the following words:—

"This policy is subject to the provisions, privileges and agreements printed and written on the succeeding pages hereof, all of which shall form a part of this contract as fully as if recited over the signature hereto affixed, but no provision, privilege or agreement can be changed, waived, or modified, except by a written agreement signed by the president or vice-president and managing director of the company."

(2) Among the "provisions, privileges and agreements" so declared to form part of the contract, the two clauses following:—

"2. That the insured may, without the consent of the company, engage in the active service of the militia of Canada, notice thereof to be given by or on behalf of the insured within ninety days after the date of his so engaging, and will also pay such extra premium during such services as the company shall fix.

If within one year, without a permit, the insured engage (a) in blasting, mining, submarine labor, the production of any explosive material, as an occupation, or in any naval or military service (except in the militia or volunteer corps in defence of Canada, as herebefore provided), or (b) engage in aerial or Arctic voyages, or (c) reside elsewhere than in Canada, Newfoundland, Europe, or the United States, or (d) between the 15th days of June and November in said year reside in any part of America south of the 36th degree of north latitude, or in the Eastern Hemisphere south of the 42nd degree, this policy shall be void, and all payments made upon it shall be forfeited to the company.

4. That subject to the provisions of para. 2, this policy shall be

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incontestable after one year from its date, except for fraud, non-payment of premiums, or for violation of the conditions of the policy relating to engaging in military service (other than such as mentioned in preceding para. 2) or naval service in time of war, without the consent in writing of a duly authorised officer of the company."

(3) The following endorsement on the policy:—

"Notice to policy-holders, agents, district managers, or inspectors are in no way authorised to make, alter, or discharge contracts or waive forfeiture."

The plaintiff says that her husband attended to the mortgage and premiums until he enlisted (December, 1915) and that she did thereafter. She says that on April 17, 1916, she went to the office of the company in Winnipeg where she saw Mr. Gowenlock, the local representative of the company which has its head office in London (Ontario). She produced in Court the receipt for $30 bearing that date, which she says she then got. She says:—

"I was receiving some money and I wanted to know how things were. He said, 'Do your best, Mrs. Beasant, and I know that the company will do right by you.' Enlistment was surely mentioned then, but he knew before. My object in going was to understand this affair and know what I had to pay for this and what I had to pay for that. I saw Mr. Gowenlock later again, but when I had seen him before I cannot say. . . . On March 28, 1917, I probably saw Mr. Gowenlock again, which I judge from this receipt which I now hold. . . . Mr. Gowenlock never mentioned anything to me about paying any extra premium. . . . On the door of the office were the 'Northern Life Insurance Co.,' as far as I can remember."

On cross-examination she said:—

"I cannot say that I had with Mr. Gowenlock any other conversation about my husband having enlisted than that of April 16. When I went to see Mr. Gowenlock on that day, it was not about the increased premium, of which I knew nothing. I went to see him to understand, to know what the policy called for. . . . I did not ask Mr. Gowenlock. . . . Well, I had heard people getting in trouble when people got killed, so I asked him if I could pay, continue to pay. He said I hadn't to pay a War Premium. I could continue to pay. I spoke to a lady in the office who was cashier in 1916 or 1917. She asked me if I had any notice of increased premium and I said 'No.' She did not ask me if my husband had enlisted, and said it was alright. . . . I gave no notice to the head office, neither verbally nor in writing. And I gave no notice in writing to Mr. Gowenlock. Mr. Gowenlock knew, I did not think it was necessary."

William Milne Gowenlock, describing himself as "agency manager for this part of Manitoba," says:—

"I admit that the premium payment shewn on receipt dated April 17, 1916, March 28, 1917, and January 21, 1918, and signed by myself, were received with knowledge that Beasant was overseas. . . I knew he had enlisted, but do not know how I knew. . . I never communicated the fact of his enlistment to any officer in the head office, either in writing or otherwise. . . . I have no recollection of her having asked me if she had to pay increased rates, nor of my telling her. . . . I never informed Beasant nor his wife of the directors' resolution fixing increased premium."

The witness also stated that he was described as district manager in the telephone book and as provincial manager in Henderson's Directory.

There is also the evidence of Hartley M. Millman, who was instrumental in procuring from the defendant company, for many parties to whom he had sold Morse Place lots, mortgage loans together with insurance as collateral security, and Beasant was one of those who had so purchased lots from him. Millman says:—

"I wrote the application for insurance for Beasant. I was then writing some life insurance and placing mortgage loans. I held no office in the company. . . . Mr. Gowenlock was the provincial manager for Manitoba. . . . I knew Beasant had enlisted, probably one week after he signed up. But I was not an officer of the company . . . I do not remember speaking to Gowenlock about Beasant's enlistment. We talked about it, but I do not know if he did not know before. It was common knowledge that Beasant had enlisted. I think Gowenlock must have known."

He also produces copies of two letters he sent to R. C. McKnight, treasurer of the company, investment department, at London, dated respectively May 12, 1916, and December 12, 1916, in which he states that Beasant had enlisted. But he adds:

"I was interested in the lots and the mortgage and considered myself also morally responsible for the mortgage to the company. So that my capacity in corresponding with McKnight was on my own personal account. I did not give any notice of enlistment to the company, either for Mr. or Mrs. Beasant. . . . Any statement I made of enlistment was just to explain delays in payments."

R. C. McKnight, who is now manager of the company, said that in 1916 he was treasurer of the investment department of the company, which was kept separate from the insurance. He says he received two letters written by Millman and referring to Beasant's enlistment. He also states:—

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"The resolution of August 15, fixing increased premiums was communicated specially to those who had given us notice, but to them only. . . . Nobody has ever given us notice of Beasant's enlistment."

I am of opinion that the construction put by defendant's counsel upon clauses 2 and 4 of the "provisions, privileges and agreements" annexed to the policy, is the proper one, and that there is no evidence that the proper notice was given.

The action will be dismissed with costs.

Action dismissed.

JOHNSON INVESTMENT Co. v. FISHER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. November 26, 1921.

REFORMATION OF INSTRUMENTS (§ I—1)—MISTAKE—EVIDENCE.

An agreement for the sale and purchase of lands consisted of two documents, one a printed form and the other typewritten. The Court held that in an action for rectification on the ground of mistake there was no special rule of evidence required, but the rule to be applied was that of good sense, and that while generally speaking where the determination of the question depended on the weighing of conflicting oral evidence alone, the writing must stand, yet the oral evidence in favour of rectification might be so preponderating and so credible as without more to justify the Court in pronouncing for rectification, and that where there is documentary evidence confirmatory of the plaintiff's story, great weight should be given to it, but that in either case the Court must be quite satisfied not only of the mistake, but also of the true agreement between the parties before rectifying the written document.

APPEAL by plaintiff (vendor) from the trial judgment, dismissing an action for rectification of an agreement for the sale and purchase of land. Reversed.

The facts and circumstances of the case are fully set out in the judgment of Beck, J.A.

J. B. Barron, for appellant.

G. A. Trainor, for respondent.

SCOTT, C.J. concurs with BECK, J.A.

STUART, J.A. (*dissenting*):—In this case it seems to me to be impossible, if a judgment is to be given at all, to avoid giving a judicial interpretation of the written agreements which will be binding upon the parties. The plaintiff in para. 4 of its statement of claim alleges that the agreement in fact made between the parties provided that the transfer of the 139 acre lot should be as collateral security for the payment of the $7,000, and that if default was made in that payment, the security should be realized by way of sale, and the amount realized applied on that debt, and that, the balance if any unrealized, should remain payable as a debt. And in para. 5 it is alleged that the supple-

mentary written agreement did not, in fact, so provide. This means that one of the things the Court must decide is what the written agreement as it stands really means, for otherwise it would be impossible in any case to decide whether or not a mistake had been made.

Then in para. 6 of the statement of defence it is denied that there was any mistake whatever in the drafting of the paragraph complained of and it is alleged that the agreement sets forth the real intention of the parties and the state of their minds at the time the agreement was entered into. Here again it seems to me to be impossible to decide this issue without making an authoritative interpretation of the agreement as it stands.

For how can the Court say whether a mistake was or was not made in the wording of an agreement without first deciding what the agreement as it stands really means?

Therefore, although the plaintiff has not in its prayer for relief directly asked for a declaration as to the meaning of the agreement it seems to me to be necessary to make the declaration at least in our reasons for judgment before the issue of mistake or no mistake can be decided at all.

The only answer to this would appear to be in a possible suggestion that the agreement on its face is ambiguous and that the Court in such a case would be entitled in an action for rectification to do no more than to declare the existence of ambiguity and to direct the document to be reformed so as to express the real agreement between the parties. But I do not think that this course has ever been adopted. Indeed, where a document is merely ambiguous it is difficult to see how it can be said that there has been a mistake at all in the sense in which the word is used in cases of rectification. In a suit for rectification the plaintiff has to allege that the parties agreed verbally upon one thing but that by mistake the written document was made to say another thing, or at any rate was not made to say the thing agreed upon. But if the document is ambiguous so as to admit of different constructions, how can the plaintiff show that it does not express what was agreed upon? Upon one construction it may do so. Upon the other construction it may not. So that we shall have a plaintiff urging a construction of a document unfavourable to himself and in a sense in which he says it was not agreed for the purpose of getting the document rectified to express unambiguously what he says was agreed upon. And we shall have the defendant admitting the construction proposed by the plaintiff and contending that in that sense it does express what was in fact agreed upon.

Now, perhaps that kind of a proceeding is permissible but

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if it is permissible it seems to me it ought to be allowed only upon a clear unequivocal admission by the plaintiff that the true construction of the document is in the sense contrary to what he alleges to have been in fact agreed upon. In this action the plaintiff proceeds in para. 4 to allege an agreement generally and then in para. 5 it merely alleges that the written agreement "does not in fact contain or embody" that actual agreement. Such a pleading would apply where the written document contained no reference at all to the subject in question. Possibly, there could even then be rectification, but in any case there is here in this written agreement a clause dealing with the subject in question and the plaintiff in effect alleges that the clause does not embody the agreement which it says was in fact agreed upon. Now I do not quite clearly see how the plaintiff can say that until it makes some declaration or admission as to what the clause as it stands does mean. It may be that the plaintiff is entitled to produce the document, refer to the clause in question in it and then say, "we are not prepared to say exactly what that clause does mean, it may mean this or it may mean that, but in any case it does not mean this, viz.: what we shall shew by evidence was verbally agreed upon, and therefore we ask to have it rectified."

The plaintiff certainly cannot take any position short of this without destroying the whole foundation of its action.

The first thing therefore to do is to examine the written agreement and discover, at least in the first place, whether it does not already mean what the plaintiff alleges was agreed upon. And in doing this, it is desirable to forget all about the oral testimony so that one may not be, perhaps unconsciously, influenced by it in placing an interpretation upon the documents.

Perhaps an obvious merely clerical error in the paragraph in question should be first referred to. It is apparent from a mere inspection and casual reading of the document that the words "second part" in the last phrase of para. 4 of the supplementary agreement must be read as "*first* part." The clause is senseless otherwise. The Court can make this correction, and will do so, of its own motion whenever the document comes before it to be enforced or dealt with in any way. See Leake, 6th ed. p. 219. This is, of itself, however, no sufficient ground for the present action and indeed was admittedly not a moving reason at all for the action being brought.

What we have before us then is this. First there is an agreement of sale prepared on a printed form by which the plaintiff agrees to sell and the defendant agrees to buy from the plaintiff certain real estate for the sum of $47,500 "of lawful money of

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Canada" payable $7,950 down on the execution of the agreement, $7,000 on May 1, 1921, and the balance at times specified but here immaterial. There is a covenant by the defendant to pay "The said sum of money above mentioned together with the interest thereon at the rate aforesaid on the days and times in manner above mentioned."

Then next we have a typewritten agreement drawn up and executed concurrently with the other and drawn up because it was desired to insert some special clauses which it was not convenient to insert in the printed form. This typewritten agreement has several recitals. First, it recites that the plaintiff is the owner of certain specified property being the identical property covered by the printed agreement, second, it recites that the defendant is the owner of two separate lots in British Columbia, one of 159 acres and the other of 139 acres, to which property no reference whatever was made in the printed form. Third, it recites that the plaintiff is desirous of selling and the defendant is desirous of buying the property owned by the plaintiff for the sum of $47,500, and then proceeds thus: "in such a way however and providing that the party of the first part shall accept as a first payment on the above mentioned amount the lot in the Kootenay District in the Province of British Columbia as contains 159 acres more or less at and for the price of $7,950."

This is all the recital. There is no further reference in it to the 139 acre lot. The document then proceeds to witness an agreement of sale of the plaintiff's property in substantially the same terms as those contained in the printed form, $7,950 is expressed to be paid down and the receipt of it is acknowledged; $7,000 is said to be "payable" on May 21, 1921.

There is no reference to interest in this typewritten agreement. It then contains the following clauses:—

"2. The party of the first part hereby undertakes and agrees to accept the Lot in the Kootenay District in the Province of British Columbia as contains one hundred and fifty-nine (159) acres at and for the price and sum of seven thousand nine hundred and fifty ($7,950) dollars, as a first payment on the above mentioned purchase price and which is payable on the execution of this agreement and the original agreement of sale entered into between the parties as of this date.

3. The party of the second part hereby undertakes and agrees to purchase from the party of the first part the above mentioned farm property at and for the price and sum of forty-seven thousand five hundred ($47,500) dollars, payable as above mentioned and agrees to give transfer immediately to the party of the first part the lot in Kootenay District in the Province of British

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Columbia as contains one hundred and fifty-nine (159) acres more or less at and for the price and sum of seven thousand nine hundred and fifty ($7,950) dollars, which latter amount is to be applied as first payment by the party of the second part to the party of the first part on the purchase price of the above mentioned farm property.

4. It is further understood and agreed between the parties hereto that the party of the second part shall give the party of the first part a complete transfer of the lot in Kootenay District in the Province of British Columbia as contains one hundred and thirty-nine (139) acres more or less as collateral security for the second party's payment which becomes due on the first day of May, A.D. 1921, and that in default of such payment the party of the second part shall retain such lot as contains one hundred and thirty-nine (139) acres more or less, and apply same as payment of the seven thousand ($7,000) dollars due on the first day of May, A.D. 1921."

There then follow some provisions, immaterial to the issues here, allowing the plaintiff to mortgage the property sold by him and providing the terms upon which the defendant is to assume any such mortgage and be given credit for it on the price.

We have, therefore, a covenant of the defendant to purchase the plaintiff's property, a covenant to pay $47,500 for it in "lawful money of Canada," a covenant to pay $7,950 in cash on the execution of the agreement, a covenant to pay $7,000 in lawful money of Canada on May 1, 1921, a recital that it had been agreed that the down payment is to be made by a transfer of the specified property to the plaintiff but no recital as to any special method of payment of the first deferred instalment, an agreement that the down payment should be made by the transfer of the lot mentioned in that regard in the recital and then an agreement that the defendant should transfer another lot "as collateral security" for the first deferred payment and that "upon default" by the defendant in that payment the plaintiff "shall retain" the lot in question "and apply same as payment" of the sum with respect to which default has been made.

I fail, I confess, to discover any inconsistency or ambiguity in this document except on account of a suggested obligatory sense in the little word "shall" in this last clause. The whole of the two agreements must be read together. In *Monypenny* v. *Monypenny* (1859), 3 DeG. & J. 572, at p. 587, 44 E.R. 1389, 28 L.J. (Ch.) 305, 7 W.R. 276, Lord Chelmsford said, "Undoubtedly as Sheppard says (Touchstone p. 87) in the construction of all parts of all kinds of deeds amongst the rules to be universally observed is one 'That the construction be made

upon the entire deed and that one part of it doth help to expound another and that every word (if it may be) may take effect and none be rejected.' Where words are ambiguous or the intention is not manifest and plain it is useful and sometimes necessary to recur to other parts of the deed for interpretation."

In *North Eastern R. Co.* v. *Lord Hastings*, [1900] A.C. 260 at pp. 267, 268, 69 L.J. (Ch.) 516, Lord Davey said, "The principle on which an instrument of this description should be construed is not doubtful. It is (to quote the words of Lord Watson in an unreported case *Chamber Colliery Co.* v. *Twycrould*, (H.L.) July 20, 1893) that the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible or (as was said by Lord Selborne) you may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to bear that interpretation. *Caledonian Ry. Co.* v. *North British Ry. Co.*, 6 App. Cas. 114."

Now we have both the covenant to pay and the stipulations that the transfer of the lot was to be as collateral security for a payment, and that in default of payment a certain thing was to happen. What exactly that thing was depends on the sense to be given to the word "shall." Surely it must, if possible, be so interpreted as not to render senseless the previous stipulations.

If an obligatory sense is given to the word "shall" then the covenant to pay in money is absolutely destroyed; the provision as to the transfer being, not merely security, but *collateral* security, is also destroyed for no security can be collateral if there is no obligation to which it can be "collateral," and the expression "default of payment" is shorn of its usual meaning and weakened into the expression of a mere omission, without fault or breach of obligation. In my opinion, it would be improper to make all the previous strong expressions give way before one particular meaning out of a number of meanings which can quite properly be attributed to the word "shall." That word is sufficiently flexible in meaning to make such a course quite unnecessary. There is in the first place the idea of mere futurity. Then there is the idea of a mere right to do something. And many other meanings are given in the Oxford dictionary. But the two I mention are quite allowable meanings and in order to make the whole document self-consistent I think no stringent obligatory sense should be given to the word but that one of these other meanings should be adopted, *ut res magis valeat quam*

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percat. For if the expression is treated as unavoidably ambiguous and if one party says he took it in one sense and the other says that he took it in another the result might be that there would be no agreement at all and the whole document would perish.

I do not think it is reasonably possible for the defendant to contend that the document means that he was to have a mere option of repurchase of the lot. The expressions used in the paragraph in question are very strange and practically senseless if that was the idea to be expressed.

I think, therefore, that upon the true interpretation of the agreement the defendant was bound to pay $7,000 in money on May 21, 1921, and that the transfer of the lot in question was, in substance, a mortgage and nothing more. The contention that what the clause expresses is an agreement for an absolute transfer with an option of repurchase in the defendant is, in my humble opinion, quite untenable. The words used are very strange indeed if the draftsman was trying to express that idea. More unsuitable words for that purpose I can hardly imagine.

This means that there was no necessity at all for a suit for rectification. I would, therefore, dismiss the appeal and sustain the judgment dismissing the action but on a different ground entirely and with a different practical result from that given for and effected by the judgment below. I have not discussed the oral testimony at all. A perfectly intelligible agreement in writing was drawn up by the defendant's solicitor or acting solicitor and signed by both parties. It was intended to, and in my opinion did, obviate any necessity for a resort to the memory of the parties as to what was agreed upon or for an attempt by the Court to decide between their conflicting stories. Read as a whole it can, for the reason I have given, in my opinion, have only one meaning, and that meaning is in accord with what the plaintiff contends was agreed upon. The defendant cannot, I think, justly complain of reasons for judgment which interpret the agreement because he himself as well as the plaintiff raised by his pleading the issue as to what it meant. It is not an issue of fact as to which evidence might be given. It is an issue of law which the Court in order to decide the action was bound to consider. And its proper decision renders any consideration of the proposed issues of fact quite unnecessary.

I think there should be no costs of the appeal nor of the action. Both parties took a wrong attitude and as I have ventured with much respect to differ from the view of the trial Judge as to the proper interpretation of the agreement and as the defendant, in my view, insisted at the trial upon an improper

interpretation, I think we would be justified in varying the order as to costs of the action by letting each party bear his own.

BECK, J.A.:—This is an appeal from Ives, J., who at the trial dismissed the plaintiff's action.

The action is one by the plaintiff as vendor against the defendant as vendee under an agreement dated August, 12, 1920, for the sale of land, for the rectification of the agreement. The purchase price was $47,500, payable: $7,950 in cash, $7,000 on May 1, 1921, $5,000 on May 1, 1922-3-4-5-6, and $7,550 on May 1, 1927, "with interest at the rate of 7% per annum payable on May 1 in each year." This agreement is constituted of two documents—one made out upon a common printed form, which is called the original agreement. Contemporaneously with it, a typewritten form of agreement, called the supplementary agreement, was also drawn up. This latter document recited that the plaintiff was the owner of the land in question; that the defendant was the owner of lot 8803 in group 1, Kootenay District, B.C., containing 159 acres and lot 8,804 in the same group, containing 139 acres; that the plaintiff "is desirous of selling" the land in question to the defendant "who likewise is desirous of purchasing" the same for the price of $47,500 "in such a way however and providing that" the plaintiff should "accept as a first payment on the above mentioned amount, the said lot 8,803 containing 159 acres at and for the price and sum of $7,950." These are the only recitals. Then the agreement witnesses:—

1. That the plaintiff agrees to sell the land in question for $47,500 payable in instalments, setting them out as in the printed form agreement.

2. That the plaintiff "hereby undertakes and agrees to accept" lot 8,803 containing 159 acres "at and for the price and sum of $7,950 as a first payment on the above mentioned purchase price and which is payable on the execution of this agreement and the original agreement of sale entered into between the parties as of this date."

3. That the defendant "hereby undertakes and agrees to purchase from" the plaintiff the land in question "at and for the price and sum of $47,500 payable as above mentioned and agrees to give transfer immediately to the plaintiff of lot 8,803 containing 159 acres at and for the price and sum of $7,950," which latter amount is to be applied as first payment "the defendant to the plaintiff" on the purchase price of the land in question.

4. "It is further understood and agreed between the parties

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hereto that the party of the second part (the defendant) shall give to the party of the first part (the plaintiff) a complete transfer of the lot in Kootenay District in the Province of British Columbia as contains 139 acres more or less, (that is, lot 8,804) as collateral security for the second party's payment which becomes due on May 1, 1921; and that in default of such payment the party of the second (*sic.*) part shall retain such lot as contains 139 acres more or less and apply same as payment of the \$7,000 due on May 1, 1921."

The controversy is over the above quoted clause.

It seems to have been a surprise to counsel on both sides to find at the trial that the party of the second part is mentioned instead of the party of the first part as the one who is to retain the lot.

The plaintiff claims that the lot mentioned in this clause was to stand as collateral security merely and that on default of payment of the instalment due on May 1, 1921, he was not to be bound to retain it as payment but was to be entitled to realize upon it and apply the proceeds as payment *pro tanto*, and that in so far as this intention is not expressed, there was a mutual mistake. The defendant denies any mistake.

The facts which appear to be material I summarize as follows:

Bigelow, who was a witness for the defence was asked by Johnson, the representative of the plaintiff company, to find a purchaser for the land in question. He found Fisher, the defendant. The three discussed the matter together on several occasions during a few days and agreed generally on the terms. There is no dispute about the price, the amount and dates of payment of the instalments of principal or the rate of interest nor the fact that the B.C. lot 8,803 (159 acres) was to be accepted as payment of the down payment of \$7,950. As to the second payment (to be made on May 1, 1921) Johnson says:—

"Q. And when was that to be paid? And how? A. Well Fisher told me he had a lot of stock and lot of cattle which he wanted to put on the farm. There was a big crop on the place that went with it. Q. What was the value of that crop? A. Well I figured the crop would be worth somewhere about eight to ten thousand dollars. There was a lot of hay and a lot of oats; he was to feed his stock there during the winter and sell them in the spring, and he could make the payment—intended to make the payment of \$7,000 and interest May 1, when he disposed of his stock. Q. So then what about the \$7,000, when was it to be paid? A. On May 1, 1921. Q. Now tell us about this transaction about this other land? A. Well I didn't want to give him possession of the land and give him all the feed on

there just with that first payment on that land, the B.C. land, and he was to give me a chattel mortgage on his stock. Q. For what? A. A chattel mortgage for collateral security. Q. To secure what? A. The payment of $7,000 due May 1. Q. To secure that second payment of $7,000? A. Yes, but when we got to make out the papers he said he didn't like to tie up his stock, he had another parcel of land in B.C., he would rather put that up in place of the stock. Q. That is the second parcel of land in B.C.? A. Yes. Q. To put that up how? A. As collateral security for the payment due on May 1. Q. Did you agree to that? A. Yes."

Johnson goes on to say, in substance, as follows:—

Having thus settled the terms, he and Bigelow and Fisher went to the law office of a Mr. Campbell, a solicitor, where they found his student, Mr. Poffenroth, to whom instructions were given and Poffenroth took down some notes of the instructions. This was in the morning; they left and returned in the afternoon, when, while they remained there, Poffenroth finished drawing the documents. When they were finished Johnson took one copy for the purpose of having his solicitor look over it, but, failing to find him, brought it back and executed the agreements, as did Fisher. While the three—Johnson, Bigelow and Fisher—were still with Poffenroth, the question of Bigelow's commission came up. Johnson refused to pay it until the $7,000 payable on May 1, 1921, was paid. Poffenroth drew up an ordinary promissory note to be signed by Johnson in Bigelow's favor for $950 payable on May 1, 1921. Johnson refused to sign the note and by reason of his objection the following document was drawn by Poffenroth and signed by Johnson and accepted by Bigelow.

"Alexander Bigelow, Esq., Calgary, Alberta,
Calgary, Alta., August 12, 1920.
Dear Sir; *Re Glenn J. Fisher.*

We hereby undertake and promise to pay you the sum of nine hundred and fifty ($950) dollars, being the full settlement of any commission owing by us to you for your services in effecting a sale of the north half of section (9) and the south-half of section (16) and the south half of section (9), all in township (26) range (2) west of the fifth meridian in the Province of Alberta, to Glen J. Fisher under agreement of sale dated August 12, 1920.

We promise to pay you the above amount as soon as and when the said Glenn J. Fisher makes his first payment under above mentioned agreement for sale, being May 1, 1921.

We further promise to pay you interest at the rate of seven (7%) per cent. from the date hereof.

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Johnson Investments Limited, per "Albert C. Johnson" (Seal)."

Johnson swears positively that it was clearly understood that the second B.C. lot was to be taken merely as security for the payment of the instalment due May 1, 1921, and that not only was there no talk of its being taken in payment under any circumstances but that it was substituted for what was first proposed, a chattel mortgage on Fisher's cattle. He says he never made any inquiry as to the value of the B.C. land. He explains that he first discovered the mistake in October of the same year in connection with a sale which Fisher was negotiating, and eventually concluded, with one Smith of the land in question, in which negotiations Poffenroth was acting for Fisher and during which, Johnson being interested, Poffenroth told him of the mistake in the agreement, all copies of which had from the time they were drawn, remained in Poffenroth's hands, owing to his having, as Fisher's solicitor, to obtain title to Fisher's name for both the B.C. lots. Johnson then asked Poffenroth to get the mistake corrected and an attempt was made to do so, but Fisher refused to recognize it.

Poffenroth swears positively that the latter part of the clause in question was a mistake and not in accordance with his instructions. He confirms Johnson's story throughout.

Smith says that at the time of the negotiations between him and Fisher, Bigelow was present and that both Fisher and Bigelow said they were going to make Johnson keep the B.C. lot in question.

Fisher positively denies that there was any question of the second B.C. lot being given as collateral security and says that Johnson was to take it in payment of the instalment payable May 1, 1921, with the privilege to Fisher of buying it back. Bigelow confirms Fisher's story. We have then, Johnson and Poffenroth on the one side and Fisher and Bigelow on the other. I think, however, there is confirmation of the story of Johnson and Poffenroth and a discrediting of the evidence of Bigelow. Bigelow, at the time of the trial, was a prisoner, having been convicted of fraud in relation to a mortgage. The written document which he accepted from Johnson for his commission seems to be inconsistent with his story that Fisher was not to be liable at all events for the payment of the $7,000 instalment on May 1, 1921, and is confirmatory of the story of Johnson and Poffenroth.

It is a point of importance too that Fisher himself says that the disputed clause does not express his own intention; for the effect of his evidence is that the second B.C. lot was not to be taken as collateral security—that he never heard that expression

used at the meetings at which the instructions were given to Poffenroth—but that it was distinctly understood that the lot should be taken as payment, with the right to him to buy it back on or before May 1.

The very words of the clause seem to emphasize the idea of security, not merely by the use of that expression, but by the use of the words "in default of such payment"; and again with the primary statement that the lot was to be collateral security it is no great strain upon the subsequent words, if they were taken to mean—and they might easily in the hurry of an uncritical reading of the whole clause be taken to mean, especially with the error of "second" for "first",—that the land was to be realized upon and the proceeds applied as payment on account.

Furthermore, the recitals in the supplementary agreement tend to confirm the plaintiff's story. The recitals indicate that only one of the two lots was to be taken in payment. The defendant's story is that both lots were to be so taken, with a right in him to buy back the second. If this were the intention one would look for a further or a different recital as well as a clause to set out the consequent agreement, not merely in different words but on different lines.

There was some attempt to discredit the evidence of Poffenroth; but it seems to me it was quite ineffectual.

The parol evidence *pro* and *contra* was conflicting; but I think the weight was much in favor of the plaintiff and I think it was, as I have indicated, confirmed by the document given by Johnson to and accepted by Bigelow. That document was drawn by Poffenroth and ought, in my opinion, under the circumstances under which it was given, be taken as part of the *res gestae* and as confirmatory of the evidence of Poffenroth and of Johnson.

See cases collected in Best on Evidence, 11th ed., with Canadian notes, pp. 477 *et seq.*

Documentary evidence in cases of this sort is of great, if not of controlling importance.

I think there is in reality no special artificial rule of evidence, or of the weight or character of the evidence required in cases of this kind; but that the rule to be applied is simply that of good sense, namely, that, while generally speaking where the determination of the question depends on the weighing of conflicting oral evidence alone, the writing must stand, yet the oral evidence in favor of rectification may be so preponderating and so credible as without more to justify the Court in pronouncing for rectification; that where there is documentary evidence con-

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firmatory of the plaintiff's story great weight should be given to it; but that in either case, the Court must be quite satisfied, not only of the mistake (which alone might justify recission only) but also of the true agreement between the parties before rectifying the written document. (See Fry, Spec. Perf'ce. 5th (Can.) ed. pp. 390 *et seq.* Hals. Laws of England, vol. 21 tit. "Mistake," pp. 26 *et seq.* and pp. 12, *et seq.*)

For the reasons indicated I would allow the appeal with costs and direct judgment for the plaintiff as prayed with costs.

HYNDMAN, J.A.:—I think the evidence justifies the conclusion arrived at by my brother Beck that the words sought to be eliminated from the contract were inserted by mistake or under a misapprehension. However, apart altogether from the question of mistake or agreement, it seems to me that such a provision in a document containing the other terms appearing therein is quite innocuous and really at law and in equity, at any rate, can have no binding effect. Had this been a conditional sale and not a security, then, of course, at the expiration of the term limited for payment of the $7,000 should the defendant fail to pay his interest would *ipso facto* cease to exist, but it cannot be said, in my opinion, on any ground, that this was a conditional sale but just what it states, a security merely. The very wording of the contract says so, and reads:—

"4. It is further understood and agreed between the parties hereto that the party of the second part shall give to the party of the first part a complete transfer of the lot in Kootenay District in the Province of British Columbia as contains one hundred and thirty-nine (139) acres more or less as *collateral security* for the second party's payment which becomes due on May 1, 1921, and that in default of such payment the party of the second part shall retain such lot as contains one hundred and thirty-nine (139) acres more or less, and apply same as payment of the seven thousand ($7,000) dollars due on May 1, 1921."

Having then taken on the character of a security it became, in effect, a mortgage and once that characteristic attached it became subject to all the attributes of a mortgage and the parties became entitled to and bound by all the rights and responsibilities of mortgagor and mortgagee. The right to redeem immediately sprang up in favour of the defendant and there was nothing he could do to clog the equity of redemption such as this clause should have the effect of doing—*Noakes* v. *Rice*, [1902[A.C. 24, 71 L.J. (Ch.) 139, 50 W.R. 305.

Assuming then that the disputed clause could not be enforced as against the defendant, can it be held to be binding on the plaintiff? The authorities seem to me to be entirely contrary to

such a conclusion. The rights must be mutual. The settled maxim "once a mortgage always a mortgage, and nothing but a mortgage" invokes a situation which cannot be limited in certain respects by agreement. Leaving out of consideration altogether the covenant for payment of the $7,000 which appears in the contract, the "mortgage" implies a debt, which the plaintiff is entitled to have paid him, holding meantime the security which he received—(See *Goodman* v. *Grierson* (1813), 2 Ball & B. 278.) It may be that the plaintiff might first have to realise on the land before suing for the money but that is not a matter with which we are concerned here.

The question is, was the clause intended to mean that the plaintiff has as security for the $7,000 this particular land which he is bound to keep in case the defendant either was unwilling or unable to pay the money on May 1, 1921; or is it merely a security? If the latter, then the consequences as I see it must be that the defendant has the right of redemption, an estate in the land, which inheres until taken away either by foreclosure or agreement and the plaintiff is entitled to payment of the sum for which such security was given.

"It is not always easy to discriminate between a mortgage and a purchase qualified by a power to repurchase. In determining questions of this nature, it must be borne in mind that a mortgage cannot be a mortgage on one side only; it must be mutual; that is, if it be a mortgage with one party it must be a mortgage with both. But the rule only requires that it shall not be competent to one party alone to consider it a mortgage. . . . .The rule is that 'prima facie' an absolute conveyance, containing nothing to shew the relation of debtor and creditor does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every case the question is what, upon a fair construction, is the meaning of the instruments and the absolute conveyance will be turned into a mortgage if the real intention was that the estate should be held as a security for the money." Coote on Mortgages, 7th ed., pp. 24 and 25 (and cases there cited —See also *Goodman* v. *Grierson*, 2 Ball & B. 274).

In 7 Cyc. at pp. 278 and 279, "collateral security" is defined as:—

"Any property or right of action as a bill of sale or stock certificate, which is given to secure the performance of a contract or the discharge of an obligation and *as additional* to the obligation of that contract, and which upon the performance of the latter is to be surrendered or discharged; a separate obligation attached to another contract to guarantee its performance;

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security for the fulfillment of a contract or a pecuniary obligation in addition to the principal security; a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the means of the creditor to realise the principal debt which it is given to secure; an additional security for the performance of the principal obligation, and on the discharge of the latter it is to be surrendered." (See also notes to the above at foot of page).

To my mind the only fair construction to be placed upon the whole transaction is that, as the express wording of the clause says, it is a "*collateral security" and not a conditional sale.* On failure to pay the $7,000 the plaintiff may sue on his covenant or even the implied debt, holding of course the land so that he may be in a position to recover when payment is made.

That being the situation, to my mind there was no real necessity for bringing the action at all (except possibly for a declaration) which, consequently, might disentitle the plaintiff to costs, but as the defendant has contested the claim throughout, I think it proper that an amendment be allowed claiming a declaration as to the meaning of the disputed clause, and that the plaintiff should have his costs.

I would, therefore, allow the appeal with costs and enter judgment for the plaintiff with costs.

The Chief Justice and Beck, J., having agreed that the plaintiff is entitled to a judgment for rectification as claimed, I concur with their conclusion for the purpose of bringing about an effective judgment to that effect while retaining the opinion I have expressed on the other point.

CLARKE, J.A. (*dissenting*):—Appeal from the judgment of Ives, J., dismissing the plaintiff's action for rectification of an agreement between the parties for the sale of farm land in Alberta.

The agreement is contained in 2 writings both dated August 12, 1920. For identification, I shall refer to one as the original writing and the other as the supplemental writing.

The former provides for the sale of the land in question containing 950 acres, by the plaintiff to the defendant for $47,500 payable as follows: $7,950 down, the receipt of which is acknowledged, $7,000 on May 1, 1921, and the balance in instalments as therein set out, together with interest from date of agreement at 7% *per annum* on so much of the purchase price as remains unpaid from time to time, payable May 1 in each year. Then follows a covenant by the purchaser to pay the purchase money and interest.

The supplemental writing after reciting the ownership of the Alberta lands by the party of the first part (the plaintiff) recites that the party of the second part (the defendant) is the owner of lots 8,803 and 8,804 in group one in the Kootenay District, B.C., one of the lots containing 159 acres more or less and the other 139 acres more or less clear of all encumbrances. It further recites the desire of the one party to sell and of the other party to purchase the Alberta land at the price of $47,500, "in such a way however, and providing that the party of the first part shall accept as a first payment on the above mentioned amount the lot in the Kootenay District in the Province of British Columbia as contains 159 acres more or less at and for the price and sum of $7,950."

The terms of payment are then set out in para. 1 an instalment of $7,000 being made payable on May 1, 1921. Paragraph 2 provides that the party of the first part agrees to accept the 159 acre lot in B.C. at $7,950 as a first payment on the purchase price of the Alberta land. Paragraph 3 provides that the party of the second part agrees to purchase the Alberta farm property for $47,500 payable as before mentioned "and agrees to give transfer immediately to the party of the first part the lot in Kootenay District in the Province of British Columbia as contains 159 acres more or less at and for the price and sum of $7,950 which latter amount is to be applied as first payment by the party of the second part to the party of the first part on the purchase price of the above mentioned farm property."

Paragraph 4, which is the one sought to be rectified, is as follows:—

"4. It is further understood and agreed between the parties that the party of the second part shall give to the party of the first part a complete transfer of the lot in Kootenay District in the Province of British Columbia as contains 139 acres more or less as collateral security for the second party's payment which becomes due on May 1, 1921, and that in default of such payment the party of the *second* part shall retain such lot as contains 139 acres more or less and apply same as payment of the $7,000 due on May 1, 1921." Admittedly the word "second" where it last appears in para. 4 is a clerical error and should read "first."

The plaintiff in its statement of claim alleges that the supplemental writing was drawn up and signed under a mutual mistake of fact and that the plaintiff never agreed to the terms contained in it—the mistake being found in the said para. 4, and asks that the said agreement should be rectified so as to

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embody the agreement actually arrived at, which he states in para. 4 of the statement of claim as follows:—

"4. It was agreed that the defendant should furnish collateral security for the payment of $7,000 due on May 1, 1921, such collateral security to be a transfer of that lot of lots 8,803 and 8,804 which contained 139 acres in group 1, in the Kootenay District in the Province of British Columbia and that if default of the said payment due on May 1, 1921, be made, the said collateral security should be realized by way of sale and the amount thus obtained be credited in diminution of the said payment of $7,000; the balance of the said payment to remain due and owing as of the said May 1, 1921."

The relief claimed in the statement of claim is for rectification only. Upon the hearing of the appeal, a discussion arose which I think was started by a suggestion from the Bench as to whether or not, upon the proper construction of para. 4 of the agreement ought to be rectified, the latter part of the paragraph which provides that upon default of payment the vendor should retain the 139 acre lot in British Columbia and apply same as payment of the $7,000 due on May 1, 1921, should be disregarded as being inconsistent with the first part of the paragraph which provides that, the said lot should be held as collateral security. If so construed, the paragraph would have the meaning contended for by the plaintiff as the true agreement between the parties and which the plaintiff seeks to establish by rectification of the written document. If such be the proper interpretation, there is nothing to rectify, and there is no justification for the action. Such is not the interpretation of the defendant neither is it the interpretation put upon it by the plaintiff in this action which presupposes it means what it says, namely that the property should be taken in payment of the $7,000 instalment and the trial Judge so treated it and that, I think, is what should, for the purposes of this action, be taken to be true meaning and effect of the paragraph; but as some of my brethren are inclined to dispose of the appeal by construing the paragraph regardless of the construction put upon it by the parties in the action, I shall state my reasons for dissenting from such a course.

The plaintiff's solicitors with full knowledge of there being some question about the proper construction of the document elected to pursue the remedy of rectification. In their letter of February 11, 1921, to the defendant, referring to the transfer of the 139 acre lot, written before the action, they say:—

"This transfer, so we are informed, was taken purely by way of collateral security and if you made default in your payment of May 1 the security was to be realized by way of sale or other-

wise and the amount thus obtained applied in diminution of the said payment of $7,000. Unfortunately however, we have been informed by Mr. Piffenroth that in the extreme hurry of drawing the agreement between you he drew the clause four on page five to apparently indicate an intention that this collateral security was in default to be applied in lieu of the payment. We do not, of course, say that this last is the correct interpretation but the clause is very vague and it is necessary that a correct clause setting out the matter definitely be substituted."

The action was commenced on February 14, 1921, before there was any default, the instalment not maturing until May 1 following, no relief in respect thereof could have been asked and the plaintiff may well have thought the Court would not entertain an action for a declaration of the construction of the agreement alone. At all events, the action was brought for rectification only, based upon a mutual mistake. There was no suggestion upon the pleadings nor at the trial that the paragraph in question had any other meaning than that attributed to it by the defendant, and indeed, the plaintiff throughout insisted that the Court should not construe the document in its present form. At the opening of the trial the defendant's counsel, Mr. Trainor, objected to the admission of parol evidence, and the following discussion took place:—

"Mr. Trainor: My Lord, before witnesses are called, I wish to make a motion. The contract between the plaintiff and the defendant, I submit, is quite clear. The paragraph on which the question is raised is clause 4, which reads as follows: (Clause read). Now I submit, my lord, that the paragraph, the meaning of it is quite clear, this property in British Columbia was transferred as collateral security. Then in default of such payment, the language is quite clear, the charge of the second party.

The Court: No one is disputing you on that. That is what they say. The language is clear enough, they say it is a mistake.

Mr. Trainor: Quite so, my lord.

The Court: What is your motion?

Mr. Trainor: My motion is that parol evidence is not admissible to vary the contract."

It is clear that at that time all parties including the Court were in accord as to the meaning of the paragraph and the action was proceeding on the basis of mistake only. At the conclusion of the trial the Judge in delivering judgment said:—

"The clause in question is quite clear as it reads. I doubt if I would have given judgment at the close of the plaintiff's case without any of the defendant's evidence because I was not satisfied at all that the interpretation desired by the plaintiff

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was the correct one. After hearing the defendant and the reasons which induced him to the negotiations which led up to it, I am quite satisfied that his version is the correct one."

Up to this time, I see no suggestion of any kind in the proceedings calling in question the meaning of the paragraph or suggesting that it was other than contended for by the defendant.

Neither at the trial nor at any time since has the plaintiff asked to amend by setting up a claim for a construction of the agreement as it stands, either by way of substantive or alternative relief, and on the contrary in the plaintiff's factum filed on the present appeal the following appears:—

"These statements, the appellant submits, also indicate that a mistrial has occurred, because the trial Judge has misconceived the issue and the remedy claimed. The trial Judge appears to consider the case one of interpretation and obviously fails to appreciate that the interpretation of the document is not the issue joined." As it is clear, therefore, that the interpretation of the document is not the issue in the action and neither party seeks to make it an issue I discern no duty on the part of the Court to force such an issue upon them. Such a course would not even have the merit of avoiding multiplicity of actions, for we were told upon the hearing that another action is pending between the parties not yet tried for the recovery of the interest payable on May 1, 1921, the principal not being claimed because, apparently, in the opinion of the plaintiff upon the unreformed document it could not be claimed. If failing rectification the plaintiff wants to seek recovery of the $7,000 upon the document as it stands it may apply to amend the pleadings in its pending action and then the defendant can, if so advised, seek relief by way of rectification should the present document be construed contrary to his understanding of it, for it appears it is not in the form he intended it but as the result would be the same if his interpretation is correct, he accepted it.

In his evidence he states the oral agreement as follows:—

"The deal was that Mr. Johnson was to take the whole of my land at $50 an acre. When we commenced to talk the deal over he said, 'Will you pay the biggest chunk, the first cash payment, and the second cash payment . . . .'? I told him I wanted it on May 1, 1921, to pay $7,000 in cash to redeem my land, and he said I could have that.

Q. The agreement you entered into according to what you say was that you were to have the right to redeem this piece of land if you so desired? A. It was my right, privilege. Q. Are you sure that Mr. Johnson understood that, was it discussed

enough so that he understood it? A. Well, it was discussed for a couple of days across from Mr. Beveridge's office. Q. Was it discussed with Mr. Poffenroth up in Campbell's office? A. There were no terms discussed either in Poffenroth's office or in Campbell's office outside of instructions to draw the papers, which, Mr. Johnson and myself were present then at the drawing of the papers. Q. Was there any discussion up in Poffenroth's office about you giving a chattel mortgage for this second payment? A. No sir. Q. No discussion of any kind? A. No sir."

In cross-examination he states as follows:—

"Q. Was there anything said about this land being collateral security? A. Not to me. Q. You heard the agreement read over didn't you, when it was read over in Poffenroth's office? A. Yes. Q. And you noticed that the first part does say . . . . A. If you read further down. Q. I know further down, but the first part, 'It is further understood and agreed between the parties hereto that the party of the second part shall give to the party of the first part a complete transfer of the lot in Kootenay District in the Province of British Columbia as contains one hundred and thirty-nine (139) acres more or less as collateral security for the second party's payment, which becomes due on May 1, 1921.' Now that does not express any. . . .

Mr. Trainor: I submit he should read the balance.

Q. Mr. Barron: That does not express the idea of a complete transfer with option to repurchase, does it? A. It was understood with Mr. Johnson, myself and Bigelow that I had the right to pay $7,000 or he was to take the land as initial payment of $7,000, otherwise I would not have put up the land. Q. That was your understanding? A. Yes."

So it appears that if the document does not bear the meaning he gives it, the defendant is the party who should have relief if his evidence be true. I am offering no opinion as to his chance of obtaining such relief but every man is entitled to his day in Court and he should have an opportunity if he so desires to seek such relief if the occasion should require it. No such claim on his part was called for in this action which recognises his interpretation to be the correct one.

I purposely refrain from expressing any opinion upon the construction of the present clause. Before doing so I would desire to hear full argument upon the question where such construction is the issue. What little discussion took place on this appeal was only incidental to the claim for rectification; and besides as rectification is the only issue in this action any opinions upon the construction of the document would, as I view it, only have the effect of *obiter dicta*, and may lead to embarrassment when

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the question comes up for determination in an action where the issue calls for its determination.

For the reasons I have endeavored to give, I think the only matter to be considered now is the right of the plaintiff to have the document rectified.

I fully agree with the trial Judge that the issue is one which inflicts a heavy burden and onus on the plaintiff. As I understand the law the plaintiff must prove that there has been a mutual mistake, that is that the writing does not express what the plaintiff intended it should express and, what is more difficult, that it does not express what the defendant intended it should express, and that both intended it should express what the plaintiff says it should express. The difficulty of making out such a case as is required to obtain rectification has been expressed in different ways.

Leake on Contracts, 6th ed., p. 216, "There can be no relief against a defendant denying a mistake."

Mortimer v. *Shortall* (1842), 2 Dr. & War. 363, Sugden, L.C., at p. 372, "I think the plaintiff's evidence has established that a mistake has occurred and I find so much of admission in the defendant's answer that there has been this mistake as relieves me from the difficulty which I should otherwise have had. I agree with the proposition as laid down by the defendant's counsel, that I must be satisfied that there was a mistake on both sides for I cannot otherwise rectify this lease. A mistake on one side might be a ground for rescinding a contract, but never could be relied on as a reason for taking from a man what he thought he was to get under his agreement."

And at p. 374: "As to the rule of law, I adhere to what I have already laid down, *Alexander* v. *Crosbie*. There is no objection to correct a deed by parol evidence when you have anything in writing beyond the parol evidence to go by. But where there is nothing but the recollection of witnesses and the defendant by his answer denies the case set up by the plaintiff the plaintiff appears to be without a remedy."

May v. *Platt*, [1900] 1 Ch. 616, 69 L.J. (Ch.) 357, 48 W.R. 617, Farwell, J., at p. 623:—"I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral there must be fraud or misrepresentation amounting to fraud."

Fry on Specific Performance, 6th ed., p. 373:—"But in order thus to procure the rectification of a contract, the proof must be clear, irrefragable, and the 'strongest possible.' As the point to be proved is that the concurrent intention of all the parties to the contract was different from that expressed by the written

contract, the Court will attentively regard the admission or denial of the defendant as one of those parties."

For the purpose of supporting the conclusion I have arrived at upon the evidence, it is sufficient to say what I think cannot be gainsaid, viz., that the evidence must be strong enough to satisfy the Court beyond any reasonable doubt that a mistake has been made common to both parties in the expression of their agreement and that in determining the question of mistake by the party opposing rectification, his denial of mistake supported by his evidence and his conduct are to receive great weight.

The trial Judge with the advantage of hearing the witnesses and observing their demeanor has accepted the defendant's version and after a careful perusal of the evidence I see no reason to question his findings as to any mistake on behalf of the defendant. So far as I can discover, his conduct has been consistent throughout. When approached by Bigelow, the plaintiff's agent, with whom the property was listed for sale, he told Bigelow he would consider the deal if he could trade some B.C. land he had which he put at $50 an acre and which he had recently taken in a trade at $50 to $55 per acre, and he wished the privilege of redeeming the 139 acre lot.

Poffenroth, a witness for the plaintiff, states that about October of 1920 he brought the mistake to the defendant's attention and the defendant maintained that his understanding was, as stated in the document, and he would make no change. About the same time when the defendant was selling his equity in the farm to Smith, a witness on behalf of the plaintiff, an agreement was prepared by Poffenroth acting for both Smith and the defendant whereby Smith was to pay defendant $8,000 on May 1, 1921, and the following clause was inserted in the draft agreement:

"The party of the second part hereby undertakes to give and transfer to the party of the first part the said mortgage for eight thousand ($8,000) dollars to the party of the first part to secure the said party of the first part for his payment on May, 1921. ~~This he will do as soon as and when the party of the first part pays off his payment of the last mentioned date to the Johnson Investments Limited, which is due on the said last mentioned first day of May, A.D. 1921, and amounts to seven thousand ($7,000) dollars.~~ The said mortgage of eight thousand ($8,000) dollars shall be applied and be the payment to be made by the second party of the ~~first~~ part to the party of the first part on May 1, 1921."

Defendant says that he asked Poffenroth why he should put that clause in (referring to the clause struck out). Poffenroth said Johnson wanted it, and defendant said, "I absolutely would

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not stand for any clause of that kind because it was not the agreement at all," and the clause was struck out. Later in his defence to the action the defendant denies any mistake and says that the written agreement as entered into sets forth the real intention of the parties and the state of their minds at the time the said agreement was entered into. Upon the trial, the defendant's evidence was to the same effect. The trial Judge believed him and he was corroborated by Bigelow.

Much stress is laid by the appellant upon an agreement between plaintiff and Bigelow for the payment of commission, which was prepared by Poffenroth after the completion of the agreement between the plaintiff and defendant whereby Bigelow was to be paid $1 per acre, $950, as being an admission by the defendant of the alleged mistake in that it contemplates the payment of May 1, 1921, in cash. I do not so regard it. The defendant was not concerned with this agreement. His evidence in reference to it is as follows:

"Q. Do you remember Mr. Poffenroth drawing out this sort of promissory note to Mr. Bigelow for his commission? A. I remember him drawing some paper, I could not say this was the note. Q. Do you remember him drawing a straight promissory note without this condition in it? A. I don't know. I don't know but what he drew a couple of papers up there. Q. About the commission? A. Yes. Q. And you were there listening to it? A. No, I did not have the commission to pay. Q. You heard Mr. Johnson and Mr. Bigelow discussing the question of commission? A. No, I don't think I did. Q. You say you were there while several papers were drawn? A. There were other papers out of that had J. O. Campbell, barrister, on top. I don't know whether I was there when it was signed, I was in a hurry to get home. Q. Did you ever see this paper afterwards? A. No, I have not seen that paper at all, outside of you producing it downstairs the other day. Q. You had never seen this? A. No sir."

Johnson says defendant heard the conversation about the commission. Poffrenroth says he only remembers Bigelow and Johnson being present. The commission agreement is as follows:—(See judgment of Beck, J.A., p. 643.)

I venture to think plaintiff would have considerable difficulty in resisting payment of this commission whether the May 1 instalment were paid in money or by keeping the land. It looks to me very like an absolute agreement to pay on May 1, 1921, that date being positively fixed as the date of the first payment however made. It is scarcely consistent with the plaintiff's version of the agreement under which, if payment were not made

on May 1 the 139 acre lot would have to be sold and only the deficiency would be payable by defendant. In any event, the agreement between the parties to this action cannot surely depend upon whether or not Bigelow can collect his commission. I have not overlooked the evidence of the two McElroy's, it only at the most relates to conversations and dealings with Bigelow to which the defendant was not privy and can be no evidence against him. Upon the evidence I have referred to, I see no foundation whatever for any contention that at the signing of the agreement there was any mistake on his part. His conduct throughout supports his contention; he is the person who knows whether he made a mistake or not; there is no suggestion of any fraud or misrepresentation. The trial Judge has believed his evidence. Unless, therefore, the Court can go beyond his words and conduct and penetrate the hidden recesses of his mind and there discover evidence of mistake, which it cannot, it seems to me the appeal is hopeless. I have some observations to make upon the evidence of Johnson and of Poffenroth. I take it Johnson is a business man. He was present when instructions were given to Poffenroth and took part in giving them. He was present while the documents were being typewritten. They were read over in his presence by Poffenroth, he reading one copy. He took them away to show to his solicitor; not finding him he returned with the seal of the company and with his eyes open and with every opportunity of knowing the contents he deliberately executes the document. The paragraph in question was not an obscure one in a printed form, but was in the supplemental agreement and concerned the matter of payment which one would think he would be most concerned about. Under these circumstances it would take very much stronger evidence than I can find in the record to convince me he was not aware of the contents of the documents he signed.

As to Poffenroth, he being the conveyancer and the man who is said to have made the mistake, is expected to satisfactorily show the mistake and the reason for it. In this, I think his evidence fails. In the first place, all parties agree that he took notes of his instructions at some length. These, if correctly taken, would probably assist very materially but they are not produced and strange to say there is no explanation why they were not produced. The following are extracts from his evidence:—

"Q. Now will you look at this document and tell us what you know about the transaction leading up to the execution of that document as well as about the execution of it? A. On this date, August 12, last year, at that time while I was acting

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for Mr. Fisher, or at least in the office of Mr. Campbell, and as such was acting for him, Mr. Bigelow I think this was the man who came in first and informed me that Mr. Fisher was negotiating with Mr. Johnson to purchase some property north west of Calgary, I think he said. Mr. Bigelow at that time came in alone and of course we sat down and he gave me some explanations—we did not go into it very fully—and then sometime, some little time after, I don't know exactly how long it would be, the three of them came in, as far as I remember. Q. The three would be who? A. Mr. Johnson, Mr. Fisher and Mr. Bigelow. Q. Can you fix the date when they came in? A. It was on this date, August 12, I drew the papers the same day. I asked for the nature of the transaction and we went into it thoroughly. I questioned both parties. Q. And they requested you to incorporate the transaction, the deal, in proper documents? A. True. Q. And that is what you undertook to do? A. Quite. Q. Who gave you the instructions? A. Well I don't know of any particular party. The majority of my instructions were received from Mr. Bigelow. I mean to say I don't know whom I received it from in particular, I believe they are all parties and they all discussed. Q. And agreed upon the terms? A. Yes certainly. Q. Now having regard to that document and having regard to the instructions which you received—by the way did they finally agree upon a deal? A. Yes they did. Q. The instructions which they gave you were quite definite? A. Yes." Q. And the documents were drawn by you all in good faith and in accordance with instructions which you had then? A. Absolutely."

The following is his account of how the mistake occurred:—

"Q. Now what were your instructions in that regard? A. My instructions regarding that was that this particular lot here was to be payment as security for the payment of this amount which is stated here, which was to be met on that date. Q. That is May 1. A. As security. Q. Were there any instructions given to you that that was to be accepted by Johnson Investments Ltd. as absolute payment in case of default of payment—did you receive any instructions that that was to be accepted by Johnson Investments as absolute payment? A. No. Q. How do you account for that variation? A. I account for it this way, that that particular morning—I cannot say definitely, but I think it was about 11 o'clock, just before lunch time, at least. I am sure of this, it was after we had come to terms, I mean to say the terms had been decided upon. Of course I was then instructed to go ahead and draw up the papers, which I did. I

do not remember for what particular reason it was, that I myself typed these papers, I do not know whether we had a girl there at the time that was inefficient or whether the girl was not there this morning, I just can't remember why I typed it myself. Q. You do remember typing it yourself? A. Yes, I went to the typewriter and I started typing out the agreement, and of course it was understood they were to be completed as soon as possible because I was informed—I don't know particularly—well from both parties, I can't say definitely more from one than another, meaning Fisher and Bigelow but that as Mr. Johnson was negotiating with other parties and that as nothing had passed—that is, there were several other parties after this property and they wanted to get the deal through as quickly as possible. One sat on each side of me and helped me along to get the thing completed. Q. They sat on each side of you at the typewriter? A. Yes. I was kind of nervous and that is the only reason I know why I did it. Q. After you started the document did they sit there to the end or did they go out? A. Well I think they went out probably for a short time, but they were there the greater part of the time and they were there when I finished it. Q. They were there when the documents were finished at any rate? A. Yes. Q. When did you finish do you think? A. Oh it was quite late in the afternoon, it took me three or four hours anyhow."

I think some better explanation than this is necessary—three or four hours seems quite long enough to prepare such documents as these. No other witness speaks of any symptoms of nervousness. I would rather expect the result of overhaste or nervousness would be the omission of some term rather than the insertion of something which never was told to him. If it was not in his instructions how did it get into the document? He alone put it there, and after it was there, it had the test of being read aloud by himself in the hearing of three other interested persons who gave the instructions and it met with the approval of all.

I cannot agree that written contracts solemnly executed under such circumstances can be so lightly treated, and would dismiss the appeal with costs.

Appeal allowed.

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RUR. MUN. OF MOUNT HOPE v. FINDLAY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, J.A., and Taylor, J.K.B. (ad hoc). November 28, 1921.

FRAUDULENT CONVEYANCES (§III—10)—TREASURER OF CORPORATION—DEFALCATIONS—MONEY ENTRUSTED TO TREASURER FOR PARTICULAR PURPOSE BY THIRD PERSON—MONEY PAID TO MUNICIPALITY TO COVER DEFALCATIONS—SECURITY GIVEN BY TREASURER TO SECURE INDEBTEDNESS—FRAUDULENT PREFERENCE—VALIDITY—RIGHT OF MUNICIPALITY TO RETAIN MONEY PAID—ASSIGNMENTS ACT R.S.S. 1909, CH. 142, SEC. 39.

The secretary-treasurer of the plaintiff municipality after many years in office resigned. It was then found that he had appropriated to his own use some $16,000 of the moneys of the municipality. The defendant at his request put up a cheque for $2,125, to pay off a mortgage on certain properties. Subsequently the secretary-treasurer sent his own cheque to the defendant to repay this amount, but this cheque was refused at the bank. The defendant later forwarded another cheque for $3,000 for the express purpose of purchasing for the defendant an interest in certain lands. This cheque was endorsed and deposited to the credit of the municipality. The defendant, upon learning that these cheques had been used to cover the shortage to the municipality, took certain securities for the amount of both cheques. The municipality within 60 days commenced an action to set them aside as preferential. Both cheques had been issued upon the account of another party and signed by power of attorney. The Court held that the defendant was a creditor as regards both cheques, and had a clear right to require an accounting and repayment regardless of who had furnished the funds. Held also that under the Assignments Act, R.S.S. 1909, ch. 142, sec. 39, which was the Act in force at the time the assignments were made, the assignments were void and must be set aside. Held, also, that the defendant was not entitled to the return of the $3,000, the loss of the plaintiff's right to bring an action for conversion, against the person making the deposit being sufficient consideration to entitle it to retain the money.

[*London & County Banking Co.* v. *London & River Plate Bank* (1888), 21 Q.B.D. 535, 57 L.J. (Q.B.) 601, applied.]

APPEAL by defendant from the trial judgment in an action brought to set aside certain assignments given to the defendant to secure an indebtedness to him, on the ground that they were preferential and void under the Assignments Act, R.S.S. 1909 ch. 142 sec. 39. Affirmed.

A. E. Hoskin, K.C., and *H. E. Grosch*, for appellant.

Alexander Ross, K.C., and *J. S. Rankin*, for respondent.

HAULTAIN, C.J.S. concurs with LAMONT, J.A.

LAMONT, J.A.:—From 1910 until March 29th, 1918, the plaintiffs had as their secretary-treasurer one W. G. Wright. After he resigned at the end of March, 1918, it was found that he had appropriated to his own use some $16,000 of the moneys of the municipality. He also had other creditors. In January, 1918, the defendant, at the request of Wright, put up a cheque for $2,125 to pay off a mortgage on certain properties. Subsequently, Wright sent his own cheque to the defendant to repay this amount, but Wright's cheque was refused at the bank, owing to

the fact that Wright had not sufficient funds there to meet it. On March 22, 1918, the defendant forwarded to Wright a cheque for $3,000 for the express purpose of purchasing for the defendant a half-interest in certain lands. Wright endorsed the cheque, and on March 28 deposited it to the credit of the municipality. On March 29 he went to Winnipeg, and on April 3 he called upon the defendant and told him that he was short in his account with the municipality to the extent of $3,000, and that he had used the defendant's cheque to cover his shortage. He offered to give the defendant certain securities for the amount. The securities which he had with him were not considered satisfactory, and Wright offered to furnish other securities if the defendant would go up to his house at Semans for them. The defendant took from Wright an assignment of the securities which he had with him and a power of attorney on April 4. He then went to Semans and obtained additional security and had these assigned to himself. These assignments were given to secure the repayment of the two cheques amounting in all to $5,125. Within 60 days from these assignments, the municipality commenced an action to set them aside as preferential. At the trial, it was brought out that both cheques issued by Wright had been issued upon the account of one Agnes D. Beatson (now the defendant's wife), signed by the defendant under power of attorney from her. As these cheques were paid out of Miss Beatson's money and not out of the defendant's account, the trial Judge held that the defendant was not a creditor, that the assignments to him were, therefore, voluntary, and he set them aside. The defendant now appeals.

In my opinion, the defendant was a creditor. As to the sum of $2,125, the defendant paid this amount at Wright's request and in respect of a certain mortgage, the discharge of which Wright was anxious to receive. As to the $3,000 cheque, it was forwarded by Wright to purchase an interest in land in his own name and was paid by the bank on presentation. It is immaterial, it seems to me, whether this order on the bank was drawn against the defendant's own account or against the account of any other person with that person's consent, so long as the bank pays the order on presentation. Miss Beatson, as she then was, is, in my opinion, the only person who can question the defendant's right to use her money as his own under the power of attorney which she had given him, and she does not question his right to do so. If she raises no objection to his doing so, the plaintiffs cannot. The defendant was, therefore, a creditor in respect of the amount of both cheques.

The next question is, do those assignments give the defend-

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ant a preference over the other creditors of Wright? Wright's evidence makes this clear. He testified that, after the assignments were made to the defendant, he had no property whatsoever with which to satisfy his obligations to his other creditors. By the Assignments Act, R.S.S. 1909, ch. 142, then in force it is enacted that, every assignment or transfer of real or personal property made to or for a creditor by a person unable to pay his debts in full, which has the effect of giving such creditor a preference over the other creditors of the debtor, shall in and with respect to any action or proceeding which within 60 days thereafter is brought to set aside such transaction be utterly void as against the creditors prejudiced or postponed, (sec. 39). The assignments made by Wright to the defendant are, therefore, void, and must be set aside.

This, however, does not apply to the assignment or transfer of her property made by Mrs. Wright to the defendant. These he is entitled to hold, because their transfer does not, in any way, hinder or delay Wright's creditors from recovering their claims out of his property.

The only other question is that involved in the counterclaim. In his counterclaim, the defendant asks that the municipality return to him the $3,000 which he sent to Wright and which Wright wrongfully deposited to the account of the municipality. It seems clear that, had Wright cashed the defendant's cheque and out of the proceeds paid his baker, butcher and grocery accounts, the money which settled these accounts could not have been recovered back, unless the parties receiving the same knew that Wright was improperly using money not his own. Should any different result follow where, instead of cashing the cheque and paying his debts out of the money, Wright deposits the cheque to replace in whole or in part sums unlawfully abstracted by him from the funds of the municipality?

The judgment of the House of Lords in *Thomson* v. *Clydesdale Bank*, [1893] A.C. 282, 62 L.J. (P.C.) 91 seems to me to answer the question in the negative. In that case the plaintiffs employed a stock broker to sell for them 50 shares of stock and to deposit the proceeds in their names in certain banks. The broker sold the shares, but deposited the cheque received therefor to the credit of his own account in the defendant bank. At that time his account was overdrawn to an amount exceeding the amount paid in. The bank knew that the cheque paid in was the proceeds of the sale of shares, but did not know and made no inquiry whether the money paid in was in the broker's hands as agent or otherwise. The broker became insolvent, and the plaintiffs sued the defendant bank for the proceeds of the

shares. It was held that the bank was entitled to retain the money in discharge *pro tanto* of the debt due to it from the broker. In his judgment, Lord Herschell, L.C., at pp. 287, 288, said:—

"It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him . . . No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which I need not dwell upon."

The same principle was enunciated by Lord Watson, who, at p. 289, said:—

"When a broker, or other agent entrusted with the possession and apparent ownership of money, pays it away in the ordinary course of his business, for onerous consideration, I regard it as settled law that a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can shew that the recipient of the money did not transact in good faith with his agent."

I am unable to distinguish this case from the case at Bar. The fact that the municipality, at the time the cheque was deposited to its account, did not know of Wright's shortage or of his obligation to make that shortage good, does not seem to me material. In *London & County Banking Co.* v. *London & River Plate Bank* (1888), 21 Q.B.D. 535, 57 L.J. (Q.B.) 601, 37 W.R. 89, the manager of the defendant bank, one Warden, stole certain negotiable securities from his bank and obtained an advance upon them of some £13,000 from one Capps, who had no knowledge of the theft. Later on, as an audit of the bank was approaching, Warden's agent went to Capps and by giving him a cheque for the money and interest due th reon obtained possession of the securities, which Warden returned to the possession of the bank. The cheque given to Capps therefor was dishonoured. Capps in the name of the plaintiff bank brought action against the defendants for the return of the securities. The defendants did not know that Warden had stolen the securities, or that he had become obligated to the bank in respect of

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them before their return. It was held that the defendants were entitled to retain the securities. In giving judgment, Lord Esher, M.R., said at p. 539:—

"These are negotiable instruments, and assuming they were the property of Capps, and had been obtained from him by false pretences or fraud, and assuming that he could disaffirm, are not the defendants persons who have given value for these negotiable instruments, and without any knowledge of a fraud on Capps? The defendants, when Warden stole those securities, could not only have indicted him for the theft, but they could have brought an action against him for the wrongful conversion of the securities. When he restored them, they lost their right, for how could they bring an action for the conversion of instruments which were in their own possession? I am of opinion that the destruction of this right of action is a value moving from them, and that it is immaterial that they did not know what they were doing. There is therefore a sufficient valuable consideration to make the case come within the ordinary rule applicable to holders of negotiable instruments obtained for a valuable consideration, and without knowledge of any fraud."

In the case at Bar, the municipality, before Wright deposited to its account the defendant's cheque for $3,000, could have sued him for the conversion of the $3,000 abstracted which that cheque covered, but after he restored that amount the right of the plaintiff to bring an action for the conversion of that sum was gone. This would appear to be sufficient valuable consideration to entitle them to retain the money, even if they did not know of Wrights defalcation, they having no knowledge of his fraudulent conduct towards the defendant.

It was argued at length that, as Wright was the plaintiff's agent and as he had knowledge that he had no right to use the defendant's cheque to cover his own shortage, the plaintiffs must be held to have had the same knowledge. This contention cannot be upheld. There was, in my opinion, no duty on the part of Wright to disclose to the municipality from whom or in what manner he came into possession of the money with which he covered up his shortages, any more than there was in the case of the manager of the defendant bank in the *London & County Banking Co.* v. *London & River Plate Bank, supra.* As there was no duty upon Wright to disclose that information, his knowledge that he had no right to use the cheque cannot be imputed to the municipality. *Re Hampshire Land Co.*, [1896] 2 Ch. 743; *Young* v. *David Payne & Co.*, [1904] 2 Ch. 608, 73 L.J. (Ch.) 849.

The defendant is, therefore, not entitled to a return of the $3,000 as claimed in the counterclaim. The appeal, in my opinion, should be dismissed with costs.

TAYLOR, J., (*dissenting in part*):—One William G. Wright was secretary-treasurer of the plaintiff municipality between the years 1910 and 1918. In 1915, according to his statement, he commenced to appropriate its moneys to his own use and did so until,—again taking his statement for what it is worth—December of 1917. The plaintiffs have a judgment against him covering these defalcations of about $16,000. If, however, the plaintiffs are bound to repay to the defendant the $3,000 cheque which Wright received from him in the spring of 1918 for one purpose, and which he deposited to the plaintiff's credit, the $16,000 will be increased accordingly. This cheque was made payable to Wright, bears his own endorsement, the endorsement of the plaintiff municipality made, I take it, by him, and, without the knowledge of any other officer of the municipality, was deposited to its credit. The defendant had furnished Wright with a further $2,125 for a specific purpose, which was also misappropriated, so that in April, 1918, Wright had received from the defendant and misappropriated $5,125. This sum the defendant had received from one Agnes Beatson, for whom he acted as attorney and agent and who has since become his wife, and the moneys were not his moneys but her moneys, and it is not, I understand, disputed that the use of her funds by Findlay in the way in which he used them was not within the authority conferred upon him by her. The result, therefore, would be that he, Findlay, was accepting a personal responsibility to her therefor.

On April 3, 1918, Wright on pressure of Findlay, who then knew of the misuse of the $5,125, executed under seal an agreement with Findlay in which his indebtedness to Findlay in that sum is admitted, and in which he assigns to Findlay certain securities, covenants to pay the said sum on April 4, 1918, and there follows a covenant that for further security Findlay is irrevocably appointed attorney of Wright to realize any other indebtedness of any person whomsoever, to Wright or upon any other security or mortgage he may hold, and also a covenant for further assurance. On April 6, 1918, Wright gave to Findlay a general power of attorney. Shortly afterwards (the statement of claim alleges April 10) Wright executed in favour of Findlay assignments of a large number of particular securities, including transfers of land, assignments of shares, transfers of mortgages, chattel mortgages, assignments of agreements of sale and other evidences and securities for payment of money, and

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Wright's wife also assigned certain assets to Findlay. They assigned all they had.

The plaintiffs' action as now framed is to set aside all these securities as fraudulent against other creditors. The action was commenced on 29th May, 1918. The plaintiffs then alleged that on or about April 2, 1918, Wright, then an insolvent to the defendant's knowledge, had assigned all his property to the defendant, and referring also to the power of attorney asked to have the alleged assignment and power of attorney set aside. On July 5, 1919, leave was given to plaintiffs to amend, and on July 10, 1919, the plaintiffs in the amended statement of claim allege the particular assignments of April 10, 1918, as well as the earlier documents, and pray that all be set aside. It will be observed that the action was commenced within 60 days of all the assignments, but the claim as enlarged in the amendment is subsequent to the 60 day period.

The trial Judge held that as the $5,125 was in fact the money of Miss Beatson and not of Findlay, Findlay was not a "creditor," that, therefore, the transactions were voluntary and void and set them aside. The defendants had had counterclaimed for the $3,000, and this claim was dismissed. The defendant appeals, asking that if necessary Miss Beatson be added as a party and allowed to advance her claim, but contends that Findlay is, in fact, a creditor of Wright; that only as to the documents referred to in the statement of claim of May 29, 1918, was the action commenced within the 60 days' period, and the execution having been obtained by pressure those subsequently attacked cannot be set aside. The defendant appeals also against the dismissal of his counterclaim.

I cannot agree with the conclusion of the trial Judge that Findlay is not a creditor of Wright. As I have before pointed out, there is an admission of indebtedness and covenant to pay in the agreement with Findlay. Independently of this to my mind, Findlay, who selected Wright as his agent and furnished the funds to him without reference in the transaction to Miss Beatson, had a clear right to require an accounting from Wright and repayment. The counsel for the respondents, quite properly in my opinion, did not endeavour to support the judgment on this ground.

In my opinion, the contention that the securities referred to in the amended statement of claim cannot be impeached is not tenable. The enabling authority for the plaintiffs' action is in sub.-sec. b of sec. 47 of the Assignments Act, R.S.S. 1909, ch. 142, and in reference to such action, it is therein enacted that "in case any amendment of the statement of claim be made, the

same shall relate back to the commencement of the action for the purpose of the time limited by sec. 39 hereof." In the absence of any reservation in the order allowing the amendment, this provision would seem directly pointed to and made to meet the appellant's contention. It is further to be noted that the effect of the documents attacked in the original statement of claim would appear to be to confer on the defendant an absolute power to obtain any of the securities afterwards assigned, and that the agreement and power of attorney put the defendant in control of the debtor's whole estate, and the action to set these aside may well be deemed an action to impeach a conveyance and assignment by the debtor of his whole estate, and the allegations in the amendment be but the furnishing of fuller particulars of what was "a continued transaction."

The judgment under appeal declaring the various transfers voluntary and void under the Statute of Elizabeth should be amended by inserting in place thereof a declaration that such transactions are, in the words of the statute, utterly void as against the plaintiffs and other creditors of William G. Wright, and the provisions for working out the judgment may well stand. The result is practically the same.

Dealing with the appeal against the dismissal of the counterclaim, in my opinion, this should be allowed. Wright occupied a dual position truly. He was secretary-treasurer of the plaintiff municipality, and carried on business on his own behalf. In the one capacity he received $3,000 from the defendant; in the other, or both, he stole this for his own benefit and that of the municipality. As secretary-treasurer he placed the municipality's endorsement upon the cheque, a step in aid of the misappropriation. It cannot be said that, on the one hand, in his capacity as treasurer he can receive, endorse and deposit the cheque to the credit of the municipality, and because he be a party to the theft, divest the municipality of the knowledge ordinarily imputed to it by notice to its agent. The conversion was complete when the secretary-treasurer acquired the cheque for and on behalf of the municipality. When so acquired he well knew that it was a stolen cheque. If it were that some third person had committed the theft and then handed the cheque to the treasurer, who acquired the same with notice of the theft, it would be beyond question that the money could be recovered. It is well settled law that a person who received in payment for a valuable consideration money which has been wrongfully obtained cannot retain it against the party defrauded where the recipient has notice of the wrong: *Calland* v. *Loyd*, (1840), 6 M. & W. 26, 151 E.R. 307, 9 L.J. (Ex.) 56; *Foster* v.

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Green (1862), 7 H. & N. 881, 158 E.R. 726; *Thomson* v. *Clydesdale Bank*, [1893] A.C. 282, 62 L.J. (P.C.) 91. Brown, J., in *Haug Bros. & Nellermoe Co.* v. *Murdock* (1916), 26 D.L.R. 200, 9 S.L.R. 56, in a judgment concurred in by the Chief Justice of this Court and McKay, J., quoted with approval (at p. 65) the language of Mansfield, C.J., in *Moses* v. *Macferlan* (1760), 2 Burr. 1005 at p. 1012, 97 E.R. 676: "This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged . . . . In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." How then can it but be admitted that the case is made stronger when the treasurer is as well the thief; the more so is the municipality responsible for the acts of its officer who, for its benefit, aids in the perpetration of the crime.

Nor can I follow the argument that it is different where the officer is himself indebted to the municipality, nor how that impairs the justice of the defendant's claim to a return of what was and always is considered his money.

The action is founded upon the same principle as those actions for recovery of money paid under mistake, and in *Canadian Mortgage Assn.* v. *City of Regina* (1917), 33 D.L.R. 43, 10 S.L.R. 30, it was held by the Court *en banc* that the plaintiffs who had under a mistaken belief that a certain parcel of land was included in their mortgage paid to the municipality the taxes charged thereon, could recover amounts so paid for taxes. The plaintiff municipality in this action cannot contend that it has released any claim, surrendered any remedy or altered its position to its prejudice to a greater extent than had the defendant municipality in *Canadian Mortgage Assn.* v. *City of Regina* (*supra*). This cheque was received into the hands of the municipality on March 28, 1918, chartered accountants commenced a thorough audit of his accounts in April, 1918, and this action was commenced in May of 1918. Before the commencement of these actions, the plaintiff municipality would surely have discovered that it had received this particular cheque, and in the action they seek to set aside the securities obtained by the defendant in April, and keep this $3,000 stolen from him and paid to them only a few days before. In good faith the $3,000 should have been immediately returned to the defendant, and if the plaintiff has released any security or abandoned any cause of action, the consequences thereof should, in my opinion, be borne by it, and not the defendant.

Counsel for the respondent pressed upon us on argument

certain English decisions as binding on this Court, and which he argued settled the question in a way contrary to the view I have taken. I have read these cases with care, but in doing so have borne in mind the well known rule laid down by Halsbury, L.C., in *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 506, 70 L.J. (P.C.) 76, 50 W.R. 139.

"Now, before discussing the case of *Allen* v. *Flood*, [1898] A.C. 1, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of *Allen* v. *Flood*.

The decision of the House of Lords in *Thomson* v. *Clydesdale Bank*, [1893] A.C. 282, is the main case so referred to by counsel. The facts are different. A stockbroker received from his customer in usual course of business securities to sell. He deposited the proceeds into his current account with his bankers, again following the usual course of business, and he, being largely indebted to the bank for advances previously made, the bank exercising its bankers' lien applied the balance at his current account towards payment of the advances. It was held that the bank had no knowledge that the funds so deposited were held in trust. I see no analogy to the facts in this case. It would be understood between the bank and the broker when the advances were made that, as bankers, they had a lien on the balances at the credit of his current account, and they but exercised a right which they had acquired for valuable consideration, and without notice, as it was held, actual or imputed, of the broker's fraud.

London & County Banking Co. v. *London & River Plate Bank* (1888), 21 Q.B.D. 535, 57 L.J. (Q.B.) 601, 37 W.R. 89, comes closer to the facts at Bar. The secretary and manager of the defendant bank stole from it certain negotiable securities, using his office to enable him to do so. These securities got into the

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possession of the plaintiff bank for value, and the manager procured some of them and others of a like kind from the plaintiffs by fraud, and restored them to the defendants, who never knew that the securities had been out of their possession. The decision is that the defendants acquired the securities for valuable consideration without notice, and were, therefore, entitled to retain them. What nice equities are raised in this statement of facts. The defendant bank practically had in its hands its own property and the plaintiff bank sought to set up a better equitable claim thereto. The case, as reported in appeal, 21 Q.B.D. 535, (before Manisty, J., (1887), 20 Q.B.D. 232) does not disclose the duties of the secretary and manager. The only suggestion in the report is that he had access to the securities by virtue of his position. There is no suggestion in the report that in his office as secretary and manager of the bank he was entrusted with any control over these securities, or what duties, if any, he for the defendant bank exercised in connection therewith. His position is not shewn, at least by the report, to be similar to that of Wright. The treasurer is the statutory official of the municipality. Any notion that a corporation can in law seek to escape responsibility for its officials performing tortious acts in the capacity of an officer of the corporation on the ground that it is a third party not authorising such acts has long been exploded. An express notice to a treasurer of a municipality is not constructive but actual, and express notice to the municipality when the matter pertains to the functions of the treasurer. In law, it is the municipality acting, not the treasurer.

The report does not suggest that the secretary and manager of the defendant bank in the case under consideration occupied a similar position. The securities were not obtained from the plaintiff bank directly by the secretary and manager. He and a third party had been engaged in operations upon the stock exchange, and this third party, apparently with the connivance of the secretary and manager, obtained the securities from the plaintiff bank by delivering to them his cheque for which there were no funds, then handed them to the secretary and manager, who returned them, I take it, to the vaults of the defendant bank.

The decision in the Court of Appeal was put on the ground that the defendants, when the manager stole the securities, could not only have indicted him for the theft but they could have brought an action against him for the wrongful conversion of the securities; when he restored them they lost their right, for they could not bring an action for the conversion of instruments which were in their possession, and the destruction of this right

of action was a value moving from them which constituted valuable consideration.

The point that the securities had been taken from the plaintiff bank by a third party and then handed to the manager and delivered over to the bank was argued but is not dealt with in the reasons for decision. It does not appear to have been even argued that the manager's knowledge by reason of his position should be imputed to the bank. It may be suggested that it follows logically from the reasoning adopted that every creditor who receives money abandons a cause of action, but it is noted in *London & County Bank* v. *London & River Plate Bank, supra*, that there appears to be no other case on all-fours with it, and I have the high authority of Lord Halsbury to which I have referred, that a case cannot be quoted for a proposition that may seem to follow logically from it.

These two cases, undoubtedly, go farther in the plaintiffs' favour than any of the others which have been cited to us. I think it unnecessary to discuss any of the others. On the facts of this case, I think it should be found that the knowledge of the plaintiffs' treasurer was its knowledge, and that it acquired the $3,000 in question with the knowledge that it had been stolen and, therefore, the defendant is entitled to the return thereof. The appeal against the dismissal of the counterclaim should be allowed and there should be judgment on the counterclaim for the sum of $3,000 with interest from March 28, 1918.

Appeal dismissed.

THE KING v. PERREAULT.

Exchequer Court of Canada, Audette, J. May 1, 1922.

COURTS (§III—196)—EXCHEQUER COURT—JURISDICTION—WRECK COMMISSIONER'S COURT—CANADA SHIPPING ACT (R.S.C. 1906, CH. 113)—APPEAL—CROWN—RIGHT TO CHOOSE ITS COURT.

1. The Crown by information sought to recover from a pilot the amount of a fine and costs, which he was condemned to pay by the judgment or decision of the Commissioner's Court created under the provisions of the Canada Shipping Act (R.S.C. 1906, ch. 113, secs. 781 to 809 and amendments) relating to shipping casualties, etc.

Held that the Exchequer Court had no jurisdiction by way of appeal from such decision.

2. Section 806A of said Act (as enacted by 7-8 Ed. VII., ch. 65), provides that there shall be no appeal from the decision of the said Commissioner's Court, except to the Minister of Marine and Fisheries; and that the judgment of the Court cannot be set aside for want of form, etc., nor removed to any Court by *certiorari* or otherwise.

Held that the reopening of the case for the purpose of annulling or vacating the judgment aforesaid by means of collateral attack would be in direct violation of the statute.

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3. That the Crown, having obtained the judgment of a statutory Court, was free to choose its Court to effectuate its rights thereunder, and the Exchequer Court of Canada is seized of jurisdiction for such purpose, both under sec. 31 of the Exchequer Court Act, and the Canada Shipping Act.

INFORMATION exhibited by Attorney-General of Canada seeking to recover from defendant, a pilot, a sum for which he had been condemned by the Court of Investigation of Shipping Casualties, under the Canada Shipping Act.

J. C. H. Dussault, K.C., for plaintiff.

Charles E. Gaudet, K.C., for defendant.

AUDETTE, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover, from the defendant, the sum of $337 being the amount of the finding or decision of the Court of Investigation created under secs. 781 *et seq.* of the Canada Shipping Act, ch. 113, R.S.C. 1906, as amended by 1908, ch. 65.

This amount claimed is made up as follows and is to cover the "expenses of investigation, comprising the travelling expenses of the commissioner and his secretary from Ottawa to Montreal, and the fees of the assessors, $160; fine for breach of regulations, $40: $200. Cost of French evidence, $137: $337.

The only appeal from the judgment of the Court of Investigation is to the Minister as provided by secs. 802 and following, as amended by the Act of 1908.

The Exchequer Court has no jurisdiction to sit on appeal from the decision at first instance or from the decision of the Minister, and cannot hear an attempt to impeach such decision even upon grounds going to its legality or regularity. The re-opening of the case would be in direct violation of the statute and the doctrine of *res judicata* would be despoiled of its effect. What the defendant seeks to do here is to have the judgment annulled by means of a collateral attack.

A "collateral attack" on a judgment is, in its general sense, any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree. The fact that the parties are the same, and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule, or make the attack any the less a collateral one. It is well settled that judgments of a Court of competent jurisdiction are not subject to collateral attack, unless they are void, and by "void" is meant that they are an absolute nullity. Words and Phrases, 2nd series, pp. 753, 754, citing *The People* v. *McKelvey* (1903), 74 Pac. 533, 534, 19 Colo. App. 131; *Cochrane* v. *Parker* (1898), 54 Pac. 1027, 12 Colo. App. 169.

By section 806A it is provided as follows:—

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"806A. There shall be no appeal from any decision of a court holding any formal investigation under this Act, except to the Minister for a rehearing under the provisions of section 806.

2. No proceeding or judgment of a court in or upon any formal investigation shall be quashed or set aside for any want of form, nor shall any such proceeding or judgment be removed by *certiorari* or otherwise into any court; and no writ of prohibition shall issue to any court constituted under this Act in respect of any proceeding or judgment in or upon any formal investigation, nor shall such proceeding or judgment be subject to any review except by the Minister as aforesaid."

These provisions reinforec the well-known maxim *omnia presumuntur rite et solemniter esse acta.*

This Court has no power to go behind the judgment of the Court of Investigation.

The King, having obtained the judgment of the statutory Court, can choose his own Court to effectuate his rights thereunder and the Exchequer Court is a Court seized of such jurisdiction both under sec. 31 of the Exchequer Court Act, R.S.C. 1906, ch. 140 and the Canada Shipping Act.

There will be judgment against the defendant for the sum of $337 and interest, as prayed.

Coming to the question of costs I think that substantial justice will be done between the parties under the circumstances if I lump the plaintiff's costs at $75, and I hereby order and adjudge accordingly.

Judgment accordingly.

SIMONIN v. PHILION.

Saskatchewan King's Bench, Mackenzie, J. March 3, 1922.

BILLS AND NOTES (§IIIA—55)—ENDORSER—SIGNING NOTE ON FACE—INTENTION OF SIGNING AS ENDORSER ONLY—LIABILITY—NOTICE OF DISHONOUR.

Where it is clearly shown that the intention of a person signing a promissory note, was to sign as an endorser only, he is only liable as an endorser, although he has signed the note on its face, and apparently as a maker, and is entitled as such to notice of dishonour.

ACTION on a promissory note.

T. C. Davis, for plaintiff; defendant in person.

MACKENZIE, J.:—This is an action on a promissory note dated September 3, 1918, for $600, payable to the plaintiff on January 1, 1919, and signed on its face by one H. E. Noel and the defendant, Philion. The said defendant signed the note at the instance of the plaintiff through his representative, one Renaud, who desired him as an endorser. The defendant swears that in so signing the said note he intended to become an endorser.

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From the examination of the plaintiff for discovery, it is clear that the plaintiff never had any intention other than treating the defendant as an endorser to whom he could look for payment if the said Noel failed to do so. In this respect this note is easily distinguishable from the case of *Hough* v. *Kennedy* (1910), 3 Alta. L.R. 114, cited by the plaintiff's counsel, where the defendant admittedly signed as an accomodation maker. The said Noel has never paid the said note. It is conceded by the plaintiff that no notice of dishonour was ever given to the defendant herein. Indeed, the situation in regard to the said Noel's default in payment was not disclosed by the plaintiff to the defendant until July 19, 1920.

The only question which I reserved to decide was whether, notwithstanding the above clear intention on the part of both parties, the defendant, by signing the said note on its face, and apparently as maker, has precluded himself from now claiming that he is merely an endorser. According to sec. 131 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, no one is liable as drawer, endorser or acceptor of a bill who has not signed it as such, and an examination of the authorities would indicate that a signature on the face of a bill may be a valid endorsement and that where the intention is to sign for that purpose, it makes no difference where the signature is placed. (See Hals. vol. 2, p. 504; *Ex parte Yates* (1858), 2 De G. & J. 191, 44 E.R. 961, 27 L.J. (Bcy.) 9.)

I, therefore, find that the defendant is not a maker of the note as the plaintiff alleges in his statement of claim, but an endorser, and that, as no notice of dishonour was given to him, he has been discharged from his liability. (See sec. 96 Bills of Exchange Act and Falconbridge on Banking and Bills of Exchange, 2nd ed., p. 651).

I therefore dismiss the action with costs.

Action dismissed.

ELDRIDGE v. ROYAL TRUST Co.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. June 29, 1922.

GIFT (§ III—16)—PURCHASE OF REAL ESTATE BY FATHER—TRANSFER MADE TO SON—PRESUMPTION OF GIFT—SUFFICIENCY OF DELIVERY—RIGHT OF SON TO DELIVERY OF TRANSFER ON DEATH OF FATHER.

Where a father buys property stating at the time that he wishes the transfer made out in the name of the son, and after payment of the purchase price the transfer is made out in the name of the son, there is a presumption of gift on account of the relationship of the parties, although the father keeps possession of the transfer for a number of years, and receives the rents and profits from the land, the father having

done all in his power to complete the gift, except the physical delivery of the transfer, the son is entitled to delivery of such transfer in the absence of evidence to rebut the presumption and establish a resulting trust.

[*Sayre* v. *Hughes* (1868), L.R. 5 Eq. 376; *Commissioner of Stamp Duties* v. *Byrnes*, [1911] A.C. 386, applied; *Curtis* v. *Langrock* (1922), 63 D.L.R. 282, 17 Alta. L. R. 160; *Anning* v. *Anning* (1916), 34 D.L.R. 193, 38 O.L.R. 277, referred to.]

APPEAL by an administrator from the trial judgment in an action by a son to compel delivery of a transfer and duplicate certificate of title. Affirmed.

The judgment appealed from is as follows:—

WALSH, J.:—In October, 1913, Samuel Eldridge agreed to buy a half section of land from one Cluff, he (Eldridge) being named in the agreement of sale as the purchaser. In the same month he wrote Cluff stating that he wanted the transfer made to his son Charlie because he was buying the farm for him as he was coming from North Dakota to live in Alberta. The plaintiff's right name is Arthur E. Eldridge, but he was commonly known in the family and by his father as Charles or Charlie, and he is, I am satisfied, the son referred to in this letter. No mention of him was made when the agreement was entered into. Cluff had the transfer prepared in accordance with this request in the name of Charles Eldridge and the same year Samuel Eldridge paid him out of his own means the full purchase price of $3,500 and Cluff delivered the transfer to him together with the duplicate certificate of title to the land covered by it. This transfer has never been recorded and so the registered title is still in Cluff. Samuel Eldridge died in November, 1920, and after his death the agreement of sale, transfer and duplicate certificate were found in the locked trunk in which he kept his securities and other papers unaccompanied by anything relating to any gift of the land from him to the plaintiff, or explanatory of the transfer being in his name.

The plaintiff brings this action to compel the delivery to him by the defendant, the administrator of the father's estate, of the above transfer and duplicate certificate.

The plaintiff did not know even of the existence of this transfer, much less that it had been taken in his name until after his father's death. Ever since its purchase from Cluff, this land, was during the father's lifetime, occupied by tenants who held it under written leases in which he is named as lessor. The breaking on it during this period was increased by about 200 acres under the father's directions. The tenants took all of their instructions from him and accounted to him for the lessor's share of the crops, the leases having been on the crop-sharing plan,

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and he, on his part, supplied the seed wheat and performed the other obligations resting on the lessor. He received all the rents and profits from it and he met all expenditures for fencing, taxes and otherwise, in connection with it either out of his own pocket or from the rents and profits. All of this was done without the knowledge of the plaintiff and without any communication to or consultation with him. In short, the father dealt with this farm during the 7 years intervening between his purchase of it and his death in every respect as though he was the owner of it. The plaintiff did not come to Alberta to live, nor did he even visit his father here, his first trip to Alberta being apparently made after his father's death for the purpose of attending his funeral. Although he and his father wrote each other several times, no letter was produced or even spoken of as referring to this land or to the gift of it to the plaintiff. Torpe, one of the tenants, swore that in 1919 he had a talk with the deceased about buying the farm, and he told him that he could not sell it, because he had given it to his son Charlie. Bergley, the other tenant, swore that the deceased said to him, when he had broken 200 acres, that he had done enough, and if there was any more to be done the other fellow could do it. He also swore that in 1920 the deceased told him that he was offered $8,000 for the place, but that he did not own it as he had given and deeded it to his son Charlie. I see no reason to question the honesty of these witnesses.

It is suggested that the deceased was peculiar in his business methods, this suggestion resting on the fact that though he kept a bank account he always made payments by bank notes and never by cheque. The full purchase price of $3,500 for this land was paid in bank notes which filled a small sack. He would carry hundreds of dollars around in his pocket and pay in money his taxes, store bills, and nearly everything else. It is also shewn that an unregistered lien note for $40 and an unregistered chattel mortgage for $150 were found amongst his papers. The net value of his estate in Alberta and North Dakota is put at $91,155.87, and the land in question is now and was at the death of the intestate valued at $10,000. This covers, I think, all of the material facts proved and admitted at the trial.

I am satisfied that the father intended to give this land to the plaintiff and that he thought he had done so. The fact that the transfer was taken in his name raises a presumption of that intention, a presumption resting upon the fact of their relationship as parent and child. The onus is on the defendant to rebut that presumption and this it has not done. Apart from that, this presumption is turned into a certainty by the declarations of

the father shewing not merely an intention to give but a gift actually made. The only question is whether or not this intention was perfectly effectuated so far as the nature of the property admits for a gift to be valid must be complete.

Now, it is clear from the foregoing statement of facts that the only thing that the father did as distinguished from what he said to effectuate this intention was to have the plaintiff named as transferee in the transfer from Cluff. There was no communication to him either of the intention or the accomplished fact, no delivery to him of the transfer, no placing of him in possession of the land.

Ever since *Milroy* v. *Lord* (1862), 4 DeG. F. & J. 264, 45 E.R. 1185, 31 L.J. (Ch.) 798, it has been well settled that "in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him." The things "necessary to be done" are in the light of the authorities those necessary to be done by the donor.

What more was necessary to be done by the deceased to perfect the gift that he intended to make? There were of course other things that he could have done. But were they necessarily to be done by him? He could have registered the transfer, but the plaintiff could have done that just as well and just as effectually and so it cannot be said that the father needed to do it. He could have delivered it and the duplicate certificate to the plaintiff, and by so doing have put the completeness of the gift beyond question. Re Hobson Estate (1901), 7 Terr. L.R. 182. I say this in the face of my own decision in *Smith* v. *Smith* (1915), 21 D.L.R. 861, a case which, by my further study of the law for the purposes of this judgment, I am now satisfied, I regret to say, was wrongly decided by me. But was such delivery necessary to perfect the gift? In *Anning* v. *Anning* (1907), 4 C.L.R. (Aust.) 1049, a judgment of the High Court of Australia, which contains the most exhaustive review of the authorities on the law of gift that I have been able to find, Griffith, C.J., at p. 1057, in illustrating his view of what was necessary to be done by the donor in various cases to perfect the gift said, "So, in the case of a gift of land held under the Acts regulating the transfer of land by registration, I think that a gift would be complete on execution of the instrument of transfer and delivery of it to the donee." This, however, is *obiter* on the part of the Chief Justice, who perhaps had in mind a transfer of his own land signed by the donor and not such a transfer as we have here. The Supreme Court of Canada in *Zwicker* v. *Zwicker* (1899),

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29 Can. S.C.R. 527, held that the effect of a properly executed deed of land (which in that case was evidently either a deed of gift or part of a transaction which amounted to a family settlement) could not be controlled by the facts that its possession was retained by the grantor until his death, that its existence had not been communicated to the grantees and that inconsistently with its tenor the grantor had retained the possession and enjoyment of the property until his death. There is a difference between that case and this because the Court there was dealing with one of the forms of conveyance used in Nova Scotia of which delivery is an essential part of the execution and was really deciding whether or not the deed was ever so delivered as to take effect as a duly executed instrument. In addition, there is the further distinction that the question which arose there was as to the sufficiency of the delivery made by the grantor and that cannot possibly arise here, for in this case the delivery by the transferor is established. What I am dealing with is the need for delivery to the transferee of a transfer delivered by the transferor to some one other than the transferee before such equitable interest in the land as passes under our system by an unregistered transfer vests in the transferee. If this transfer had been from the father to the plaintiff, the facts of this case would have been identical with those in the *Zwicker* case and apart from any distinction arising from the difference in the methods of transfer in the two Provinces, that case would have absolutely governed this. The principle of that decision might perhaps be properly applied to the facts of this case, but I prefer to rest my conclusion that delivery of the transfer to the plaintiff was not necessary to round out this gift upon my view of the situation created by its delivery to the father.

Under our Land Titles Act, ch. 24, 1906, the legal estate of this land is still in Cluff for until registration of the transfer it is not effectual to pass any estate or interest. In Hogg's work on the Registration of Title to Land Throughout the Empire, at p. 116, he thus expresses his opinion of the effect of the decisions of the Courts upon this question, in Alberta and other jurisdictions under the same system as ours:—

"An unregistered interest passes no actual interest in the land that can be called an equitable estate in the ordinary sense but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purporting to be conveyed by the instrument."

In support of this opinion are cited the Australian case of *Barry* v. *Heider* (1914), 19 C.L.R. (Aust.) 197, where at p. 198 it is said, "An unregistered transfer of land confers upon the

transferee an equitable claim or right to the land," and our own case of *Wilkie* v. *Jellett* (1896), 26 Can. S.C.R. 282, in which case, in delivering the judgment of the Court below, 2 Terr. L.R., McGuire, J., speaks, at p. 149, of the registered owner being "a mere trustee for some one else who is the real, the beneficial owner," though he refers to the unregistered transfers as being "after all little, if anything, more than agreements binding on the vendors." *Howard* v. *Miller*, 22 D.L.R. 75, 20 B.C.R. 227, at 230, [1915] A.C. 318, 84 L.J. (P.C.) 49, is also cited.

The agreement between Cluff and the father was fully executed by both parties. It is a completed transaction. While the legal estate still remains in Cluff because of the non-registration of the transfer, he is a mere trustee of it. He has done everything necessary to be done by him to divest himself of it and to pass it to his transferee. He cannot be asked for more, nor can he safely do anything in derogation of his transfer, at least without the consent of the transferee. For whom is he a trustee? In my opinion, for him to whom the equitable interest passed under the transfer, and that can be none other than the plaintiff. By what title can the father's estate claim to be recorded as the legal owner of the land? Not under the original agreement of sale, for it was ended by and merged in the transfer. Not under the transfer, for no interest whatever passed to the father under it, and the facts exclude the presumption of a resulting trust in his favour. In my opinion, this became a perfect gift on the execution and delivery of this transfer to the father. *Re Smith; Bull* v. *Smith* (1901), 84 L.T. 835, 17 Times L.R. 588, might be looked at. That was the case of a purchase of shares in the wife's name. There is some analogy between such a case and this, for the complete legal title to shares is not obtained by the transferee until the transfer is registered and until registration, the transferor is a trustee of them for the transferee. Notes to Palmer, p. 666. On the other hand, *Forrest* v. *Forrest* (1865), 34 L.J. (Ch.) 428, 13 W.R. 380, much relied on by Mr. Ford, is a case in which, though the shares were actually put in the name of the party claiming them as a gift, it was held that no completed gift had been made.

It is argued that because of the reason given to Cluff by the father for having the transfer made to the plaintiff, namely, that he was coming to Alberta to live, the inference may be drawn that the gift was intended to be conditional upon the happening of that event which never happened. Any such idea as that is dispelled, however, by the fact that 6 or 7 years after this purchase was made, he spoke of the land as the plaintiff's and that

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he retained the transfer until his death in its original form without, so far as is disclosed by the evidence, ever suggesting to Cluff its destruction or the substitution for it of one in his own name. In support of this argument, the fact is relied upon that the plaintiff is described in the transfer as being "of the post office of Metiskow in the Province of Alberta." There is nothing in the evidence to indicate that he was so described under the instructions of the deceased. The transfer was apparently prepared and executed in its present form at Hardisty a few days before the purchase was completed at Metiskow, and I should say that the probabilities are that Cluff instructed this description of the plaintiff's residence in reliance upon the father's statement as to his son's contemplated change of residence.

It is argued that as there was no communication of this gift to the plaintiff, it was not complete, because acceptance of it by him was necessary to its completion. Express acceptance of it by him was unnecessary to complete it, for acceptance is to be presumed until he signified his dissent, even though not aware of the gift. *Standing* v. *Bowring* (1885), 31 Ch. D. 282, 55 L.J. (Ch.) 218, 34 W.R. 204. As Cotton, L.J., put it in that case at p. 288: "Now I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once, before he knows of the transfer subject to his right when informed of it to say if he pleases, 'I will not take it.'"

It is also contended against the completeness of this gift that the father controlled this property during his life without the plaintiff's concurrence or either profit or loss, as the case might be, by its operation. In addition to *Zwicker* v. *Zwicker, supra,* the judgment of the Judicial Committee in *Commissioner of Stamp Duties* v. *Byrnes,* [1911] A.C. 386, 80 L.J. (P.C.) 114, may be usefully read in this connection. I do not think that this fact alone is sufficient to destroy the gift. Objection to the plaintiff's right to succeed is further based upon the evidence of the Deputy Registrar of Land Titles that the transfer in its present form is not fit for registration as it lacks the necessary affidavits under the Unearned Increment Tax Act and does not reserve to His Majesty the mines and minerals, to which reservation Cluff's title was subject. I do not think that this objection can prevail. All that the plaintiff asks for is an order for the delivery of these documents to him, no matter how many may be his difficulties in procuring the registration of the transfer.

The papers are his, in my opinion, and whether defective or not he is entitled to the possession of them.

My conclusion, after a very careful consideration of the case from every aspect, is that the plaintiff is entitled to the relief which he asks, and the judgment will be accordingly.

Mr. Ford asked a declaration that this land must be brought into hotchpot if I gave effect to the plaintiff's claim. I do not think that I can decide this question in this action. It is one which will necessarily arise in the administration of the estate if this judgment stands, and it should be then disposed of. That is the view taken of the same question by the Appellate Division in *Groat* v. *Kinnaird* (1914), 20 D.L.R. 421, 7 Alta. L.R. 390. The plaintiff is entitled to his costs out of the estate, as is also the defendant.

Frank Ford, K.C., and *Alex. Knox*, K.C., for appellant.

F. C. Jamieson, K.C., and *Cecil Rutherford*, for respondent.

SCOTT, C.J., concurs with BECK, J.A.

STUART, J.A.:—I think this appeal should be dismissed with costs. As to the perfection of the gift, I am unable to agree that there ever was a gift of the money. But with regard to the gift of the land, my opinion is that when the deceased, who had a right, upon payment of the purchase money, to demand a transfer from the vendor, asked the vendor to make out that transfer to the son, paid the money, and received the transfer to the son and the certificate of title he, the deceased, had relieved the vendor from all further obligation in the matter. No one had, thereafter, any right to make any further demand whatever upon the vendor. His obligation was to sign a transfer and deliver it and the certificate and he did as he was requested by the only one who had any right to make any demand upon him. When the transfer was delivered, it was, I think, delivered to the transferee. Eldridge treated the delivery as being sufficient to satisfy Cluff's obligation to him, and, in that case, it must have been a delivery to the transferee or to some one for him, i.e., to be held for him, the named transferee. I think, therefore, that the deceased held the transfer, not as a lingering protection to some right of his own, because the transfer could not give him the land and, as I have said, he had no right whatever to have any further recourse to Cluff or to ask him to sign another one of any kind, but for the son, not as an estate in the land but as a mere chattel the possession of which would be all that the son would require in order to have the property registered in his own name. The son's recourse is not to a Court of Equity but to a Court of Law demanding delivery of a document, and that document, too, not a deed or instrument

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signed or executed by the person in possession and refusing to deliver, but by a third party upon whom no further demands could possibly be made.

I think there was a gift, and a perfect one. There is then a presumption of advancement which must be rebutted and I have failed to discover anything in the evidence to reveal any reason which the father could have had for putting the land in the son's name other than a desire to advance him in life. There has been no rebuttal of the presumption.

BECK, J.A. (dissenting):—This is an appeal by the defendant company from the judgment of Walsh, J., at trial.

The defendant company is the administrator of the estate of Samuel Eldridge, deceased, who was the father of the plaintiff. The plaintiff in his statement of claim alleged that on or about October 31, 1913, the deceased purchased in the plaintiff's name, and for the plaintiff, a certain half section of land and obtained a transfer thereof in the name of the plaintiff; that the deceased, through his ignorance of the law and customs of Alberta, or through an over-sight, retained the said transfer and the duplicate certificate of title in his possession, and did not have the same registered; and that the transfer and duplicate certificate of title are now in the defendant's possession, who refuses to give them to the plaintiff, although a demand has been made.

The plaintiff claims an order that the defendant deliver to the plaintiff the transfer and duplicate certificate of title, or in the alternative, an order vesting the land in the plaintiff.

The plaintiff, whose proper name is Arthur E., was known in the family as Charlie or Charles. He was the eldest of 6 children of the deceased. The deceased was divorced from his wife, the mother of these children. He married again in 1908, and his second wife survives him. The deceased's family by his first wife, or at all events the plaintiff, has resided for many years at or near a place called Valley City, in North Dakota.

The deceased came from North Dakota in 1911 with his wife to Alberta. He bought a farm about 10 miles from a place called Metiskow, and was living on it and farming it when, on October 2, 1913, he entered into an agreement with a man named Cluff of Hardisty to buy the land in question in this action, which is distant about a mile and a half from the farm on which the deceased lived. The agreement is expressed to be between Cluff and the deceased. The price stated is $3,500 to be paid on November 2, 1913, with interest at the rate of 8% per annum. Some day or two before October 31, 1913, he wrote to Cluff asking him to come to Metiskow and get the purchase money, and at the same time bring along a transfer made out in the

name of Charles Eldridge. Cluff came to Metiskow, bringing a transfer made out to "Charles Eldridge of the Post Office of Metiskow, in the Province of Alberta, farmer." It does not appear whether or not the deceased's letter requested this statement of residence and occupation. It is natural to suppose that the transfer was drawn upon a printed form. It acknowledged the consideration of $3,500 to have been paid by Charles Eldridge. The money was paid by the deceased and the transfer and certificate of title in Cluff's name were handed to the deceased. Cluff says: "As far as I remember he (the deceased) explained the reason for having the transfer made out to *his son was that his son was coming up from the States.*" He says he does not remember anything being said at the time the agreement was made about the land being intended for the deceased's son.

The deceased retained the certificate of title and the transfer (unregistered) and they, with a duplicate of the agreement for sale, were both found among his papers after his death, in a locked trunk. He never told his son Charles anything about this particular land, nor did he tell his wife, so she says, anything about Charles in relation to this land.

Charles never came to Alberta. The deceased, his wife says, went back to Dakota only once, that is, probably in 1915 or 1916. He went, apparently, because Charles was sick. But not even on that occasion did the deceased tell Charles about this land, for it is admitted that Charles did not know of the existence of the transfer in his favour until after his father's death, or even that his father had purchased the land.

At the time the deceased purchased the land there were 37½ acres of it broken. It now has 240 acres broken, and is estimated to be worth about $10,000.

A witness, Bergley, says he was tenant of the land for 6 years, I gather covering the years 1915 to 1920. One Torpe, his son-in-law, was tenant with him during apparently the year 1920, and in partnership with him during the year 1919. The leases seem to have been oral, except the lease of Bergley and Torpe, which was in writing for 1 year. The leases were "on shares." The deceased throughout made the leases, took the profits, paid for the seed grain, paid for the breaking and paid the taxes on the land.

The deceased died November 16, 1920.

Putting the time as September, 1920, Bergley relates a conversation with the deceased as follows:—"He was telling me one day about having an offer of $8,000 for the south half (the whole of the land in question), the one I had rented; $3,000

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down, if I do not remember wrongly; and I said: 'Don't you consider that is a pretty fair price?' 'Well,' he says, 'it probably would be, but,' he says, 'I am not to sell this place; it don't belong to me any more'; and I said: 'Well now, who would own it, if you don't?' and he said: 'I have given this to my son Charley.'" Cross-examined upon this statement, he said as follows:—

"Q. Was any other word used? A. Well, I would not say whether it was 'I gave it' or 'I have given it.' Q. Did you say when you were good enough to come to me about it, 'I have deeded it to him'? A. Well, I left out 'deeded'; it is my mistake. Q. Do you remember telling me: 'I deeded it to him' stuck in my memory? A. Well, I have just left it out here. Q. But do you remember it here that his words were, 'I deeded it to him'? A. 'Deeded it to him' and 'gave it to him' both. That was the words."

He said that was the first and only conversation in which he referred to the place as Charles'.

Torpe, called as a witness, said that in 1919 he asked the deceased if he would sell him this farm and that the deceased said no, he could not sell it, he had given it to his son Charley; and the witness said that just after this conversation took place he related it to Bergley.

The evidence of these two witnesses, Bergley and Torpe, is the only evidence of an oral expression of intention with regard to the land made by the deceased after he had paid for the land. Such evidence is, I suppose, admissible, but obviously little weight should be given to casual statements made to strangers and under circumstances which suggest that they may have been made merely by way of excuse.

The original intention of the deceased in taking the transfer in his son's name was evidently that he desired and expected his son to leave North Dakota and to come to Alberta and live upon the land in question, which was quite near the farm of the deceased. Were it not for the evidence of Bergley and Torpe, it seems to me that in view of the deceased's statement to Cluff, his dealing with the land and the profits from it for 7 years, his retaining the documents of title in his possession unregistered, his refraining from telling any one of the alleged gift, especially the alleged donee, it would have been quite impossible to find that the deceased had ever held a fixed, absolute, unconditional, final intention to make a gift of the land to his son. If this is so, the evidence of Bergley and Torpe seems very slender evidence upon which to find the contrary. In view of the fact that the plaintiff claims as a mere volunteer

and that the subject matter is of quite large value, I think it ought to be held that he has not proved such an intention.

If the question of intention were to be decided the other way, there still remains the question whether there was ever a perfected gift.

If there was an intention to give, it was clearly an intention to give the complete ownership of the land—the *legal* as well as the beneficial interest. It is unquestionable that there was no perfected gift of the *legal* estate, the legal title passes only upon registration. The purpose of the action is, and the effect of a judgment in favour of the defendant would be, to force the deceased's representative to perfect a gift of the legal estate left imperfect by the deceased, and it is clear that the plaintiff is not entitled to any order of this Court which will have that effect. Was there a perfected gift of the beneficial interest?

It seems to me that if, as is clear, a gift was intended as a gift of the father's entire interest in the land both legal and beneficial, these interests cannot be severed, in as much as they were evidently not separated in the mind of the donor.

If it is said that the deceased, though having no idea of separation of the two estates in his mind, must be taken to have supposed that the certificate of title and the unregistered transfer were all that was necessary for the purpose he intended; first, his mistaken supposition that the gift was perfected would be insufficient, and secondly, in order for the plaintiff to be entitled to the possession of the certificate and transfer, it would be necessary to hold that the deceased constituted himself a trustee of these two documents and constituted Cluff a trustee of the legal estate, both for the son; and the decisions warn us to avoid perfecting an imperfect gift by finding a trust. In my opinion, there was no perfected gift of the land.

Mr. Jamieson for the plaintiff urges the view that there was a gift of the purchase money. It seems to me that to so hold would be attributing to the deceased an intention which the evidence indicates was not the true intention of the deceased.

On the whole, I think the plaintiff fails, and consequently the appeal should be allowed with costs, and the action dismissed with costs.

It may be worth while pointing out that, if the plaintiff were to succeed, he would, in all probability, have to bring the value of the farm into hotchpot upon a distribution of the estate. See Corpus Juris, vol. 18. tit. Descent and Distribution, ss. 201; ss. 240; ss. 245-6. Ency. Laws of England, 2nd ed. tit. Hotchpot, vol. 6, p. 612.

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We had recently to deal with the law as to gifts in some of its aspects in *Curtis* v. *Langrock* (1922), 63 D.L.R. 282, 17 Alta. L.R. 160, which may be worth referring to.

Our attention was called, after argument to *Anning* v. *Anning* (1916), 34 D.L.R. 193, 38 O.L.R. 277, which has been considered.

HYNDMAN, J.A.:—This is an appeal from the judgment of Walsh, J. who gave judgment in favor of the plaintiff.

The facts are fully set forth in the judgments of the trial Judge and Beck, J.A.

It has been laid down by a long list of authorities that when a man purchases land and takes the title in the name of another, a resulting trust is presumed to arise in favour of the person paying the money, unless such presumption is rebutted by evidence to show that a gift was intended; except, however, that when the person in whose name the property is purchased happens to be a wife, child or near relative the situation is reversed and the payment of the purchase money is considered *primâ facie* to be an advance (see *Re Hobson Estate*, 7 Terr. L.R. 182. Lewin on Trusts (8 Eng. ed.) 163; Storey Eq. Jur. 13th ed. para. 1201) because it will be presumed that it was intended as an advancement and provision in discharge of a moral obligation, or as a token of affection; unless there are circumstances which furnish a strong presumption of a contrary intention; such as a contemporaneous declaration or act of the purchaser or transferor to manifest an intention that the other party should take as a trustee. A subsequent act or declaration by the former will not suffice to negative an advancement. (See Smith on Real and Personal Property vol. 1. p. 310 and case cited.)

In *Sayre* v. *Hughes* (1868), L.R. 5 Eq. 376, Sir John Stuart, V.C. at p. 381, quoting Chief Baron Eyre in *Dyer* v. *Dyer* (2 Cox 92) said:—"The clear result of all the cases, without a single exception is, that the trust of a legal estate, whether freehold, copyhold, or leasehold—whether taken in the names of the purchasers and others jointly, . . . (or) in one name or several, whether jointly or successively, results to the man who advances the purchase money. This he says, is in 'strict analogy to the rule of the Common Law, that where a feoffment is made without consideration the use results to the feoffor. But it is the established doctrine of a Court of Equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further and prove that the circumstances of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust.'"

At p. 382 the Vice Chancellor goes on to say:—"In *Grey* v. *Grey* (2 Sw. App. 594) the father received the profits after the

purchase, and that was an important circumstance—the immediate benefit being for the father himself. But Lord Nottingham says (2 Sw. 600): 'The difference I rely upon is this: Where the son is not at all, or but in part advanced, and where he is fully advanced in his father's lifetime.' If the son be not at all, or but in part advanced, there if he suffer the father who purchased in his name to receive the profits, this act of reverence and good manners will not contradict the nature of things and turn a presumptive advancement into a trust; the rather because in this family there were neither debts nor casualties, so no occasion to create trusts; but if the son be married in his father's lifetime, and by his father's consent, and a settlement be thereupon made, whereby the son appears to be fully advanced, and in a manner emancipated, there a subsequent purchase by the father in the name of such a son, with perception of profits by the father, will be evidence of a trust; for all presumption of an advancement ceases.'"

Leaving aside for the moment the effect of an unregistered transfer, it seems to me the moment such transfer was signed (subject to registration) the land became the property of the plaintiff, Cluff having been paid in full and divested of all interest except the bare legal estate which latter also on registration would be effectively disposed of to the plaintiff. Cluff had fulfilled his contract completely with the deceased and, in my opinion, nothing could legally be done by the latter to alter what he had caused to be done. The only act remaining to vest the full legal and equitable estate in the plaintiff was the mere physical act of registration. Had the land been in the name of the deceased a transfer signed and retained by him might be a very different matter as deceased could at any moment have destroyed it, in other words there was no "delivery." But in the case at Bar there was delivery by the only person capable of executing an effective transfer and as I said above, at the instant of delivery by Cluff the interest of the plaintiff arose. Had the transferee been a stranger a resulting trust would *primâ facie* have arisen, but the plaintiff being a child, presumptively it was a gift. It was then for the Court to weigh all the evidence advanced both for and against the contention that it was not a gift but a trust for the father.

That was a pure question of fact. If so, the familiar rule that a Court of Appeal will not interfere with the trial Judge's finding of fact unless he is shown to be clearly wrong applies.

In my opinion, the trial Judge very fully and carefully weighed and considered all the facts and surrounding circumstances, including the circumstances of receipts by the father

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of the profits, and having come to the conclusion that the presumption was not rebutted I do not think there is shown to be any reason to question it, and in my humble opinion, it was the right conclusion.

But it was very strongly pressed at the argument that inasmuch as the transfer had not been registered that the gift was not complete and, therefore, ineffective.

While it is true that an unregistered transfer does not pass any estate or interest in land nevertheless an equitable interest of a contractual nature under the instrument arises consisting of a right to be registered as the owner of the interest purporting to be conveyed by the instrument.

This feature of the case has been very ably dealt with by the trial Judge with whom I agree. I merely wish to add that, in my opinion, so soon as the transfer was executed and it is established that a gift was intended, this right to be registered as the owner came into existence. The equitable jurisdiction of the Court is not necessary to be invoked but a mere action at law would be effective to put the plaintiff in possession of the document in order to make registration, and round off his complete ownership. There was no act or thing remaining to be done by the father to perfect the gift. In my opinion, the gift was complete so far as the father could make it so, and the performance of the agreement by him and Cluff whereby the transfer was taken in the plaintiff's name completely divested him of all and any interest he had hitherto under his agreement with the registered owner; in effect the agreement became merged in the transfer.

I would dismiss the appeal with costs.

CLARKE, J.A.:—With considerable hesitation I have decided against interference on my part with the judgment of the trial Judge who has so fully discussed the questions involved that I shall content myself with adding very little to what he has said.

I have no hesitation in holding that if at the time the transfer was taken in the name of the plaintiff the father intended it as a gift or advancement, the gift should be held to be complete, agreeing in this respect with the judgment of Wetmore, J. in *Re Hobson Estate*, 7 Terr. L.R. 182.

I think there is a presumption that a gift or advancement was intended, the question of whether or not the circumstances rebut that presumption so as to create a trust in favor of the father, who paid the purchase money, is what causes my difficulty. There are several circumstances which seem rather inconsistent with an intention to make an immediate gift at the time the

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property was transferred to the son, viz: the transfer was taken in the name of the son in the expectation that he would remove from the United States and settle on the property, which he did not do; the transfer was not registered nor was the son advised of its being taken in his name during the father's life time; the father expended considerable sums of money in improving the property, leased it and generally acted as if he were the owner, and he was so reputed; and nothing appears in evidence to show any claim of the son upon the bounty of his father beyond that of the other members of the family. But it may be the proper way to view these matters is that they are reasons why the father would not take the transfer in the son's name rather than reasons for rebutting the presumption arising from his having done so. The fact is that the transfer was made to the son and the law presumes the gift, and such presumption upon the authorities is not to be lightly displaced.

In favor of the presumption is the fact pointed out by the trial Judge that the transfer in the son's name was retained by the father for several years without any attempt on his part to have it changed, and the supposed natural inclination of the father, who had married a second time, to make a certain provision for the oldest of his family by a former wife which would enable him to care for himself and his younger brothers and sisters.

It is improbable that the fact of his second marriage was an inducing circumstance and may account for his secrecy regarding the transfer.

There is also the evidence of Cluff, Bergley and Torpe which supports the gift—on the whole I am not convinced that the presumption has been rebutted and that being so my plain duty is to affirm the judgment.

In *Grey* v. *Grey* (1677), 2 Swans 594, 36 E.R. 742, which received the mark of modern approval in *Commissioner of Stamp Duties* v. *Byrnes*, [1911] A.C. 386, the facts in support of rebuttal of the presumption were almost, if not wholly, as strong as in the case at Bar and I think strongly supports the judgment appealed from.

I would dismiss the appeal with costs.

Appeal dismissed.

CONLEY v. GRAND TRUNK PACIFIC R. Co.

Saskatchewan King's Bench, Embury, J. April 13, 1922.

MASTER AND SERVANT (§IID—97)—RAILWAY ACT, CAN. STATS. 1919, CH. 68, SEC. 298—EFFICIENT APPLIANCE—MEANING OF—FAILURE TO PROVIDE—NEGLIGENCE IN NOT PROVIDING—CAUSE OF INJURY—LIABILITY.

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CONLEY v. GRAND TRUNK PACIFIC R. Co.

EMBURY, J.

A railway company which supplies an appliance to couple and uncouple cars, which will not work on a curved track, does not supply an efficient appliance within the meaning of sec. 298 of the Railway Act, 1919, Can. Stats. ch. 68, and is liable for injuries caused to a brakeman, while uncoupling cars by hand when such appliance fails to work.

ACTION by a brakeman to recover damages for injuries received while uncoupling freight cars.

P. M. Anderson, K.C., for plaintiff.

J. N. Fish, K.C., for defendant.

EMBURY, J.:—The plaintiff suffered injury while employed as a brakeman by the defendants. While the train crew to which he belonged was shunting in the defendant's Regina yards, the plaintiff was required to remove one of the couplings from between two cars but was unable to make the lever provided for uncoupling, work. Plaintiff thereupon mounted the platform of one of the cars, a flat car with sides and ends 3 ft. high and having a vacant platform space at each end of about 14 inches. The plaintiff climbed to this 14 inch space, then stooped down and pulled the coupling pin of the adjoining car by hand. He then gave the stop signal with his left hand, his right hand at the same time grasping the top of the 3 foot end of the car, this being the only available position open to him if he were to maintain his balance. Upon the signal being obeyed, the contents of the car shifted and imprisoned his right hand against the side of the car, inflicting severe injuries thereon.

The Railway Act, 1919 (Can.) ch. 68, sec. 298, sub-sec. (1) provides:—

"Every railway company shall provide and cause to be used on all trains modern and efficient apparatus, appliances and means (c) to securely couple and connect the cars composing the train, and to attach the engine to such train, with couplers which couple automatically by impact and which can be uncoupled without the necessity of men going in between the ends of the cars."

This section casts upon the company the duty of providing couplers which can be uncoupled without the necessity of men going in between the ends of the cars.

In this case, the evidence is clear that the appliance for uncoupling would not function at the time of the accident. It follows that, in the absence of proof to the contrary, it is reasonable to deduce that the appliance was not as the statute requires "efficient" for uncoupling. By way of explanation (I assume), it is given in evidence that the reason the apparatus would not work was because the switching operations were being conducted on a railway track which was curved. But, assuming

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this to be true, I cannot see that the defendants are excused; for the statute makes no exception to the effect that the appliance need not be such as will work properly on a curved track; i.e., that it must be "efficient" only on a straight one.

I think, on the evidence, the conclusion must be drawn that the defendants failed in the duty cast upon them to provide an apparatus "efficient" for uncoupling.

The plaintiff's duty at the time of the accident was to uncouple the cars indicated; and, in the circumstances, while there may have been other courses open to him, still I cannot see that what he did do was other than that which he might reasonably be expected to do. Accordingly, the default of the defendants in providing the proper appliance for uncoupling was a circumstance which contributed directly to the accident. The other contributing cause of the accident was the shifting of the cargo. As to whether or no the shifting was due to any negligence of the defendants I very much doubt, but, in any event, the failure with regard to the coupling appliance was quite as contributing a cause of the injury as was the loading of the cargo in a manner which permitted of its shifting. It is urged that plaintiff should first have inspected the contents of the car or looked to see the contents; but even if this be so, I cannot see that, on looking, he would realize that the cargo would shift.

For the above reasons I think that the accident is directly attributable to the negligence of the defendants in failing to provide an appliance "efficient" for uncoupling as required by the statute.

The plaintiff, I think, should have judgment for $1,600 and costs.

Judgment for plaintiff.

Re THE REAL PROPERTY ACT AND CAVEAT No. 103969.

Manitoba King's Bench, Macdonald, J. March 24, 1922.

COMPANIES (§ IVA—46)—POWER TO BORROW—BONDS HYPOTHECATED WITH BANK TO SECURE EXISTING INDEBTEDNESS—VALIDITY—BANK ACT, R.S.M. 1913, CH. 35, SEC. 71.

When the shareholders of a company have passed a by-law empowering the directors to hypothecate mortgage, pledge and give to a bank all or any of the stocks, bonds, debentures, etc., of the company for the purpose of borrowing money, and the directors having authorised the hypothecation of said bonds, such bonds may, under sec. 71 of the Bank Act, R.S.M. 1913, ch. 35, be issued and hypothecated to the bank to secure an existing *bonâ fide* indebtedness.

[*Re B. C. Portland Cement Co.* (1915), 22 D.L.R. 609, affirmed, 27 D.L.R. 726, distinguished. See Annotation on Company Law, 63 D.L.R. 1.]

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RE THE REAL PROPERTY ACT.

Macdonald, J.

APPEAL by way of petition to remove a caveat affecting certain lots in St. Boniface. Petition granted.

W. P. Fillmore, for petitioner.

C. P. Wilson, K.C., and *W. C. Hamilton*, for the Registrar.

MACDONALD, J.:—The Western Trust Co. is the registered owner of the said lots under the Real Property Act, R.S.M. 1913, ch. 171, by certificate of title issued to the said company on February 8, 1916.

The District Registrar of the land titles district of Winnipeg filed a caveat against the said lands and certificate of title and has refused to discharge or remove the same from the said certificate of title and has refused the said Royal Bank the acceptance of a transfer from the said Western Trust Co. to the said Pentland and McLeod, officers of the said bank, to whom the Royal Bank instructed said company to issue said transfer and this appeal is from such refusal of the said District Registrar.

The property in question was owned by the Winnipeg Tanning Co., and was on the — day of November, 1911, mortgaged to secure a bond issue of the said company to the extent of $35,000. Default having been made in payment of the said bonds proceedings were taken under the mortgage securing said bonds whereby the property became vested in the said Western Trust Co.

Under By-law 28 of the Winnipeg Tanning Co. passed on December 29, 1919, the directors were authorised to "obtain advances upon the credit of the company from the Royal Bank of Canada, either by discounting or causing to be discounted negotiable paper or instruments made, drawn, accepted, or endorsed by the company, by overdraft, by arranging for credits, or by way of liens, advances or otherwise howsoever, and as security for any such discounts, overdrafts, liens, credits, advances, or other indebtedness, or liability of the company to the bank, and interest thereupon, to hypothecate, mortgage, pledge, and give to the said bank all or any of the stocks, bonds, debentures, negotiable instruments, agreements, and personal property of the company and to give or cause to be given to the bank, warehouse receipts, bills of lading, securities under the Bank Act, mortgages, pledges, agreements, or other collateral securities, assignments, promises to give security under the Bank Act, promises to give warehouse receipts, and or bills of lading, of and on all or any of the property of the company and same from time to time to renew, alter, vary and substitute."

This by-law was regularly passed and adopted by the company's directors and shareholders.

In the month of December, 1910, the said Winnipeg Tanning

Co. applied to the Royal Bank of Canada for a line of credit and on December 28 of that year the supervisor of the said bank authorised a loan of $25,000 to the said company, the said by-law having been passed at the same time. In December, 1911, the said company was indebted to the bank in the sum of $25,000 and the said company applied to the bank for a renewal of its line of credit and an extension of the time within which to pay such indebtedness and an extension of the time was granted on the condition that in consideration of such indebtedness the said Winnipeg Tanning Co. would deposit with the said bank as security for such indebtedness bonds of the said company to the amount of $35,000, and mortgage bonds or debentures to that amount were deposited with the bank.

On each of the said mortgage bonds or debentures is this recital:—

"This bond is one of the series of bonds of The Winnipeg Tanning Company, Limited, amounting in the aggregate to the sum of $35,000, numbered consecutively from 1 to 50, both inclusive. All of said bonds are equally secured by the mortgage or deed of trust bearing date the first day of January, A.D. 1912, made and executed by the said Winnipeg Tanning Company, Limited, and the Western Trust Company, trustee."

These bonds were lodged with the said bank under a paper writing (ex. A) called a "general hypothecation" which describes the bonds in question and recites that the said securities and any renewals thereof and substitutions therefor and proceeds thereof are to be held by the bank as a general and continuing collateral security for payment of the present and future indebtedness and liability of the said company.

The question that I am called upon to decide is—Were the bonds properly issued and hypothecated to the bank?

By-law 28 provides that:—(b) as security for any such discounts, overdrafts, liens, credits, advances, or other indebtedness or liability of the company to the bank and interest thereupon, to hypothecate, mortgage, pledge, and give to the said bank all or any of the stocks, bonds, debentures, negotiable instruments, agreements, and personal property of the company, and to give mortgages on all or any of the property of the company.

The powers of the company with respect to the matter in issue are governed by sec. 71 and its subsections of the Companies Act, R.S.M. 1913, ch. 35. This section provides:—"(a) for borrowing money; (b) for issuing bonds, debentures, or other securities; (c) for pledging or selling such bonds, debentures or securities for such sum and at such prices as may be deemed

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expedient or be necessary; (d) for charging, hypothecating, mortgaging, or pledging, any or all of the real or personal property, rights and powers, undertaking, franchises, including book debts and unpaid calls, of the company to secure any bonds, debentures, or other securities or any liability of the company. . . .''

Under sub-sec. (d) the company is authorised by by-law to secure any liability of the company and there was a liability to the Royal Bank of Canada and By-law 28 was passed obtaining advances upon the credit of the company from the bank and for the express purpose of securing such indebtedness as by the said by-law provided, and in this respect this case differs from *Re B.C. Portland Cement Co.* (1915), 22 D.L.R. 609; 21 B.C.R. 534, cited by counsel opposing this motion. In this case the authority of the company was to issue bonds for the express purpose of raising by way of loan a further sum of money and there was no authority to use the bonds as collateral security for the company's indebtedness and that is what was attempted to be done and in appeal (1916), 27 D.L.R. 726, 22 B.C.R. 443, Martin, J.A., states in his judgment:—

''This appeal turns on the short point that the power to raise money by way of a loan (which I agree might have been done by pledging or selling the bonds in question) was not properly exercised by handing them over to creditors as security for existing debts. That, either in the ordinary business acceptance of the term, or in the circumstances of this case, cannot be fairly said to be a 'pledge' of the bonds to raise money for the purposes of the company.''

There is no doubt the intention of the parties was to secure the bank the company's indebtedness to it as and when required and that intention was carried out in compliance with the terms of the by-law of the company regularly passed, and the secured bonds to the value of $35,000 were handed to the bank. The bank was not purchasing the bonds. The indebtedness was much smaller than the aggregate face value of the bonds and the bank received the bonds as security for the company's indebtedness. They were the holders of the obligation represented by the bonds and the mortgage security went with the bonds and on default in payment of the bank's claim they were entitled to control the mortgage security held by the trust company as security for the payment of the bonds.

The chief contention of counsel opposing the motion is that there is no authority to pledge the bonds as security for an existing indebtedness, that they can only be issued for pledging or selling to raise money.

In *Howard* v. *Patent Ivory Mfg. Co.* (1888), 38 Ch. D. 156, at pp. 169, 170, 57 L.J. (Ch.) 878:—

"Now it has not been denied that to the extent to which there was a *bona fide* debt, it was legitimate to issue debentures to creditor, and to treat that as a borrowing. That has been decided in several of the cases that were cited, as for instance *In re Inns of Court Hotel Co.* (1868), L.R. 6 Eq. 82, 37 L.J. (Ch.) 692, and *Landowners West of England and South Wales Land Drainage, etc. Co.* v. *Ashford* (1880), 16 Ch. D. 411, 50 L.J. (Ch.) 276. I have no doubt that is the law, and the reason for it is quite clear and obvious. If you might not issue debentures to a creditor under a borrowing power it would come to this, that you would have to issue debentures to the bankers, or to somebody else, who would advance the money, and then pay that money over to the creditor, or issue debentures to the creditor himself, he lending you money first and then you paying it back to him. Of course it is obvious that such a roundabout proceeding as that need not be resorted to, and the Court looks to the substance of the matter. Therefore, the issue of debentures under the borrowing power to a person who is already a creditor of the company may well be treated as a proper issue of debentures."

It is contended that this refers only to a case where the company sells its bonds in liquidation of its debt, that is, that the indebtedness is extinguished and the creditor accepts the bond in payment. The same reasoning would however apply to a case of extending of the time for the payment of a present indebtedness and the same result accomplished by the bank advancing the amount of its then claim against the company and taking the bonds as security and then having the company deposit the money so advanced to its credit, being the same roundabout way as applicable to a case of extinguishment of the debt by the purchase of bonds.

Mitchell on Canadian Commercial Corporations, at p. 1257:—

"The mortgage of property to secure money borrowed would also constitute an exercise of borrowing powers; but not where the mortgage is given to secure existing debts."

This is cited by opposing counsel and the authority for that statement by the author of this work is *Barthels, Shewan & Co.* v. *Winnipeg Cigar Co.* (1909), 2 Alta. L.R. 21. That case decides that under their ordinance all companies shall have power to borrow money for the purpose of carrying out the objects of their respective incorporations; and to hypothecate, pledge or mortgage their real and personal property; to issue debentures secured by mortgages or otherwise; and it is held that this

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ordinance applies only to mortgages and other securities to secure money borrowed and does not restrict implied power to a trading company to give security for existing debts.

Our Companies Act provides that the directors of a company may make by-laws for the purposes already stated, subject however to confirmation by a vote of not less than two-thirds in value of the shareholders.

In this case, the shareholders passed a by-law enabling the directors to borrow, hypothecate, etc., and the directors by resolution authorized the hypothecation of the bonds in question. The bank was in possession of this by-law and of the resolution; they were given possession of the bonds for the purpose mentioned and they would be justified in concluding that the internal management of the company was of such a nature as to regularly and legally vest the property in the bonds in them as intended.

From a perusal of the cases cited I have come to the conclusion that the claim of the bank should be sustained and the prayer of their petition granted.

Petition granted.

BALLS v. McGREGOR.

Manitoba King's Bench, Galt, J. March 29, 1922.

BROKERS (§ IIB—12)—SALE OF REAL ESTATE—COMMISSION—SUFFICIENCY OF BROKER'S SERVICES—SOLDIER SETTLEMENT ACTS, CAN. STATS. 1917 AND 1919—EFFECT ON BROKER'S RIGHT TO COMPENSATION.

The Soldier Settlement Act, Can. Stats. 1917, ch. 21, which was repealed by the Act of 1919, Can. Stats., ch. 71, did not contain any restrictions on the right of a real estate agent to recover a commission on a sale of land to the Board, as contained in sec. 61 of the repealing Act, and under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 9, the repealing Act did not affect the right of a real estate agent to recover commission on a transaction entered into before the repealing Act came into force. Held also on the evidence that the agent had earned his commission on the sale, by carrying out what he had bargained to do and fulfilling the conditions imposed by the contract.

[See Annotations on Brokers, 4 D.L.R. 531.]

ACTION by a real estate agent to recover commission alleged to be due.

W. B. Powell, for plaintiff.

W. H. Trueman, K.C., for defendant.

GALT, J.:—Action by a real-estate agent for commission. The plaintiff alleges that on or about June 7, 1919, the defendant was the owner of the west half of sect. 29, tp. 12, r. 12, west of the principal meridian in Manitoba, and being desirous of disposing of the said land, employed the plaintiff to find a purchaser. The plaintiff says in his evidence that the defendant called upon him and discussed the question of selling the said land and the

defendant gave to the plaintiff the following document:— —

"G. H. Balls, Esq., Winnipeg, Man.

Starbuck, Man., June 7, 1919.

In consideration of the sum of One dollar, receipt of which is hereby acknowledged, I hereby give you an option on the West ½ of 29-12-12, West 1st, as follows: I will sell the N.W. ¼ at $3,750 cash, and the S.W. ¼ at $3,250 on half crop payments, providing the purchaser will break and crop 25 acres each year until 125 acres are under cultivation, with one-half crop payable to me or towards wiping off the amount due under agreement for sale under which this land was purchased by me. All monies obtained over and above the above prices are to be retained by you for your commission. If I desire to cancel this option I hereby agree to give you thirty days' notice in writing. Yours truly, (Sgd.) Wallace McGregor."

The plaintiff proceeded to find a purchaser or purchasers for the two quarter sections, and on June 16, 1919, the plaintiff procured the following document signed by J. Buchanan:—

"G. H. Balls, Esq., 849 Somerset Block, Winnipeg.

I hereby make application to purchase the N.W. ¼ of 29-12-12, W. 1st at $4,000 cash, through the Soldiers' Settlement Scheme, and I also make application to purchase the S.W. ¼ of 29-12-12, W. 1st, at the price of $4,000, making a cash payment of $200 cash and agreeing to pay $500 on or before November 1, 1919; I also agree to break and crop at least 25 acres of new land each year until 125 acres altogether are under crop, one-half of the crop off which land is to go towards interest first at 8%, and then the balance to be applied toward reducing the principal until the whole purchase price is paid in full."

The sale of the north-west quarter was completely carried out and the $4,000 paid in cash. The sale of the south-west quarter fell through, as the defendant changed his mind and decided not to carry it out. I must deal with the two transactions separately, as the law applicable to them is different.

So far as regards the north-west quarter, the defendant relies upon sec. 61 of the Soldier Settlement Act (Can.), 1919, ch. 71, which was assented to and came into force on July 7, 1919. That section contains the following provisions:—

"61—(1) No person, firm or corporation shall be entitled to charge or to collect as against or from any other person, firm or corporation any fee or commission or advance of price for services rendered in the sale of any land made to the Board, whether for the finding or introducing of a buyer or otherwise.

(2) No person, firm or corporation shall pay to any other

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person, firm or corporation any such fee or commission or advance of price for any such services.

(3) The Board may require of any person, firm or corporation from whom it purchases land, or who is in any manner interested therein, the execution of an affidavit in Form E in the schedule to this Act.

(4) If any such fee or commission or advance of price is paid by or to any such person, firm or corporation for any such services the following consequences shall ensue:

(a) Any person who in any affidavit made as required under subsection three of this section wilfully and knowingly states an untruth or suppresses the truth with respect to any matter which, pursuant to such subsection, he is required by way of such affidavit to make disclosure, shall be guilty of an indictable offence and be liable to a fine not exceeding $5,000 or to imprisonment for a term not exceeding five years, or to both such fine and such imprisonment; and,

(b) the fee or commission or advance in price paid may be recovered by the Board, by suit instituted in the name of the Board as agent of His Majesty, in any court having jurisdiction in debt to the amount involved, whether the transaction was one with respect to a sale or projected sale to the Board, as if such amount were a debt due to the Board, as aforesaid, and every person who participated in the receipt of any part of such amount shall be liable to pay to the Board the part of such amount actually received by him;

(c) All such consequences shall have operation cumulatively."

Apart from the restrictions contained in the above section, it is not contended by the defendant that the plaintiff in any respect failed to earn his commission. But it is argued that the restriction is so comprehensive that it affords a complete answer to the plaintiff's claim. The defendant was examined for discovery and part of his evidence was as follows:—

12. Q. Did you sell that quarter section, that is, the northwest quarter? A. Yes. 13. Q. Who was the purchaser? A. I sold it to the Soldiers' Settlement Board, J. Buchanan. 14. Q. Mr. Trueman: What was the document by which you did deal with the land? A. I dealt entirely with the Settlement Board. 15. Q. You have mentioned Buchanan, who is he? A. It is Buchanan that Balls really sold to but I dealt with the Soldiers' Settlement Board. 18. Q. Is Buchanan, to whom you referred a few minutes ago, living on that land? A. He was last fall. 22. Q. How did you first meet Buchanan? A. I met Buchanan up in Mr. Balls' office. 23. Q. And you met him through Mr. Balls? A. Yes. 24. Q. That is Mr. Balls, the plaintiff in this action? A. Yes. 25. Q. What price did you get for this land, northwest

quarter? A. $4,000. 26. Q. What were the terms of this agreement? A. What do you mean? 27. Q. Was it cash? A. Yes."

On June 16, 1919, Buchanan had already applied through Balls to McGregor to purchase the north-west quarter at $4,000 cash through the Soldier Settlement Scheme, so that the plaintiff had already found a purchaser upon terms which complied with the defendant's instructions or agreement of June 7.

Now, at the date of Buchanan's application or agreement of June 16, the Soldier Settlement Act, 1917, was the only Soldier Settlement Scheme then in force. It provided for the appointment of a Board of three commissioners and it authorised the Board to loan to a settler an amount not exceeding $2,500 for the acquiring of land for agricultural purposes, etc., etc., but it did not contain any of the restrictions which were included in the Act which came into force on July 7, 1919. It is true that the Act of 1919 repeals the Act of 1917, but I cannot think that this affects the point which I have to decide. Under the Interpretation Act, R.S.C. 1906, ch. 1, sec. 19:

"Where any Act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation shall not, save as in this section otherwise provided. . . .

(b) affect the previous operation of any Act, enactment or regulation so repealed or revoked, or anything duly done or suffered thereunder; or,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked."

The original sale was agreed to be made to Buchanan and the plaintiff's right to commission on the sale could not be affected by any change of purchaser which might be arranged afterwards as between Buchanan and the vendor. For these reasons, I am of opinion that the plaintiff is clearly entitled to the $250 commission claimed by him for the sale of the north-west quarter.

On June 16, 1919, Buchanan also made application to purchase the south-west quarter at the price of $4,000, and made application to the plaintiff, and he agreed to break and crop at least 25 acres of new land each year until 125 acres are under crop, one half of crop of which land is to go toward paying off interest first at 8%, then the balance to be applied towards reducing the principal until the whole of the purchase-price is paid in full. This agreement was completely in accord with the original instructions given by the defendant to the plaintiff and, unless some justifiable objection were raised by the defendant to accepting Buchanan as a purchaser, the plaintiff

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would have done what was expected of him towards finding a purchaser.

On July 21, 1919, the plaintiff wrote the following letter to the defendant:—

"Dear Sir,—This is to notify you that I have sold the two quarter sections in the W. half of 29-12-12, W. 1st, according to the option given to me by you dated June 7, 1919, the one quarter section for all cash and the other quarter section on crop payment plan. The purchaser agrees to the conditions mentioned in the said option as to breaking and cropping a certain number of acres each year. The lawyers will take up the matters of title with you. I am enclosing herewith my cheque for $10 as deposit on this sale."

On or about the same date as the last-mentioned letter the plaintiff procured Buchanan's signature to an agreement of sale of the south-west quarter by McGregor to Buchanan, upon terms which included all the consideration which McGregor had stipulated for and also certain additional payments which would belong to the plaintiff. The plaintiff endeavoured to have this agreement of sale executed by the defendant because Buchanan had stipulated that he should not be obliged to make the cash payment until he had the agreement signed by the vendor. McGregor demurred to executing the agreement until the first sale for cash went through, but when it did go through he made some other excuse for delay and finally determined not to carry out the sale. No objection was raised by the defendant upon the ground that Buchanan was not ready, willing and able to carry out the purchase. In fact, no evidence whatever was offered in defence to the action. The general law applicable to such a case is stated in 1 Hals., sec. 413, as follows:—

"In order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, or at any rate must have substantially done so, and all conditions imposed by the contract must have been fulfilled. He is not, however, deprived of his right to remuneration, where he has done all he undertook to do, by the fact that the transaction is not beneficial to the principal, or if it has subsequently fallen through whether by some act or default of the principal, or otherwise, unless there is a provision of the contract, express or implied, to that effect, or unless the agent was himself the cause of his services being abortive."

In *Prickett* v. *Badger* (1856), 1 C.B. (N.S.) 296, 140 E.R. 123, 26 L.J. (C.P.) 33, 5 W.R. 117, the headnote states:—

"Where an agent employed for an agreed commission to sell land at a given price, succeeds in finding a purchaser at the

stipulated price, but the principal, from whatever cause, declines to sell, and rescinds the agent's authority, the latter is entitled to sue for a reasonable remuneration for his work and labour, and is not bound to resort to a special action for the wrongful withdrawal of the authority. In such a case, a contract to pay what is reasonable is implied by the law; it is not a question for the jury."

In that case, the defendant called upon the plaintiff and according to the plaintiff's evidence representing that he had an interest in a piece of land containing about 14 acres, proposed to the plaintiff to look out for a purchaser at the price of about £650 per acre. The plaintiff agreed to do so, at the same time telling the defendant that his terms would be a commission at 1½% upon the amount of purchase-money. The plaintiff immediately set about preparing a plan and advertisements, etc., and ultimately received an offer of £675 per acre from the Birkbeck Land Society. The defendant then for the first time informed the plaintiff that he had no interest in the land, but that is belonged to one Wagstaffe; and Wagstaffe at first stated that he himself had not completed the purchase of the land, and afterwards declined to sell it to the Birkbeck Land Society; and in January, 1853, the plaintiff was desired by Wagstaffe to take no further steps in the matter. The plaintiff claimed £143. 5s. The jury found a verdict for the plaintiff and awarded him £50.

In delivering judgment, Williams, J., said at p. 304:—

"I think there was evidence which was fit for the consideration of the jury, that the defendant employed the plaintiff to sell the land, upon the terms, that, if he found a purchaser at the price named he was to receive a commission of 1½ per cent; and that the plaintiff bestowed his labour in endeavouring to find, and did find, a purchaser at that price; but that the negotiation failed because the defendant was not prepared to come forward as vendor; and that so the plaintiff was prevented from earning the stipulated commission. If the jury believed these facts to be established then, according to *Planché* v. *Colburn* (1831), 8 Bing. 14, 131 E.R. 305, and other authorities in conformity therewith, the plaintiff was entitled to abandon the special contract, and resort to an action founded upon the promise which the law would infer from such a state of facts."

Crowder, J., says at p. 305:—

"The defendant having declined, from whatever cause, to sell the land after the plaintiff had succeeded in procuring a purchaser willing to take it at the price proposed, and the

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plaintiff having thus done all he could to entitle him to the stipulated commission, the Lord Chief Baron ruled that, although the plaintiff could not maintain an action upon the special contract, he was nevertheless entitled to recover upon the common count a reasonable remuneration for his work and labour. In this I am of opinion he was quite right."

Willes, J., says at p. 308:—

"The plaintiff would have been entitled to receive the commission agreed on if the defendant's conduct had not prevented his earning it. I must confess I do not see why the jury should not have given him the full amount."

In the present case no question was raised as to the form of action or as to the amount recoverable, if the plaintiff was entitled to succeed at all.

I am of opinion that the plaintiff was entitled to the stipulated commission as regards the south-west quarter also, amounting to the sum of $750.

There was a small item of $10 additional which the plaintiff paid to the defendant and which the defendant in his statement of defence admits to belong to the plaintiff.

Upon the whole case, therefore, judgment will be entered in favour of the plaintiff for the sum of $1,010, together with costs of action.

Judgment for plaintiff.

PITMAN v. PITMAN.

Manitoba King's Bench, Galt, J. March 21, 1922.

DIVORCE AND SEPARATION (§ IV—41)—ADULTERY BY WIFE—CONDONATION.

Where a husband promised his wife that he would take her back if she went through with the whole thing, meaning thereby that she was to prosecute certain Police Court proceedings against the co-respondent to a conclusion, the proceedings being such that he could have prosecuted them more effectually than his wife could, and the husband admitting that the wife had done everything she had promised; the Court held that the husband had condoned the previous misconduct of the wife, notwithstanding her failure to prosecute such Police Court proceedings.

[*Dent* v. *Dent* (1865), 4 Sw. & Tr. 105, 164 E.R. 1455, 34 L.J. (P.) 118, referred to. See Annotation on Divorce, 62 D.L.R. 1.]

PETITION by a husband for dissolution of his marriage on the ground of adultery. Dismissed.

W. J. Donovan, for petitioner.

Ward Hollands, for co-respondent.

GALT, J.:—It appeared by the evidence that the petitioner was married to the respondent in August, 1909, and that they have had three children, aged respectively 12, 11 and 6 years. The co-respondent also lived at Cartwright. On October 13, 1920, an action was brought by the petitioner as plaintiff against the

co-respondent as defendant, alleging that on various times between June 1, 1920, and September 1, 1920, the defendant unlawfully and against the will of the plaintiff procured said Annie Pitman, whom the defendant then well knew to be the wife of the plaintiff, to have illicit and adulterous relations with him the said defendant, and that the defendant has by his actions and conduct towards the plaintiff's said wife alienated the affections of the plaintiff's said wife, etc. In that action the petitioner claimed $5,000 damages.

On March 31, 1921, the following judgment was entered in the action:—

"This action having on March 22, 1921, come on before the Honorable the Chief Justice by way of motion for judgment the defendant having in writing consented to judgment against him for $750 without costs, and the Court after hearing counsel for the plaintiff ordered that judgment for the plaintiff against the defendant be entered accordingly. It is this day adjudged that the plaintiff recover against the defendant the sum of $750 without costs."

At the hearing before me, the petitioner stated that at Christmas, 1920, he had a talk with his wife and that she handed over to him presents that Bradley had given her, and that she also gave him certain instruments for producing a miscarriage in case the necessity arose. Later on in his evidence the petitioner says:—

"My wife came to Winnipeg with me. I took her to my lawyer here. She admitted everything to my lawyer, instruments and all. She came of her own accord. She wanted my suit settled out of Court. At that time I knew everything. She wanted me to come back. She laid a charge against Bradley about the instruments. I promised her I would take her back if she went through with the whole thing. She did everything she promised. When we came back from Winnipeg I slept at home but took my meals at the hotel. About 3 weeks ago she asked me to take her back. If she had gone after Bradley right respecting the instruments I would not be asking for a divorce. I do not know anything against her since the settlement of the action. She neglected to go on with her charge against Bradley as to the instruments. . . . She told me she didn't want to go to Court."

The question is, whether the plaintiff has not condoned his wife's misconduct. In *Dent* v. *Dent* (1865), 4 Sw. & Tr. 105, 164 E.R. 1455, 34 L.J. (P.) 118, the Judge Ordinary says, at pp. 107, 108:—

"'Condonation' is a strictly technical word. It had its origin,

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and as far as I know its entire use, in the Ecclesiastical Courts, and it means 'forgiveness with a condition.' The statute says, that if the petitioner has condoned, that is, has conditionally forgiven, the adultery complained of, the petition shall be dismissed. The question is, whether the Legislature meant by those words that where the petitioner has conditionally forgiven the adultery complained of, her remedy should be barred, although the condition of the forgiveness is afterwards broken. Such a construction seems unreasonable. It seems to me that if the condition on which the forgiveness is founded is broken the effect of the forgiveness is taken away as if there had been no condonation at all. I think the statute means, not that the petitioner shall be barred of her remedy if she has ever condoned, but that she shall be barred of her remedy if the condonation is still existing."

Counsel for the plaintiff argued that in this case the respondent was in the same position as the respondent was in *Dent* v. *Dent*, *supra*, because the petitioner says, "I promised her I would take her back if she went through with the whole thing," meaning thereby that she was to prosecute the Police Court proceedings against the co-respondent to a conclusion. It must be borne in mind that we have only the petitioner's version of his promise and he could have prosecuted the Police Court proceedings, one would suppose, more effectually than his wife could. He certainly afterwards stated in his evidence that his wife had done everything she promised. Upon the whole case I am of opinion that the petitioner condoned his wife's misconduct with Bradley and he admits that since the settlement of the action above mentioned he did not know anything against her. For these reasons I am of opinion that the petition must be dismissed.

I see no reason for awarding any costs to either the respondent or the co-respondent.

Petition dismissed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases.

MORTGAGE CO. OF CANADA v. FILER.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. March 3, 1922.

SPECIFIC PERFORMANCE (§IE—30)—*Order of trial Judge—Determination of agreement and for foreclosure—Sale of portions of land to sub-purchasers with consent of vendor—Protection of interests of sub-purchasers.*]—Appeal by some defendants from order of Blain, Master at Edmonton in an action for specific performance of an agreement for sale of a large area of land. The appeal came first before Harvey, C.J., who referred it to the Appellate Division.

H. H. Hyndman, K.C., for plaintiff, respondent.

J. R. Boyle, K.C., for defendant Ball.

John Cormack, K.C., for defendant McMillan.

A. F. Ewing, K.C., for defendant Filer.

The judgment of the Court was delivered by

STUART, J.A.:—The order was in the nature of a final order for the determination of the agreement and for the foreclosure of all the rights of the purchaser under the agreement.

It is to be observed that the order was not an order for rescission. Apparently the Master or those who drew the order considered that there was a distinction between the "rescission" and the "determination" of a contract, some authorities showing that upon a rescission strictly so called if made on the application of the vendor the latter must return any moneys paid under it. But, in this case, large portions of the land have been conveyed to sub-purchasers with the consent of the vendor, which gave title under a special clause in the agreement making provision therefor. So that an actual rescission in the sense of putting the parties back into their original position was impossible in any case. It was doubtless for this reason that the expression "determined" was used instead of "rescinded."

The Court has gone very far in this case in its endeavor to give the purchaser and the numerous sub-purchasers who have not got title an opportunity to protect their interests, going so far as to have the registrar telegraph to the representative of one of the largest sub-purchasers offering to hear him personally if he would come from Spokane, and intimating that if he was prepared to give proper assurance as to ability and willingness to pay, the Court would see that his principal was protected

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in regard to title. This agent who represented also a number of other interested persons did not see fit to accept the invitation or to send any person on his behalf. And all the other sub-purchasers have had ample opportunity to submit proposals but have done nothing.

So far as the purchaser is concerned, there is no doubt that he has given up all hope of ever being able to pay. Indeed, this was admitted on the argument. The appeal was brought merely to endeavor to secure another chance for the sub-purchasers, which has been given and not taken advantage of, and to get something done to protect the purchaser from possible claims against him by the sub-purchasers who had paid him large sums of money and had not got any assurance of title if they completed.

In my opinion, everything possible has been done by the Court that either purchaser or sub-purchasers could reasonably ask and we should not further concern ourselves with their possible rights as to carrying out the agreement, that is to say they were properly foreclosed and debarred from all right to ask that the agreement be performed.

I had some doubt however whether, in view of the fact that a large portion of the property has been conveyed, either determination or recission was the proper order to make and whether a sale should not rather have been ordered. But it is stated in the Master's order and it was admitted on the argument that the remaining property would not realize upon a sale anything like the amount remaining unpaid. In these circumstances, it is the established practice of the Court not to order a sale against the desire of the vendor but to foreclose. And even though some of the property has been finally conveyed I do not think the vendor should be forced to sale which might lead to great loss when there is any other means of protecting the purchaser's interests.

I would, therefore, allow the order determining the agreement and foreclosing the defendants to stand. But I would add one further clause as a final protection to the purchaser and sub-purchasers. The agreement of sale contains this clause:—"Provided that in the event of default occurring in payment of any instalment of the purchase price or in performance or fulfilment of any of the stipulations, covenants, provisos and agreements on the part of the purchaser herein contained the vendor shall be at liberty to determine and put an end to this agreement and to retain any sum and all sums paid thereunder as and by way of liquidated damages, &c."

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This is the right which the vendor now asks the Court to give it. But with the rapid fluctuation of values in farm lands which we know do take place in this country, I think the Court ought to contemplate the possibility, that in spite of the present depression, the value of the land may shortly rapidly increase and that the vendor, after being placed as it will be by the order now confirmed in a position to resell as it pleases and to give title, may ultimately realise far more than is now expected out of the lands. I do not think indeed that the vendor should ever be called upon to account for the whole amount that it may realize over and above what was due from the purchaser. That would be placing it in the position of a trustee or receiver. But I think its right finally to retain as and by way of liquidated damages the amounts received from the purchaser should be subject to revision by the Court upon the application of the purchaser. If it should turn out that the vendor realized in full out of resales the whole amount which the defendant agreed to pay then the vendor would have suffered no damages by the defendant's default and there would have been a forfeiture from which the Court might relieve the defendant under the power given in the Judicature Act.

I would, therefore, merely add a clause to the order of the Master reserving liberty to the defendant to apply in this action whenever so advised, to have an enquiry as to the actual damage suffered by the vendor through his default and to be relieved from any mere forfeiture that the plaintiff may be retaining. This liberty should also be available for any sub-purchaser whose money the defendant had received and who might be entitled to stand *pro tanto* in the defendant's shoes.

I think the plaintiffs should have their costs of the appeal.

Judgment accordingly.

LEHMAN v. ALBERTA PACIFIC GRAIN Co. Ltd.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. April 13, 1922.

CONTRACTS (§IID—175)—*Lease of land—Crop payments—Agreement as to division of grain in settlement of accounts—Construction.*]—Appeal by defendant from the trial judgment in an action claiming a declaration that plaintiff was entitled to a certain sum from the sale of wheat grown on land leased from the plaintiff to the defendant. Affirmed.

A. McL. Sinclair, K.C., for appellant.

H. W. Menzie, for respondent.

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The judgment of the Court was delivered by

STUART, J.A.:—In March, 1918, the plaintiff leased a farm to the defendant, Mary Graham, a married woman, for a term of 3 years upon the terms amongst others, that the lessor should receive two-thirds of the crop in 1918 and one-half of the crop in the years 1919 and 1920.

In the fall of 1920 the plaintiff and the lessee, Mary Graham, placed with the defendant company and stored in its elevator at Parkland, some 1,125 bushels of grain, under a joint consignment note, signed by both of them, which did not specify the amount of their respective shares. The plaintiff testified and it was not denied that he interviewed the defendant Graham and her husband at the farm on October 30, 1920, and that there then occurred an adjustment of some accounts which were outstanding between them. He said that they "proceeded to figure out the settlement," that Graham and himself did the figuring, that it was found that plaintiff owed Mrs. Graham $128 for seed for the 1920 crop and that she was owing him a little over $200 from 1918, all under the lease, that Mrs. Graham had hauled some of the 1920 crop to Stavely and had kept back between three and four hundred bushels of frosted wheat for seed and the oats and green bundles.

He said that besides this they had the grain in the elevator at Parkland, and that when they figured out what his share of the crop was, that is what Mrs. Graham was owing him and what she had already kept for her share of the crop; it was found that he was entitled to half the grain in the elevator at Parkland and to $627.61 out of the balance. He said that it was agreed that he was to get half the grain in the elevator and $627.61 on the other half to "make up my half" of the crop as per the lease. It is obvious from his evidence that a value was placed upon what Mrs. Graham already received but that a value could not be placed on the grain in the elevator at Parkland because they did not know what it would sell for.

Then this occurred between the Court and the plaintiff:—

"A. I was entitled to $627.61 in order to make up my half according to the lease. Q. Yes, that is right but that is the amount that Mrs. Graham was to pay you, it is the amount she assented to as owing out of her half of the grain? A. Yes. Q. You did not have any ownership in Mrs. Graham's wheat at all? A. She had her half as I had mine *undivided*."

Then at the interview in question in pursuance of this adjustment or agreement, Mrs. Graham, by the hand of her hus-

band, signed this document (she being present and assenting when he did it):— Alta. App. Div.

"Parkland, Oct. 30, 1920.

Alberta Pacific Grain Co.:—

Please pay to the order of J. H. Lehman six hundred and twenty-seven 61/100 for value received.

M. L. Graham, per W. A. Graham, Att'y."

At this time the grain had not been sold. It was not sold until early in May, 1921. Prior to this, on April 18, plaintiff had written the defendant company telling them that he had wanted to sell for months but that Mrs. Graham did not wish to sell, that they, the Grahams, were renters on his place, that "I have an order from them for money from crops and debts of previous years for about $600," and asked if he could sell without their consent. Then on April 28 he wrote again, saying:—

"Mrs. Mary Graham and I each have ½ share in grain shipped from Parkland. I already have an order from them for $627.61. This amount is partly for 1918 crop which Mr. Graham kept without my consent, also for feed raised on my farm for which he has not paid. When the wheat is sold, if you will deduct this amount from their share, I'll send you the order. Mr. Graham has not dealt fairly with me and I wish to get what is due me."

To this the company answered that not knowing the basis of plaintiff's contract with the Grahams they could not say whether or not he could sell without their consent, and added that "if they owe you anything from their share of the car you had better secure an order from them for us to pay you. What is your share of this car?"

Now it appears that the defendant company claimed that Mary Graham was indebted to them in the sum of $693.60 for hay and coal used on the Lehman farm. So when the grain in their elevator was sold they proposed to retain this amount from what they claimed was Mary Graham's half interest in the car. And on August 9 Mary Graham signed a promissory note in favor of the defendant company for $268.60 and gave them a document authorising them to deduct "from proceeds of my share of grain contained in car No." &c. the sum of $425.

The plaintiff had long before August 9 begun to complain. He demanded his money. The company sent him a cheque for his half, which he refused. The company raised questions as to his so called power of attorney to sign the document of October 30, 1920 on behalf of his wife.

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The plaintiff began his action, claiming on account of the sale of the car of wheat, a declaration that he was entitled to receive out of the proceeds in his own right $1315.20, and payment of that sum by the defendant company.

The company defended, pleading their right to retain Mrs. Graham's share as against her debt to them and paid into Court the amount they admitted to be coming to the plaintiff.

Simmons, J., who tried the action, gave judgment for the plaintiff and the defendant company appeals.

In my opinion the trial Judge was right in his conclusion.

The appellant's contention chiefly was that the document of October 30, 1920, was not an assignment but merely a bill of exchange. But I think this is taking too narrow a view of the matter. I think what occurred on October 30 was an agreement by which the two parties jointly interested in the grain decided, by way of settlement of their accounts, on what was to be considered the extent of their respective interests. After going into their accounts, ascertaining the cash which Mrs. Graham had got for the grain taken to Stavely, and estimating as best they could the value of the grain retained on the farm, it was quite obviously agreed that the plaintiff was entitled to one-half the grain in the elevator and to, not so much money, but a certain sufficient portion of the other half to make up in value, when sold, the sum of $627.61.

In my opinion this was nothing more than a method of describing the extent of the interest of the plaintiff in all the grain in the elevator and that when the parties agreed to this there was an interest created in the plaintiff. Even assuming it to be correct that technically the grain was in the first instance the property of the tenant still it is quite clear that the plaintiff had an interest in it as landlord. He was to receive one-half of the whole crop. Some of it had been taken by the tenant and sold, some was kept on the place for seed. The parties then met and started to enquire as to how a just adjustment was to be made to give the plaintiff his rights. They took into account an old debt of comparatively small amount and they then agreed that one-half of the grain in the elevator and $627.61's worth of the rest should be the plaintiff's. There is no doubt whatever on the evidence that that is what happened. The mere writing of the order was only a simple way of telling the company what had been thus decided and the plaintiff did tell the company in the two April letters.

I can see no ground, therefore, for suggesting that the defendant company were ever indebted to Mary Graham at all.

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Until the adjustment of October 30 was made, her interest was uncertain, but it was then made certain by agreement long before the grain was sold and while the company were mere warehousemen.

It is improper, therefore, I think, to deal with the matter as if it were a case of the assignment of a debt. It was a case of the division of grain to which the parties were jointly entitled. It was impossible to compare frozen wheat or oats or straw with wheat in an elevator, except on the basis of measurement, not by bulk, but by value. And that was all I think that was done.

There are no facts which make possible the application of the principle of purchaser for value without notice and the provisions of the Bills of Sales Ordinance (Ord. Alta. 1911, ch. 43), cannot possibly apply. No contention of that kind was raised on the argument.

The appeal should be dismissed with costs.

Appeal dismissed.

DUNN v. ORDERS.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman, and Clarke, JJ.A. March 16, 1922.

APPEAL (§VIII—475)—*Judgment at trial—Sufficiency of evidence to support—Interference with by Appellate Court.*]—Appeal by defendant from the trial judgment in an action arising out of the sale of real estate. Affirmed.

M. B. Peacock, for appellant.

H. P. O. Savary, K.C., and *H. H. Gilchrist*, for respondent.

The judgment of the Court was delivered by

STUART, J.A.:—I would dismiss this appeal with costs.

I take up briefly and *seriatim* the grounds set forth in the notice of appeal.

"1. That the judgment appealed from is contrary to law and evidence and the weight of evidence."

This is formal but as to the weight of evidence I must say that, after reading the appeal book through carefully, I think the judgment is in conformity with the weight of evidence. I do not altogether like the appellant's evidence even as it reads in print. At any rate, I can find no reason for saying that the trial Judge was clearly wrong in believing the plaintiff rather than the defendant with respect to what happened when the listing was given. Practically, the defendant accused the plaintiff of forgery. The trial Judge refused to find the plaintiff

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guilty of that crime and it is impossible to disturb his finding.

"(2) That the trial Judge erred in holding that the listing had not been changed since the date of its execution by the defendant." With this I have already dealt above.

"(3) That the trial Judge erred in holding that the plaintiff was acting for the appellant or was instrumental in effecting a sale of the said lands."

On the evidence, the plaintiff was clearly acting for the appellant. As to his being instrumental in effecting the sale it is quite clear that he brought the parties together. It was the appellant's own reluctance, his refusal in the plaintiff's office, to deal with Stafford that prevented the deal being put through at the time. The defendant and Stafford then met on their own account within a couple of weeks and made a bargain after some negotiation and adjustment and they did this unknown to the plaintiff and behind his back. Such a course of conduct cannot, in my opinion, be allowed to deprive an agent of his agreed commission. It was argued that the defendant only agreed to renew the negotiations because he had got into a quarrel with the tenant of his lands and had been badly assaulted and then was himself arrested for assault and obliged to get bail &c. This, it is said, was what really induced him, the defendant, to proceed with the deal. I could understand the argument if something of the kind had occurred to the proposed purchaser and if it had been such an occurrence, and not the plaintiff's efforts, that had induced *him* to become a purchaser. But that a vendor, after listing his property with his agent, should argue that he was only induced to proceed with the deal proposed by the agent because of such an occurrence, strikes one as exceedingly strange.

Grounds numbered 4, 6, and 7 all relate to the circumstance that the plaintiff was at the same time claiming a commission from Stafford, the purchaser, who put in 190 acres of land in Wisconsin as part of the purchase price. The two actions were tried together and judgment was given against Stafford, who did not appeal. The trial Judge held that the defendant knew all about the commission to be paid by Stafford. I cannot disagree with that inference but the case is, I think, stronger even than that. Accepting as we must the evidence of the plaintiff, for the trial Judge accepted it and there is no ground for saying he was wrong, it appears that the defendant in haggling over the commission to be paid actually told the plaintiff that he must get anything more than the $1,000, he agreed to pay from the purchaser Stafford. It was, therefore, the defendant's

own suggestion that plaintiff should get a commission from Stafford, although, no doubt, the plaintiff had already arranged for it. Substantially, the defendant intimated to the plaintiff that the latter was quite at liberty to take a commission also from the purchaser and that he did not care whether he did or not. I do not think that after doing that he has any right to complain of his agent's accepting such a second commission.

The fifth ground of appeal was that the trial Judge erred in holding that the listing was not cancelled by the appellant. But I see nothing in the reasons for judgment to that effect. And, in any case, the alleged cancellation, having been made after the plaintiff had brought the parties together, was, in my opinion, made too late.

It is true that the exact price mentioned in the listing was not obtained, but it is clear that that price was only mentioned as a basis for negotiation and the obtaining of it was not a strict condition of the agreement to pay a commission. The acreage in Wisconsin, which was to be part of the price, was reduced from 270 acres to 190 acres, but this was in substance merely a reduction in price. See *King* v. *Schon* (1918), 44 D.L.R. 111, 14 Alta. L.R. 79. And, moreover, there is in the listing an express agreement to pay the $1,000 no matter for what price the land was eventually sold.

Appeal dismissed.

DUNN v. GRAF.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. February 18, 1922.

BROKERS (§IIB—10)—*Sale and purchase of land—Listing with real estate agent—Sufficiency of agent's services.*]—Appeal by the plaintiff from the judgment of Tweedie, J. in favor of defendant in an action for commission upon the sale of land. Affirmed.

[See Annotation 4 D.L.R. 531.]

H. P. O. Savary, K.C., and *H. H. Gilchrist*, for appellant.

J. W. Hugill, K.C., for respondent.

The judgment of the Court was delivered by

SCOTT, C.J.:—On March 23, 1921, the defendant by writing listed with the plaintiff for sale certain lands belonging to him near Swalwell, Alberta, at a certain price and upon certain terms and thereby agreed to pay the plaintiff a commission of 5% for making a sale of the land at the price stated or any other price and terms which the defendant might accept from any party introduced to him by the plaintiff. The defendant

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thereby agreed that, if he made a sale of the property other than through the plaintiff, he would at once notify the latter of such action.

Prior to obtaining this listing from the defendant, the plaintiff appears to have seen an advertisement of Kinney & Co., real estate dealers at Corvallis, Oregon, offering a parcel of 392 acres near there for sale or exchange. He wrote them about it and received from them a description of the property and the terms of sale. On May 6, 1921, the defendant came to his office and he there read him the description which he had received from Kinney & Co.

This property was owned by two or more brothers named Edwards, one of whom, (Homer Edwards) at one time resided at Carmangay, Alberta. Plaintiff furnished defendant with the name and address of Homer Edwards. The plaintiff wrote him several times at Carmangay and defendant also wrote him about the property but they never received any answer from him and it does not appear that he ever received their letters nor does it appear that the defendant and the Edwards were ever brought together by the plaintiff.

In addition to listing his property with the plaintiff the defendant had also listed his property with one Gillilan, another real estate agent at Calgary, and Homer Edwards had also listed the Oregon property with him.

About the middle of May, 1921, Homer Edwards and Gillilan went out to inspect the farm of one Raethke, who also had listed his property with Gillilan for sale. After inspecting it Edwards stated that before making a purchase he desired to look around a little bit more. Raethke then referred them to the defendant who was a near neighbor, and he accompanied them to the farm of the latter, where they saw him and then, or at a subsequent interview a few days later, entered into negotiations with him, which resulted in the sale to the Edwards of his farm, he receiving the Oregon property in partial exchange therefor.

The plaintiff has failed to shew that he made a sale of the defendant's lands or that the defendant made a sale thereof to a person introduced to him by the plaintiff and has, therefore, failed to establish his right to a commission.

Some of the facts disclosed in the evidence might raise a suspicion that there may have been collusion between Homer Edwards and Gillilan in order to defeat the plaintiff's claim to a commission but at most it would be merely a suspicion, as there was no evidence of such collusion. The fact that Gillilan had

listings of both defendant's and the Edwards' property long before he effected the exchange between them and that he did not approach the defendant until after he and the plaintiff had written Homer Edwards would tend to arouse such a suspicion, but Gillilan gives a reasonable explanation of this, viz; that up to the time of his visit to the defendant, the Edwards were desirous of exchanging their property for a tract consisting of two sections and that defendant's property did not contain that area.

Homer Edwards was accidentally killed while moving some heavy machinery to the defendant's lands and the plaintiff was, therefore, unable to prove the receipt by him of the letters written by the plaintiff and defendant. It is possible that, if living, his evidence would have removed any doubt upon this point. It is shewn, however, that about the time these letters were written he was engaged in farming operations at Gleichen and was not then residing at Carmangay, to which place the letters were addressed.

Another circumstance which might give rise to such a suspicion is the fact that during the negotiations for his sale to Edwards the defendant arranged to visit Oregon to inspect the Edwards' property there and he asked the plaintiff to give him a letter of introduction to Kinney & Co. The plaintiff states that the defendant asked him for a letter so that he could inspect the property. The letter then written stated merely that the defendant desired to inspect the Edwards' property. Upon being shewn this letter the defendant asked the plaintiff to request Kinney & Co. in this letter to shew him another property in Oregon which they had submitted to the plaintiff and by him to the defendant, which request the plaintiff complied with. The defendant states that he then told the plaintiff that he had made up his mind to look at all the properties that he could get hold of in the States.

At the time the defendant asked for this letter Homer Edwards had agreed to accompany him to Oregon to inspect the Edwards' property and it was, therefore, unnecessary for the defendant to obtain authority from Kinney & Co. to inspect it. The defendant's statement as to his reason for asking for this letter is, therefore, the more reasonable, especially in view of the fact Kinney & Co. knew of other properties on the market there and it is doubtful whether the Edwards had any knowledge of others than their own.

I would dismiss the appeal with costs.

Appeal dismissed.

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GOLDBERG v. EMPLOYERS LIABILITY ASSURANCE Co.

Alberta Supreme Court, Tweedie, J. February 13, 1922.

INSURANCE (§IX—450)—*Of Automobile against theft—Proof of loss—Rights under policy determined—Recovery of car—Refusal of company to settle on basis agreed upon—Construction of policy—Rights of parties.*]—Action to recover the amount due under a policy, insuring an automobile against theft.

W. F. W. Lent, K.C., for plaintiff.

H. P. O. Savary, K.C., for defendants.

TWEEDIE, J.:—This was an action brought by the plaintiff to recover the sum of $2,200 on account of the theft of his automobile. He was the owner of a McLaughlin K 45 special touring car and on March 26, 1920, he effected insurance with the defendant company under an "Automobile policy" for the sum of $2,200, "upon the body, machinery and equipment of the automobile described herein" (subject to certain exceptions and reservations contained in the policy which do not arise for consideration herein) "against direct loss or damage caused while this policy is in force by perils specifically insured against." The perils specifically insured against were,

"(A) Fire arising from any cause whatsoever and lightning. (B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including average and salvage charges for which the Assured is legally liable.

(C) Theft, robbery or pilferage, excepting . . . " (certain exceptions and exclusions follow, which are not material to this case.)

The policy was to continue in force until March 26, 1921, and was in force at the time of the theft herein referred to. The value of the car was set forth in the policy at $2,470.

On November 30, 1920, the automobile while standing in front of a store on one of the business streets in Calgary was stolen, which fact was established by the subsequent apprehension of the thief and his conviction, and is admitted by both parties to the action. On December 2, 1920, the plaintiff filed a sworn statement in proof of loss which was stamped with the rubber stamp, "E. L. A. Corporation Limited, received December 4th, 1920, Western Canada Branch." In this statement he sets forth amongst other particulars, the theft of the car on November 30 and that "as a result of the said theft that the assured claims from the Employers' Liability Assurance Corporation Limited the sum of $2,200." This proof of loss was on the regular form

provided by the company through its agent F. W. Mapson & Co., who were presented by Mr. Durrell and who had authority to take applications, issue policies and who did in the course of their business receive claims and proof of loss against the company and forward the same to the Calgary office of the defendant company for adjustment.

During the period of 60 days immediately following, that is from the date of the filing of the proof of loss, December 4, 1920, to February 2, 1921, the defendant company made no request to the plaintiff for the appointment of an appraiser nor did it even intimate to the plaintiff that it was dissatisfied with his proof of loss and that an arbitration would be necessary to determine what the actual loss by reason of the theft was nor was any objection taken by the defendant company as to the amount claimed by the plaintiff therein.

From the expiration of the 60 days until the car was recovered, which was on or about March 24, 1921, but not by or on behalf of the plaintiff as alleged in the defence, the plaintiff endeavored to collect the insurance money from the company but was unsuccessful. The negotiations will be referred to more fully later on.

The car, while in the possession of the thief was very seriously damaged, having been employed in taxi service. According to the evidence of Woodley, a garage man who was familiar with the car, it would cost $733 to repair it and put it in a condition approximating that in which it was before the theft and even then, admitted that there were some repairs, one at least, which could not be made upon the car here satisfactorily, but that it would be necessary to have this work done at the factory. He also admitted that he did not recognize the car when he first saw it after the theft, a period of only 4 months, and that he would not give over $750 for it. Notwithstanding the fact that he testified that the car could be restored for that sum of money, he admitted that even when fully repaired, it could not be sold for anything like the value that the owner placed upon it before it was stolen, or for the value that the adjuster of the insurance company places upon it according to his rules, and that it would probably be worth only $1,500.

After the car had been recovered and was in the hands of the police in connection with the prosecution of the thief, the police department 'phoned the plaintiff and asked him what they would do with the car, and the plaintiff in reply instructed them to call up the insurance company, intimating that he had no further interest in the car.

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After the expiration of the 60 day period, the plaintiff began to enquire as to when he might expect his money. For this purpose he went to Durrell, of Mapson & Co., with whom he had filed his proofs of loss, they being the agents through whom he procured the insurance. Durrell was acting as an intermediary between the plaintiff and the company in an endeavor to have the money paid with as little delay as possible. He advised him that the loss would be settled on the basis of $2,200, in fact the cheque was on its way. On February 14, 1921, he wrote the plaintiff as follows:—

"We are very sorry indeed at the delay caused in forwarding you your cheque in payment of your claim under Employers' Liability policy. We can assure you that the cheque is on the way. We were advised by the local representative of the Employers' Liability Assurance Corp. Ltd., to write you in accordance with the above, and to assure you that the cheque will be handed over to you immediately on its arrival. This will remove any doubt which may be in your mind as to what would happen should the car turn up prior to the arrival of the cheque."

In reference to the sending of the above letter Jankins, fire manager for Canada of the defendant company, states in his evidence on commission,—"91. Q. Have you any reason to doubt the correctness of the authorization of that letter? A. Not with regard to the cheque."

On February 16 the F. W. Mapson Co. wired the western fire manager of the defendant company at Winnipeg as follows:

"Goldberg theft claim. Have given assured written statement that cheque on way. Cannot understand your continued delay in making payment. We have never been confronted with such an awkward situation before. Please instruct us or Howarth to pay claim and draw on you. Rush answer."

To which the western manager replied on the 16th,

"Regret very much delay Goldberg claim. See Cracknell. Writing."

On the 17th he wrote Mapson & Co. as follows:—

(After confirming the above wires)

"The company advise that their wires are in poor shape today, but notwithstanding we hope the message arrived in good time.

I may say that, personally, I entirely agree with your attitude; but the responsibility for the delay is not with this office, but with head office, who, as doubtless Mr. Cracknell has since explained to you, are of the opinion that at the time of the

theft, the assured was not entitled to the recovery of full face value of the policy. I have requested our Calgary office to look into this point at once and report here. As soon as I receive further word, I shall again wire Montreal."

No question as to the value set forth in the proof of loss was ever before raised by the company so far as the plaintiff was aware. Pursuant to the instructions contained in the above letter, the Calgary office must have looked into "this point" to ascertain whether or not the insured was entitled to the recovery of the full face value of the policy. The E. A. Lily Adjustment Agency, were engaged to investigate and a few days prior to the recovery of the car, Hornby, who acted as the representative of the adjustment agency and who conducted all the negotiations with Goldberg, went to the plaintiff, and as he says himself offered him $2,100. This was 17 days after the expiration or the 60 day period. He explained to the plaintiff the rules by which they determine the amount of the loss which he showed to be slightly over $2,000. The plaintiff still wanted his $2,200. The amount which he arrived at was not consistent with the amount set out in the adjustment agency's letter following:—

"Assured had possession and use of the car for a period of about eight months. Applying a ratio of depreciation of 25% for the first year, the depreciation for the period of eight months would be say 15%, and deducting this from the cash value of $2,760, less 15% $414, the cash value at date of theft was $2,346. And as the sum insured is $2,200 assured's claim for loss under the policy is total, and he declares that he is not in the mood for any bargaining in the matter and demands that sum stating it to be his intention to place the collection in the hands of a solicitor for collection, if not paid for shortly.

Under the circumstances we feel obliged to recommend payment of same."

This letter must have been effective for we find the company forwarding its cheque for $2,200 to be paid to the plaintiff a few days before the recovery of the car. The evidence of Jankins, fire manager for Canada and who also has to do with automobile theft policies, taken under commission at Montreal is as follows:

"Q. I have been asking this question because in the statement of defence reference is made to the proof of loss being inadequate and incorrect. Now will you tell us what was the situation with respect to settlement of this claim at the time when

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the car was recovered, that is to say you said that a cheque had been sent to Calgary what was the amount of that cheque? A. I understand it was for $2,200. Q. Where was it sent from? A. Winnipeg. Q. Was it sent with instructions to deliver it to Goldberg? A. I do not know. Q. Could it have been sent for any other reason that you know of? A. No. Q. Did your company ever agree to pay Goldberg $2,200 in full settlement of the amount of the policy? A. I would answer that by saying we sent out cheque for $2,200. Q. But as far as you know your company did not undertake to Goldberg to pay him $2,200? A. Well, I suppose there must have been some conversation between the adjuster and Goldberg, which resulted in the Winnipeg office being advised to send $2,200. Q. Could we go further and say that this $2,200 was sent to Calgary to be paid to Goldberg in adjustment of this claim? A. Yes."

The cheque was not, however, delivered to Goldberg, the car having been recovered in the meantime. The date of the cheque, when it was mailed in Winnipeg, and of its receipt in Calgary, does not seem to be clearly established, but it must have been dated and mailed a few days before, and received about the time the car was recovered.

After the car was recovered, Hornby again visited Goldberg for the purpose of settling with him on the basis as he expresses it of a "new bargain" having been made on account of the recovery of the car. Negotiations were carried on in an endeavour on the part of Hornby to get Goldberg to take the car and a certain sum of money. Nothing, however, came of this. Hornby admits in his evidence that Goldberg always insisted that he wanted his full $2,200.

On April 13, 1921, more than 4 months after the filing of the proof of loss and more than 2 months after the expiration of the 60 day period, and after this action had been commenced, the defendants served upon the plaintiff and the solicitor of the plaintiff the following notice:—

"Owing to disagreement as to the amount of loss or damage to the McLaughlin car insured by the above policy against theft alleged to have been stolen on or about November 30, 1920, and recovered in February, 1921, you claiming a total loss without regard to the recovery of the car and the Assurance Corporation claiming that the amount of loss for which it is liable is the amount of damages done to the car by the theft and detention of it, the said corporation has selected as its appraiser to determine the amount of loss or damage, Mr. S. W. Woodley, of 129 5th Ave. W. Calgary, and you are hereby called upon to select

an appraiser in accordance with the conditions of the said policy.

Dated the 13th day of April, 1921."

This was the first notice ever served upon the plaintiff asking for an appraisal.

The plaintiff, not having recovered payment of his claim, brought this action on March 30, to recover the sum of $2,200, the full amount alleged to be owing under the policy.

The policy contains many important terms and conditions, nearly all of which have been set up by way of defence, to this action. Those relied upon are set forth at length. They are numbered for convenience, there being no numbers attached to them in the policy, and are as follows:

(1) "This policy is made and accepted subject to the provisions, exclusions, conditions and warranties set forth herein and endorsed hereon, or on the back hereof, and upon acceptance of this policy the assured agrees that its terms embody all agreements then existing between himself and the corporation or any of its agents relating to the insurance described herein, and no officer, agent or other representative of this corporation shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.

(2) Notice and proof of loss. In the event of loss or damage the assured shall forthwith give notice thereof in writing to this corporation or the authorised agent who issued this policy, and shall protect the property from further loss or damage and within 60 days thereafter, unless such time is extended in writing by this corporation, shall render a statement to this corporation, signed and sworn to by said assured, stating the knowledge and belief of the assured as to the time and cause of the loss or damage, the interest of the assured and of all others in the property; and the assured, as often as required, shall exhibit to any person designated by this corporation all that remains of any property herein described, and submit to examination under oath by any person named by this corporation, and subscribe the same; and, as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this corporation or its representative, and shall permit extracts and copies thereof to be made.

It is a condition of this policy that failure on the part of the

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assured to render such sworn statement of loss to the corporation within 60 days of the date of loss (unless such time is extended in writing by the corporation) shall render such claim null and void.

(3) Appraisal. In the event of disagreement as to the amount of loss or damage the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The assured and this corporation shall select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter, the appraisers together shall estimate and appraise the loss or damage, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing to any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

(4) Payment of loss. This corporation 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 sum for which this corporation is liable, pursuant to this policy, shall be payable 60 days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this corporation, including an award by appraisers when appraisal is required hereunder.

(5) Agent. No person shall be deemed an agent of this corporation unless specifically authorised in writing by the corporation.

(6) Suit against corporation. No suit of action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the foregoing requirements, nor unless commenced within 12 months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the Province wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such Province.

(7) Additional conditions. This corporation shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the assured to repair or replace the same with material of like kind and

quality; such ascertainment or estimate shall be made by the assured and this corporation, or, if they differ, then by appraisers as herein provided. It shall be optional with this corporation to take all or any part of the property at such ascertained or appraised value and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice within thirty days after the receipt of sworn statement of loss herein required of its intention so to do; but there can be no abandonment to this corporation of the property described."

As to the first (defence par. 3) this in my opinion has no application in this case and refers only to such waivers as have taken place during the continuance of the policy and before the loss insured against has occurred, and the cause of action has arisen. Here, any waivers of which the plaintiff seeks to avail himself, arose after the loss.

As to the second defence paras. 4 and 5), notice was given by the plaintiff immediately the car was stolen and on December 2 he personally went to the office of F. W. Mapson & Co., who were agents under the express terms of this condition, they being the agents who issued the policy, of the defendant company to receive proofs of loss, and filed with them a "sworn statement in proof of loss," which was forwarded to and received by the Western branch office of the company on December 4, 1920. The notice and proof of loss were never objected to by the defendant until at least 17 days after the expiration of the 60 day period following the notice and proof of loss. He was never required to do any of the things which he might have been required to do under this condition, and consequently could not violate the terms thereof in these respects. This action was not commenced until March 30, 1921, and proofs of loss were completed December 2, 1921. The notice and proofs of loss were sufficient and there has been no breach of this condition on the part of the plaintiff.

As to the third (defence paras. 7, 12, 13), in the event of disagreement as to the amount of loss or damage. The loss must be determined by arbitration. Was there a disagreement, and if so when did it take place? Before the expiration of the 60 day period following the proof of loss or after? The plaintiff had filed his proof of loss on December 2. No objection was taken to it by the company so far as the plaintiff was aware until about 17 days after the expiration of the 60 day period. In fact, he had been led to believe that the full amount of the claim would be paid by Durrell, of Mapson & Co., whom Jankins describes in his evidence "as an intermediary." They had no

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written authority to and consequently could not bind the company. Durrell acted as an intermediary in the transmission of information from the defendant company to the plaintiff. This is important not from the view of binding the company, but as to any "disagreement" necessitating the appointment of an appraiser. On February 14 after no doubt verbal assurances had been given to the plaintiff that the full amount of this policy would be paid, Mapson & Co. write the defendant, "we can assure you that the cheque is on the way" and then proceeds, "we are advised by the local representative of the Employers' Liability Assurance Co. to write you in accordance with the above and to assure you that the cheque will be handed over to you immediately on its arrival." Does this indicate any disagreement between the parties? Clearly not, just the reverse. Who would be in a better position to know if any disagreement existed than the local manager through whose hands all these claims must pass. The cheque as a matter of fact as it afterwards turned out was not on its way, and on February 21 Mapson & Co. write the plaintiff, "It appears that the head office has not yet forwarded the cheque in payment of this claim though we were given to understand by the local office that such would be the case," and goes on to inform him that the defendant had placed the matter in the hands of the adjustment company. On February 17, Calverley, the Western fire manager, says, "Head Office . . . are of the opinion that at the time of the theft the accused was not entitled to the recovery of the full face value of the policy."

About this time the adjuster, Hornby, called upon him and tried to get him to take $2,000 or $2,100 as more fully set out in the evidence herein. In the evidence of Jankins, we have a suggestion of disapproval on the part of the company.

"37. Q. Was the company satisfied in issuing the cheque payable to Goldberg for $2,200, that loss was suffered by Goldberg to that extent? A. No. 38. Q. Well why did they issue the cheque for $2,200? A. We pay a good many claims—sometimes they represent settlements which, in our opinion, are more than the actual loss."

From the above, I think it perfectly clear that there is no disagreement such as is contemplated by this condition of the policy, until some very considerable time after the expiration of 60 days. So far as the evidence of Jankins is concerned, if at any time he had disapproved, that disapproval was overcome by his signing the cheque, and the moment that he signed the cheque on behalf of the company it is evidence that the company had decided to accept the proof of loss as filed by the plaintiff. So far

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as any disapproval on the part of the company is concerned, it seems to have been a matter wholly within the knowledge of Jankins, and uncommunicated to the plaintiff, to have a disagreement under this condition, it is not enough that after the claimant has filed his proof of loss that an officer of the company should have a mental objection to the proof as filed. He must do something more. He must communicate that disapproval to the claimant and unless it is communicated to him, notwithstanding the fact that his views as to the value of the property lost or destroyed may differ from those of the claimant, we have not a disagreement such as is in contemplation in this condition. There was no disagreement between the parties until long after the expiration of the 60 days. A disagreement arose somewhere around the 15th or 20th of February, but that disagreement arose at a time after the rights of the plaintiff had become established and can be of no avail to the defendant company and in any subsequent endeavours to negotiate a settlement between the representative of the adjustment agency and the plaintiff. It is quite clear that the plaintiff did nothing which would prejudice his rights or, in any way, waive his right to the recovery of the full amount of the policy. The interview between the representative of the company and the plaintiff is more in the nature of an endeavour on the part of the defendant company to effect a compromise of an established claim. This is perhaps borne out by the letter of the adjustment agency written on February 22, 1921, to the defendant company at its Calgary office in which they say in speaking of the plaintiff's attitude in claiming $2,200, "he declares he is not in the mood for any bargaining in the matter and demands that sum stating it to be his intention to place the collection in the hands of a solicitor for collection if not paid for forthwith." There could be no question of the value of the car itself because in that same letter the adjustment company states the cash value at the date of the theft was $2,346 and concludes the letter by stating that "under the circumstances we feel obliged to recommend payment of the same." This recommendation was followed by the company, they having issued their cheque in settlement thereof, although that cheque was not actually delivered to the plaintiff.

What the plaintiff really did was to disagree with the representative of the company by refusing to accept any amount less than that to which he had already become entitled. After the car was recovered, the defendant relied on the fact that a disagreement had arisen and notice had been served calling upon him to appoint an appraiser. It is quite true that the representative of the adjustment agency went to see the plaintiff, but,

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as he admits in his evidence set out before, Goldberg always insisted upon his right to receive his $2,200. He had refused to appoint an appraiser, his rights under the policy having already been determined. He did nothing at these interviews which would prejudice his interest or waive his rights to recover the full amount to which he had become entitled.

In regard to the fourth (defence paras. 8, 12). What I have said in regard to the above, the third condition, largely applies. So far as to the waiver of any provision or condition if it applied at all that must be a waiver by a requirement, act or proceeding on its part. Here, they made no requirement, nor did the company do any act, nor did they institute any proceeding. What they did was simply they failed to act, and the waiver was brought about in that manner. It is provided that the loss shall be payable 60 days after notice, ascertainment, estimate and satisfactory proof of loss herein required have been received by this corporation, including an award by appraisers when an appraisal is required. As to the notice and proof of loss, I have already dealt with that.

As to the ascertainment and estimate. This is covered by the proof of loss and the ascertained and estimated value are these set out in the proof of loss, namely, $2,200, which were never questioned by the defendant company and which they must be deemed to have accepted.

As to the award by an appraiser. No award was ever made by the appraisers, nor was there any request by the defendant company for the appointment of appraisers until after the determination of the rights of the plaintiff under the policy. It was then too late.

The defendant sets up that if an agreement was arrived at it was before the recovery of the car, while both parties were under the belief that the car would not be recovered. It is a defence somewhat in the nature of a mutual mistake of fact, but no special relief is claimed in connection therewith. The inference is that the agreement having been arrived at under this mistaken belief cannot be effective, but I am unable to agree with this view. Relief may be granted, where there is mutual mistake of fact, but this is not a mistake of fact. It is just a matter of conjecture and there is no evidence at all as to what the belief of either of the parties in connection with the transaction was, and to be of any value at all it would be necessary that it should relate to some present existing fact.

As to the fifth condition (defence para. 9). Nothing much turns on this as there is no endeavour on the part of the plain-

tiff to hold the company by the acts of any unauthorised agent.

As to the sixth condition (defence para. 8). I find that all the requirements set forth in the policy of insurance have been complied with and that the plaintiff was entitled to maintain his action.

As to the seventh condition (defence para. 6). Paragraph 6 of the statement of defence reads,

"It was a condition of the policy that such loss or damage should in no event exceed what it would cost the assured to repair the automobile with material of like kind and quality."

This might be the case, I do not say it would be, if the car had been recovered before the expiration of the 60 days or before the rights of the parties had become determined under the policy; but, in view of the finding I have made in regard to the rights of the plaintiff having been determined before the recovery of the car, I hold that this provision cannot apply and I think properly so.

This condition provides that "this corporation shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs." This was clearly a loss; the value of the property at the time of the loss was determined; he has a right of action; to say that he is now limited to damages which would not exceed what it would cost to repair the automobile would be to virtually divest him of a right which he had as for a total loss under the policy.

This condition further provides that there can be no abandonment to this corporation of the property described.

I also hold that this provision has no application in this case, the period of 60 days having expired and the rights of the plaintiff having been determined.

In the case of *Dixon* v. *Reid* (1822), 5 B. & Ald. 597, 106 E.R. 1309, a case of barratry, it was held that for the purpose of insurance the property was a total loss at the time of the tortious act of the crew and consequently the owner of the property was entitled to recover as for a total loss notwithstanding the fact that some of the property insured was subsequently recovered.

Huddy on Automobiles, 5th ed. p. 1048, says:—

"Under some policies if the machine is not recovered within sixty days after the loss, the insured can collect the entire insurance moneys although the machine is recovered before the institution of a suit therefor," and cites in support of this proposition, *O'Connor* v. *Maryland Motor Car Insurance Co.* (1919), 122 N.E. Rep. 489, which is the decision of the Supreme Court of Illinois. In that case the facts and conditions of the

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policy are very similar to the facts and conditions here. Carter, J., at p. 491, says:—

"There can be no question that the liability of the company might be affected by the return of the automobile and the giving of the required notice before the expiration of the 60 days; but we are disposed to hold that if, after the notice and satisfactory proof of loss were given, 60 days had expired before the finding and return of the automobile, the policy intended that there might be full recovery from the company for the value of the automobile, and this without reference to the question of abandonment. As we construe this policy as to loss by theft, the term, 'abandonment,' as used in the quoted provision, was intended to mean that there could be no voluntary abandonment (using the word in the technical sense) by the owner before the expiration of the 60 days."

At p. 490, he says:—

"Abandonment in its technical sense, means the relinquishment of a right; the giving up of something to which one is entitled; the giving up of a thing absolutely, without reference to any particular person or purpose."

At p. 491, he says:—

"Obviously, in order to make an insurance policy of this kind of value to the owner of the property, there must be some time fixed after which the return of the automobile will not release the company from liability. Automobiles are so generally used in business affairs and other activities of life that public policy requires that a person having a theft policy should not be compelled to wait indefinitely on the chance of having the stolen automobile recovered, or be compelled to incur the expense of buying a new one and thereafter taking the old one back, is recovered. Fairly construed, we think this insurance policy intended to fix the date at 60 days after the notice and satisfactory proof of loss had been received by the company—in other words, to fix the date at which the insured would not be compelled to take the stolen car back even if recovered at the date when the insurance money was agreed to be paid.

For the purposes of this case, it is not necessary to decide whether or not the defendant company became liable for a total loss as at the time of the theft of the car.

The plaintiff became entitled to recover the full face value of the policy at the expiration of the 60 days from the date on which the proofs of loss were filed, and his right to recover that amount is not affected by the fact that the car was subsequently recovered.

There will be judgment for the plaintiff for the full amount of the claim with interest at 5% per annum and costs.

The plaintiff having abandoned his car it becomes the property of the defendant.

At the trial, counsel for the plaintiff asked leave to amend his statement of claim by adding the following clause:—"7a. The defendant did not within the said period of sixty days serve any notice on the plaintiff requiring the plaintiff to proceed to arbitration under the terms of the said policy, and the defendant thereby waived its rights, if any, to arbitrate as to the loss under the said policy"; which leave was granted and statement of claim amended accordingly.

Judgment for plaintiff.

SHYMKA v. SMOKY LAKE UNITED FARMERS Co.

Alberta Supreme Court, Tweedie, J. May 4, 1922.

CONTRACTS (§IIIA—196)—*With manager of company to take shares—Settlement on termination of employment—Transfer back to company of shares—Release of money claims—Shares and profits—Validity of contract—Rights and liabilities of parties—Specific performance.*]—Action for specific performance of a contract.

R. G. Tighe, for plaintiff.

J. Cormack, for defendant.

TWEEDIE, J.:—This was an action brought by Andrew Shymka against the Smoky Lake United Farmers Co., for a decree for specific performance of an agreement between the defendant as vendor and the plaintiff as purchaser of a portion of the southeast quarter of sect. 21, tp. 59, r. 17, west of the 4th meridian entered into on August 13, 1920, and also to recover certain sums of money owing under an agreement entered into on January 17, 1921. As to that part of the action which relates to the specific performance of the agreement for sale and purchase of the land the defendant in his pleading admits liability but undertakes to justify the delay, but, at the commencement of the trial, its counsel abandoned that and consented to an order for specific performance being made. As to the remainder of the action the facts are briefly as follows:—The plaintiff was employed by the defendant company as its manager and at the incorporation of the company signed the memorandum of association, agreeing to take 80 shares of stock of the company. The company having commenced business, the directors met and passed a resolution, which, undoubtedly, is the cause of this trouble; on September 13, 1919, which reads as follows:—

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"Moved by Kosmo Cheranochan and Andrew Shymka" (the plaintiff in this action) "that after 3 years' time any person or persons wants to take his shares out from such store he shall take his or her shares with the full profit." Shymka continued to work for the company for some time and did not receive any profits or dividends from the business. In January, 1921, when he decided to sever his connection as an employee of the company he arranged with the directors a settlement as a basis of his withdrawal, which was reduced to writing on January 17, 1921.

Under the terms of the agreement the plaintiff was to pay to the defendant company $4,400.67, as follows:—(1) By transfer of his shares in the company which he agreed upon for the purpose of the settlement at 100 shares at $25 each, $2,500; (2) By release of claim for money owing to him which he had advanced to company by way of loan, $500, and (3) By release of profits on shares and deposit, $1,400=$4,400.67.

In return for which the company was to:—(1) Release him from an alleged claim which it had against him for goods received while in the company's employ and losses which the company sustained and for which they considered he was responsible $1,805.66; (2) Deliver goods to him pursuant to the agreement (and which he actually received $1,750.01, and (3) Transfer to him of book accounts for the sum of $845.01;= $4,400.68.

At the time of entering into the agreement the plaintiff disputed his liability for $1,805.66 on the ground that he did not get the goods and that the other amounts charged to him as for goods of the company which he had sold and not accounted for was improperly charged against him. As a result of this dispute, and in order to get the matter closed up, the company gave him a letter dated January 17, 1920, (which was in error for 1921) in which they agreed to pay him all or any portion of the $1,805.60 which was improperly withheld.

After the plaintiff left the employ of the company the directors found errors in the financial statement and the company owed more to wholesalers than they thought. Accordingly, they passed a resolution "That it is impossible to pay Andrew Shymka the amount which shall be given by the said company on about March 1, 1921, for the reason that shall straight it all mistakes which Andrew Shymka made then we pay the balance," meaning evidently until all mistakes are straightened out. As a result of this resolution the company refused to

transfer to him the $845, of book accounts to which he claimed to be entitled. Nor did they render him any statement in regard to the claim which it made against him for the $1,805.01.

The plaintiff brought action against the defendant company asking for various forms of relief and amongst others, and the one relied on at the trial, judgment for the sum of $2,650.67 that amount being made up of the items for $845.01 and $1,805.66, under the agreement.

The defendant defended on the ground that the contract as a whole is illegal by reason of the fact that it is an agreement whereby the company is to buy back 100 of its own shares for $2,500 and is binding itself to pay $1,400.67 in dividend which it says was not properly declared, and treating the whole of the contract as illegal counterclaims for $3,065.67 being made up of $1,805.66 referred to in the agreement which he says is on account stated, and the sum of $1,750 being the amount of the goods sold and delivered—these being the goods delivered pursuant to the agreement,—which together amount to $3,553.67 and against which he allows a credit of $500 that being the amount loaned to the company by the plaintiff.

As to the illegality of the contract there is no doubt that it was illegal in part as to the purchase of its own shares, in the sense that it was ultra vires. The law on that point is well settled by the case of *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409, 57 L.J. (Ch.) 28, 36 W.R. 145.

It then becomes necessary to ascertain as to what extent the plaintiff was a shareholder in the company. The defendant claims that he is the owner of 100 shares as covered by the agreement. It is quite true that the agreement mentions that number and was entered into on that basis. But the defendant now repudiates that agreement on the ground of illegality and that being the case it certainly cannot set up that it is illegal in so far as it binds the company but still operates in some way to estop the plaintiff. It being in regard to the shares must be treated as a nullity in so far as it purports to effect them or the plaintiff in connection therewith.

When the company was incorporated, he signed the memorandum of association and thereby became the holder of 80 shares of the par value of $2,000. Subsequently, while in the employ of the company, he made payments on account of some 20 or more to the extent of $500 their par value. He made no formal application therefor, nor was he ever allotted any by the directors of company, nor is there anything to shew that his application—informal if any—was ever accepted, and he now con-

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tends that he is not a shareholder except as to the 80 shares. I find as a fact that the directors never accepted an application from him for the 20 shares and he is a shareholder to the extent of 80 shares only. As to the $500 paid on account of the 20 shares I think that the agreement must be interpreted as releasing the company from any liability to repay him that amount notwithstanding the fact that it could not be accomplished by means of transferring the 20 shares of stock. It is quite clear that the intention of the whole agreement was that each was to release the other from all liability and that the company was to acquire all the plaintiff's interest therein and effect must be given to it as far as possible and legal, and is effective as a release to the company of his right to recover the $500 as money had and received to his use, or otherwise.

The other ground of illegality which is relied upon by the defendant is that item in the agreement which forms part of the consideration moving from the plaintiff to the defendant, viz.:Profit on shares and deposit ..... $1,400.67.

The agreement is somewhat inartistically drawn, the obligation of the plaintiff being set out in the following words:—

"Witnesseth that the party of the first part herewith acknowledges the receipt from the party of the second part of the sum of forty-four hundred dollars and sixty-seven cents, $4,400.67, made up as follows:—"and then proceeds to enumerate the items set forth above, including "Profits on shares and deposit."

Shortly before the plaintiff severed his connection with the company, the directors declared a dividend which was credited to each of the shareholders on the books of the company and was applied in discharge of their respective liabilities. In addition to the dividend which they should place to the credit of the plaintiff, they also agreed to allow him interest on his deposit, that is his loan, at the same rate, or as they called it, proportion. This they added to the dividend and credited his account with $1,400.67 to his account and as he owed the company nothing he had a surplus credit of that amount.

The defendant contends that as the company was operating with table A of the Companies Ordinance as by-laws and a dividend could be declared only by the shareholders. That is correct, but I do not think that inasmuch as the dividend with which his account was credited was declared by the directors and not the shareholders that it was an illegality which affects the agreement.

He also says that it was paid out of capital and, therefore, illegal. This I find is not correct as the evidence shows that

the net earnings of the company were sufficient to warrant this dividend and it could be properly paid if properly declared by the shareholders. How is this agreement affected by the fact that the shareholders did not declare the dividend? I think not at all. This is not an action to enforce the directors or shareholders to declare a dividend nor is it an action to recover from the company a dividend which was illegally declared. The effect of the agreement is that he releases the company from its obligation to pay him $1,400.69 which stands to his credit on the books of the company made up in part of the dividend and in part of the allowance made for the use of his deposit or loan. He released the company for a valuable consideration namely a release of its liability to pay him a dividend in respect of his shares if and when properly declared as well as its liability to pay him for the use of his $500. The directors of the company must have known their own powers in regard to declaring the dividend and the value of the release which they were getting in exchange for the consideration they were giving. If they improperly paid out the money of or parted with the property of the company they themselves may be liable to the creditors or shareholders of the company or the plaintiff might be liable to return the dividend under certain circumstances that it is not available to the company as a defence in this case. While the declaration of the dividend by the directors may have been illegal and the payment thereof illegal, it was not *ultra vires* of the company and may be remedied by a meeting of the shareholders in fact declaring the dividend which I have no doubt would be done as all the shareholders received their dividend the same as the plaintiff. By so doing the potential right which the company has to the dividend of the plaintiff would become an actual one and the consideration which it received from the plaintiff become of the value which they considered it to be at the time of the agreement. In my opinion, there is nothing illegal as to this clause in the agreement. The agreement then being illegal only in part should not be set aside as to the whole if the consideration can be apportioned, and I think it can.

It should not be set aside because it would be impossible to restore the parties to their original positions, the consideration moving from the company having been performed in large part by the delivery of goods, some of which the plaintiff has sold and some of which he has on hand, greatly depreciated in value.

It is true that the whole agreement could be set aside and the parties left to their remedy on the common counts for money had

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and received and goods sold and delivered, but this would serve no good purpose as it would mean a new trial or at least the taking of further and expensive evidence in regard to the value of the goods.

The consideration here is easily divisible as it can be measured in terms of dollars and cents. See judgment of Palles, C.B., in *Re Irish Provident Assurance Co.*, [1913] 1 Ir. Rep. 352. This case however was decided on another point. Also see Mitchell's Canadian Commercial Corporation p. 1189.

The agreement will, therefore, stand except as to the item for the sale of shares which I find to be an agreement by the company to purchase 80 of its own shares at $25 per share or $2,000 for which amount the defendant is released from liability. As to the remaining portions of the agreement involving mutual consideration valued at $2,400.67 I find as follows:—

The plaintiff has performed his part by releasing the company from liability to refund money, par on shares not allotted, $500; release from liability to repay loan $500; release from liability for profits (dividends) on shares and on deposit, $1,400=$2,400.

The defendant has performed its part by delivery of goods at time agreement entered into, $1,750; by release of claim for goods sold and delivered and which for part of the item $1,805.66, viz., $705=$2,455.

The defendant has paid to the plaintiff $55 (omitting the cents in the calculation) over and above the amount required under the legal part of the contract and is entitled to a refund of that amount.

The defendant did not admit the amount claimed by the plaintiff for $2,650.67 and it was necessary for him to prove it. I find that the plaintiff is entitled to this amount except as to $705.66 which forms part of the item for $1,805.66 and allow the claim at $1,945 which with the $55 to which the defendant is entitled in all $2,000 will be set off against the $2,000 the price of the shares and no recovery allowed therefor.

As to the counterclaim of the defendant for $3,055.67 there will be allowed $55 being the amount which he is entitled to recover back on account of the illegal portions of the contract. The plaintiff has practically succeeded on the counterclaim but there will be no costs to either party in connection therewith.

The usual order for specific performance will be made with terms as agreed upon between the parties. In the event of the parties being unable to agree as to the terms of the formal order further application to be made for the purpose of forming the terms.

Plaintiff to have his costs of the action, column 2, rule 27 to apply.

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Judgment accordingly.

ALBERTA PACIFIC GRAIN Co. v. DOMINION BANK.

Alberta Supreme Court, Tweedie, J. March 2, 1922.

MISTAKE (§VIIA—160)—*Bank—Payment to for credit of customer—Mistake of fact—Recovery back.*]—Action to recover money paid to the defendant under an alleged mistake of fact.

A. M. Sinclair, K.C., and *A. C. McWilliams*, for plaintiff.

J. E. A. Macleod, K.C., for defendant.

TWEEDIE, J.:—This action was brought by the plaintiffs to recover the sum of $1,300 with interest thereon from the date of payment, this sum having been paid on October 22, 1920, to the defendant for the credit of one of its customers under a mistake of fact. The alleged mistake of fact was the payment of this amount in excess of what the plaintiff actually owed to the defendant's customer without knowledge of the error on the part of either the plaintiff or the defendant.

The facts are based on transactions which took place in 1920 and are briefly as follows: One R. H. Townsend, was a customer of the defendant bank and had a current account at the Calgary Branch through which his various deposits passed including moneys received from the plaintiffs by way of advances made on account of grain sold and to be delivered by him to it, as well as amounts found to be owing on the final adjustments. He was indebted to the bank at the time of the transactions hereinafter referred to in a sum approximating $12,000 which had been outstanding for upwards of 3 years. This indebtedness did not show in the current account but was shown in the liability ledger as a loan. There was a special loan account at the time of the excess payment referred to and the defendant held Townsend's note, which was a renewal of a series of renewals of the original notes and which did not mature for some considerable time after the excess payment and, although it is not very clear from the evidence, probably not until after the defendant became aware of the excess payment. The defendant also held security on all the available assets of Townsend, real and personal, and in addition had a guarantee for the account. The indebtedness arose as a result of his having availed himself of a line of credit which he had with the bank in 1918 but which had long before the happening of the events upon which this action was based been discontinued and never renewed.

In the fall of 1920, grain declined sharply in price and the

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manager of the defendant bank telephoned Townsend to enquire if he had sold his grain and Townsend replied that he was in the course of selling it. The manager then asked him to request the plaintiff "to consign the grain to us." Just what was meant by this was not explained but as a result the proceeds from the grain, less the advances against specific cars, were paid over to the bank.

On October 19 the plaintiff by its cheque made a general advance to Townsend against his grain, without reference to any particular one of several cars, which were then being shipped by Townsend to the plaintiff company. This cheque was delivered to him, and by him endorsed and deposited to the credit of current account in the defendant bank, and subsequently chequed out in various small amounts.

On October 7, the plaintiff company advanced the sum of $600 against car No. 216177, the net proceeds of which as accounted for on the 22nd., of that month being $1,743.05, thus leaving a net balance owing thereon of $1,143.05. On October 14, the company again advanced the sum of $800 on account of car No. 85054, the proceeds of which as accounted for on the 22nd being $944.05, thus leaving a net balance owing thereon of $144.05 or $1,287.10, for the two, for which the plaintiff issued cheque on October 22. On October 21 the company issued its cheque for $871.85 being the net proceeds of car No. 74314, no advance having been made against that car. Both cheques, amounting to $2,158.95, were made payable to Townsend and by an arrangement made between Townsend and the plaintiff and the defendant were delivered on the 22nd, by the plaintiff to the defendant and by the latter endorsed, pursuant to Townsend's verbal instructions "deposited to the credit of R. H. Townsend, the Dominion Bank, Calgary, Alta., prior endorsement guaranteed," and placed to the credit of the current account of Townsend, the deposit clips therefor having been filled in by one of the defendant's accountants.

The net proceeds of the three cars of grain amounted to $3,558.95, while the two cheques and advances against specific cars were an equal amount. Through an error in the accounting department of the plaintiff no deduction was made on account of the general advance of $1,300 on October 19 and an excess payment of this amount was made to the defendant.

At this time, the current account showed a credit balance of $231.55, this deposit increasing the total credit balance to $2,390.50. Three days later, on the 25th, the current account was debited with $2,300 which was transferred to the credit of

Townsend's account in the Liability Ledger and applied on the indebtedness represented by the note not yet due. This left a credit balance in the current account of $90.50. From this time on until November 1, this account was not very active. On that date, the defendant made an advance to Townsend of $598.88 in payment of his cheques which they had shortly before refused to honour, for the purpose of paying taxes on land upon which it had security.

The defendant's manager, in his evidence, stated very positively that this advance would not have been made had the bank not received the deposit of $2,158.95 above referred to.

On November 1, the plaintiff's solicitors wrote to the defendant advising it of the excess payment of $1,300 and, as its manager understood it, demanding a return of the same. This letter was not received until December 4, and no explanation was given as to the delay in transmission. The defendant, however, had knowledge, through its manager, of the excess payment at some time between the 8th, and the 20th of November, he, admitting that he had within that period been so informed by Townsend.

The manager also says that Townsend knew that this $2,300 (which included the excess payment of $1,300) was applied on account of the indebtedness (loan) because he signed a receipt for it. By receipt is evidently meant the "voucher receipt and confirmation of balance" which he signed on November 13, 18 days after the transfer from the current account to the loan account in the liability ledger, showing that there was to his credit in the current account at the end of October only $58.76.

From October 25 to December 2 the deposits and withdrawals from the current account with the exception of the item of $598.88 on November 1 were few and small. On December 2, the current account is charged with a "note $10564," this being no doubt the balance owing on the current note for the loan as shown in the liability ledger. There is also a credit on the same day of "Dis. $11114." which was the proceeds of a note given to cover the note charged, an overdraft of $546.30 (due to the payment of the cheque for $598.88) and a small item for interest. From this time on there are but few small items shewn in the current account.

The liability of Townsend, other than that shewn in the current account according to the manager of the bank was shewn as a loan in the liability ledger while, at the same time, they held his note to cover the same. When the $2,300 was trans-

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ferred on October 25, as was pointed out before, a note was current and did not mature for some considerable time thereafter. In regard to the note and renewals the manager said that "the notes were just being kept current" and that "the account was in liquidation." "All moneys which came into Townsend's credit were applied on his credit irrespective of whether there was a note due or not," "we kept a special loan account and $2,300 was applied on it." By way of explanation as to why they held Townsend's note for this loan and took renewals thereof he says "instead of carrying it as past due we carried it on a note so that it would look better."

At the date of the trial of this action, Townsend, after having been given credit for the amount transferred, including the overpayment of $1,300 and the proceeds of securities realised on, was still indebted to the bank for approximately $9,500. The defendant consequently refuses to repay the $1,300 to the plaintiff.

Unless the defendant can be said to have altered its position to its prejudice between the time when it received this amount of $1,300 on October 22, being the amount paid in excess of the amount to which Townsend was properly entitled and the time when he became aware of the excess payment, which was between November 8, and 20, I am, in view of all the circumstances, of the opinion that it should pay back to the plaintiff this money.

In the case of *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort Sons & Co.* (1904), 20 Times L.R. 403, 90 L.T. 474, 52 W.R. 489, money was paid to the defendant under a mistake of fact somewhat similar to that alleged in this case. In that case the plaintiffs had agreed to purchase from Kromrisch & Co. a quantity of rubber in the purchase of which the latter had been financed by the defendants and another firm of bankers Brandt & Co., each taking as security shipping documents to the extent of their advances. When any portion of the rubber was sold Kromrisch & Co., procured from the banks holding the shipping documents, a delivery order to enable him to deliver the rubber and gave in exchange an assignment of the purchase moneys. A number of purchases were completed by the plaintiff on account of which the purchase price was payable to the defendants and on the adjustment of the accounts as of a certain date it was found that the plaintiff owed Kromrisch & Co., payable to the defendants, £1246 14s 8d. In the meantime the plaintiffs had bought other rubber from Kromrisch & Co.,

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the purchase price of which had been assigned to and was payable to Brandt & Co., amounting to £1480, 15s, 11d.

During this time the plaintiffs had made further large purchases of rubber from Kromrisch & Co. who so advised the defendants and procured delivery orders against the assignments of the purchase price. Instead of making delivery to the plaintiffs, they converted the rubber to their own use. The plaintiffs owed the defendants the £1246 14s 8d and no more. The defendants honestly believed that they were entitled to more than they actually received and would have been but for the fraud of Kromrisch & Co. of which they were not aware. Owing to a blunder on the part of one of the plaintiff's clerks the fact that part of the money had been assigned to and was properly payable to Brandt & Co. was overlooked and the remittance for the whole amount (£1246 14s 8d and £1480 15s 11d) was sent to the defendants with instructions in the covering letter to place the same to the credit of Kromrisch & Co. which was done with the knowledge and consent of the latter. The plaintiff on discovering the mistake demanded payment back of the amount overpaid, which was refused on various grounds, of which one was "the state of the accounts between Kromrisch & Co. and the defendants had in fact been altered between the dates of the receipt of the money and the notification of the mistake."

The Master of Rolls at p. 405 says: "It is clear law that *primâ facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party and has handed it on is no longer accountable to the sender. In such a case he is a mere conduit-pipe and has not had the benefit of the windfall."

Romer, L.J., at p. 405 (2nd column) says "when the mistake in fact was discovered, the plaintiffs became entitled to recover the moneys from the defendants unless the defendants could shew that they had received the moneys as agents and, before notice of the mistake, had parted with them to their principal, or so dealt with them by the mandate of their principal as to render it unjust to call upon them to repay the moneys to the plaintiffs. But in the present case the defendants could not shew that they had so received and dealt with the moneys."

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The Court upheld the decision of the trial Judge who was of opinion "that the £1480 15s 11d was paid into the defendant's hands in such circumstances of mistake as to make it money paid by the plaintiffs to their own use and that it never ceased to have that character," and accordingly ordered the defendants to pay back the money.

In the case of *Kerrison* v. *Glyn, Mills, Currie & Co.* (1911), 81 L.J. (K.B.) 465, (House of Lords 1911) cited by the plaintiff the plaintiff was held entitled to recover £500 under the following circumstances; the plaintiff had arranged with Kessler & Co. of New York for a line of credit of £500 in favor of the Bote Mining Co. in which he was interested on the understanding that when advised of payments made against such credit he would deposit with the defendants, who were the London agents of Kessler & Co., an amount sufficient to cover the amounts so paid out and charges. In the course of dealings the plaintiffs sometimes voluntarily anticipated the actual advances to be made by Kessler & Co. On October 21, 1907 Kessler & Co. credited the Bote Mining Co. with the proceeds of £500. On October 31, Kerrison deposited with the defendants to the credit of Kerrison & Co. £500 although he was not bound to do so under the agreement as he had not been advised by Kessler & Co. that any advances had been made. This deposit was made in anticipation of the advances to be made and the belief that Kessler & Co. "were a living commercial entity able to carry on their business as theretofore" and would honour the drafts of the Bote Mining Co. to that extent. In the meantime Kessler & Co. had become insolvent and were not carrying on business and were unable to honour the drafts of the mining company, a number of which, though drawn between the 21st, and 31st, of October were not honoured. When the plaintiff became aware of this he notified the defendant and demanded repayment of the money. Kessler & Co. were indebted to the defendants and they held the money against this indebtedness and refused to pay it over.

Lord Atkinson, in speaking of the plaintiffs' rights to recover at p. 470, says "I cannot doubt but that on general principles he would be entitled to recover back money paid in ignorance of these vital matters as money paid in mistake of fact." It was urged in this case that the plaintiff was precluded from recovering from the defendant because they were not his bankers but Kessler & Co.'s and that the relations between them (Kessler & Co. and the defendants) was that of debtor and creditor. In

discussing this point Lord Atkinson says, at p. 470: "The several cases cited deal with the respective rights of banker and customer *inter se*, and with those rights alone. They do not touch the question whether a banker to whom money is paid to the credit of his customer's account at that customer's request in mistake of fact, is in a better position than his customer would be, and is entitled to hold it, though his customer, had it been paid to him direct, would have, under the circumstances, been bound to refund it. That was the principle contended for by the respondents before your Lordships. No authority was cited in support of it. It seems to me contrary to reason and justice, and in the absence of binding authority upon the point I refuse to accept it as the law."

Lord Shaw at pp. 471, 472 says: "I agree with the opinion that money so paid can be successfully re-demanded. I do not think that it would be correct, either in law or in business, to permit the recipient, though a banker, to impound money which his principal could not have honestly or legally retained. This rule applies generally, even although the recipient, whether banker or agent, was, as here, ignorant at the time of receipt of the disability of the principal to do the thing for which, and for which alone, the money was deposited, or was himself under a mistaken impression on that subject."

Lord Mersey at p. 472 says:—

"The facts bring the case directly within the terms of the Judgment of Lord Loreburn in *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (1907), 97 L.T. 263, where he says, 'It is indisputable that, if money is paid under a mistake of fact and is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received.' An attempt. . . . . No doubt when a banker receives money, either from his customer or from a third person on account of his customer, he becomes his customer's debtor for the amount so received. But this does not entitle the banker to retain money which in common honesty ought not to be kept. If, indeed, the banker has paid over the money to his customer, or has altered his position in relation to his customer to his detriment, on the faith of the payment, the banker may refuse to repay the amount and may leave the person who has paid him to enforce his remedy against the customer."

In this case the money was clearly paid by the plaintiff to the defendant and by it received under a mistake of fact. The plaintiff believed that it owed to Townsend, the defendant's cus-

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tomer $1,300 more than it actually owed him and made payment accordingly. The defendant believed that all the moneys which it received were the proceeds from the sale of its customer to the plaintiff and was actually owing by the plaintiff to its customer or at best was ignorant of the fact that an error had been made and that the $1,300 was in excess of the amount to which its customer was properly entitled. Clearly, if this money had been paid to Townsend himself, the plaintiff would be entitled to recover it back. Is the defendant in any better position? I think not unless he can shew that between the time of the payment and its receiving knowledge of the error that it had altered its position to its prejudice. This it has not done unless it may have been said to have done so in regard to the payment to the customer of $598.88 on November 1. In other respects it cannot be said to have altered its position except by crediting the excess payment to the customer's account and applying it on his indebtedness. Even so he was not prejudiced by so doing. This was done in the cases above referred to in which the plaintiff was held entitled to recover back the money paid under a mistake.

The defendant in this case was not a mere intermediary for the purpose of handing the money on to a third person, he was to receive a benefit from the payment. He received it in accordance with arrangements which had been entered into before payment was made. According to the evidence of the defendant's manager the indebtedness of Townsend was in the course of liquidation. The defendant held security on all his available assets. The receipt of the money in no way caused the defendant to make any payment except the $598.88 or grant any indulgence to Townsend. The notes although on their face might have the appearance of extending time were, in fact, mere formalities. None of the securities held by the bank had been released. There was no prejudice except as intimated, to the plaintiff by his crediting the amount in his books on the indebtedness of Townsend.

Although the action here is on the common count for money had and received to the use of the plaintiff, the nature of the relief sought is equitable. If the defendant were allowed to retain the money received without having altered his position to his prejudice he would be unjustly enriched to that extent. It would be inequitable to allow it to retain it.

As to the payment of the $598.88 on November 1, to Townsend notwithstanding the fact that this money was used to pay taxes on the land of which the defendants held the interest of

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Townsend as security, I conclude that the defendants were induced to make the advance by reason of the deposit of $2,158.95 on October 22 of which the excess payment of $1,300 formed a part and that he did so before he became aware of the mistake and was thereby prejudiced to that extent.

There will be judgment for the plaintiff for the sum of $701.12 being the difference between the excess payment to the defendant of $1,300 and the amount advanced to its prejudice $598.88 with interest at the rate of 5% per annum thereon from October 22, 1920, and costs.

Judgment accordingly.

MEADOW FARM Ltd. v. IMPERIAL BANK OF CANADA.

Alberta Supreme Court, Appellate Division Beck, Hyndman and Clarke, JJ.A May 11, 1922.

Levy and seizure (§IIIB—46)—*Recovery of judgment—Seizure of hay of company for debt of secretary of company—Damage to hay while under seizure—Right of company to compensation.*]—Appeal by plaintiff from the trial judgment dismissing its action for damages for injuries caused to plaintiff's goods while under unlawful seizure. Reversed.

H. R. Milner, K.C., for appellant; *Frank Ford,* K.C., for respondent.

The judgment of the Court was delivered by

CLARKE, J.A.:—On January 29, 1921 the sheriff at Edmonton by his bailiff under a writ of execution directed to him in an action in which the Imperial Bank recovered judgment against E. Auld, upon the express instructions of the bank, seized a quantity of hay knowing it was claimed to be the plaintiff's property and took no proceedings for its removal or sale. On May 18, 1921, the sheriff notified the solicitor for the defendant, Auld, that the seizure was released on March 18, 1921, which was the first notice the said defendant or the plaintiff herein had of the release. While under seizure the hay became damaged by water and the plaintiff lost a beneficial sale of the hay and claims to have lost $650.25 by reason of the seizure.

The hay, which was of natural growth, was cut upon land under a permit given by the owner to the plaintiff for which it paid $50.

The plaintiff company was incorporated in 1917 and the members of it at the time of the seizure were the wife, two sons and a daughter of the said Auld, who was its secretary. Auld was for some years prior to the incorporation of the company and continues to be under heavy financial obligations. After

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fully considering the evidence I am unable to find that the company was not in fact the owner of the hay or that the company was the plaintiff's agent or alias in connection with it, but on the contrary I think the proper conclusion upon the evidence is that the company and not Auld was the owner at all material times. I cannot distinguish the case in principle from *Salomon* v. *Salomon* [1897] A.C. 22, 66 L.J. (Ch.) 35, 45 W.R. 193.

The trial Judge appears to have accepted the defendant's contention that Auld represented to it that he was the owner or had authority to deal with the hay and on the strength of that representation induced the bank to refrain from entering action against him for his indebtedness to the bank. There is no evidence that he was authorised by the company to make any such representation or that the company had any knowledge of it unless his knowledge being secretary of the company is the knowledge of the company. I do not think it is. It would be a fraud upon the company if he could succeed in diverting its assets for the payment of his debts. I do not think the plaintiff's right of action is affected by its omission to formally notify the sheriff of its claim to the ownership of the hay or to take earlier proceedings to assert its right nor was it bound to notify the sheriff or the bank of the loss of a profitable sale caused by the seizure or to make proposals for the carrying out of the sale on terms which would substitute the proceeds for the hay. The defendant took the risk of damage to the hay and loss of market which might have been anticipated. Had an application been made promptly for an order for removal and sale which it was I think the duty of the bank to make, it is quite probable directions would have been given whereby the loss or the greater part of it would have been avoided. It may be that a *bona fide* purchaser or an execution creditor of the plaintiff company could have treated the seizure as abandoned after the great delay but I do not think the bank can so treat it without having given any intimation thereof to the interested parties.

I see no ground for reducing the amount claimed by the plaintiff for damages.

I would allow the appeal with costs, set aside the judgment below and direct judgment to be entered in favor of the plaintiff against the defendant for $650.25 and costs.

Appeal allowed.

Re BUTRUILLE ESTATE.

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Alberta Supreme Court, Tweedie, J. February 11, 1922.

PARTNERSHIP (§I—3)—*Document purporting to be partnership agreement—Interpretation of.*]—Application by way of originating notice pursuant to sec. 48 ch. 19 Consolidated Ordinances and Rules of the Supreme Court 433 and 444, by judicial trustees of an estate, for directions and instructions and interpretation of a certain document, purportnig to be a partnership agreement.

G. H. Ross, K.C., for the trade creditors; *A. Hannah*, for P. Butruille.

A. de B. Winter, for the widow; *F. de Roussy de Sales*, for the judicial trustee.

I. F. Fitch, for the official guardian of the infant children.

TWEEDIE, J.:—The following were represented at the hearing: The Canadian Credit Men's Trust Ass'n, as manager of the partnership business (The Trochu Valley General Stores); the creditors of the partnership business; the infant children; children who had attained their majority; the widow (administratrix), and the Trusts and Guarantee Co., Ltd., judicial trustee.

The facts are as follows:—

On May 25, 1910, Jean Butruille, the deceased, who was engaged in a general store business sold the business to Theodoli Pappillard and Werth, who carried on the business as partners under the name of The Trochu Valley Gen'l Store, for $21,120 on deferred payments which were to bear interest at the rate of 8%, the purchasers to assume all the outstanding liabilities. Butruille died intestate leaving surviving him a widow and 5 children, of whom 4 were minors, on April 23, 1916, and on May 3, 1918, his widow was appointed administratrix.

The deceased was married in France at which time a marriage settlement was entered into. At the time of the death of the deceased he was domiciled in France. Relying on these facts she believed that she was entitled to nearly the whole of the estate of the deceased (which was largely in personal property) irrespective of the laws of Alberta, she never having sought the advice of the Court to determine what she was entitled to.

When war broke out in 1914 the parties in the business entered military service and placed the management of the business under the control of the Canadian Credit Men's Trust Ass'n, who successfully carried it on until early in the year 1919 when Pappillard, one of the partners, returned from France and took over the management. During the time the trust association

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was in control it paid Mrs. Butruille considerable sums under instructions from the partners and presumably on account of the indebtedness to the estate under the original agreement with the deceased. On January 31, 1919, about the time the Credit Men's Ass'n withdrew from the management, Pappillard, the manager, prepared a statement shewing a surplus of $103,361.59.

Fixed assets, $33,327; Liabilities, $9,548.73: $23,778.27. Mercantile assets, $104,522.79; Mercantile liabilities, $24,939.47: $79,583.32. Total: $103,361.59.

In this statement no liability to Jean Butruille or his estate is set out. Pappillard continued in the management of the business which had always been carried on under the name of the "Trochu Valley General Store" until March 10, 1921, when on account of financial difficulties the Canadian Credit Men's Trust Ass'n was requested by the partners—the creditors being no party to the arrangement—to again take over the management of the business, which it did. A written agreement for that purpose being entered into between the three original partners and the trust association. There is nothing before me to shew what the assets and liabilities of the business were at this time but judging from a financial statement of the partnership business of January 31, 1921, and from what the manager of the trust association sets forth in his affidavit the liabilities must have been very heavy.

The financial statement shews:—

Fixed assets	$49,733.69	
Real estate liabilities	16,446.97	
		$33,286.72
Mercantile assets	$230,430.93	
Mercantile liabilities	143,536.94	
		86,893.99
Total surplus		120,180.71

In this statement there does not seem to be any reference to the claim of the estate, although no one was able to say whether or not it was included in an item "accounts payable not due $83,800.74." It will be seen that the surplus is $120,180.71 as compared with a surplus $103,361.59 on January 31, 1919, while the real estate liabilities had increased in that period from $9,548.73 to $16,446.97 and the mercantile liabilities from $24,939.47 to $14,536.94, which considering the nature of the assets set out in statements shews a very unsatisfactory state of affairs,

notwithstanding the fact that profits approximately $10,000 are shewn for each of the years 1918 and 1919.

The serious condition of the business was soon after March 10, realised by the trust association and a meeting of the creditors was called to discuss the situation; a resolution was passed and the trust association was still continued as manager and was to look after the interest of the partners and the creditors. No written agreement was entered between the partners and the creditors as to the liquidation of the assets and the payment of the debts, no assignment for the benefit of creditors was ever made, nor was any petition in bankruptcy ever filed. The trust association proceeded to realise on the assets and pay the debts *pro rata*, with the exception of the debt owing to the estate. It did this under the supervision of three inspectors appointed by the creditors. As to the payments made, the affidavit of Freeze, the manager of the trust association says:—

"13. Since taking over the said business on the 10th day of March, 1921, as aforesaid creditors have been paid $78,258.16 and there are still outstanding liabilities to the extent of $69,421.03. Particulars of the payments made are as follows:—

1921, June 18. A dividend of 15% was declared and paid to unsecured creditors; Aug. 10. A dividend of 10% was declared and paid to unsecured creditors; Nov. 22. A dividend of 25% was declared and paid to unsecured creditors.

The total of these dividends to unsecured creditors was $48,658.10. Payments were also made to secured creditors, one of them the Imperial Bank of Canada collected and received about $19,800."

Out of the payments of $78,258.16 nothing was paid to the estate and in the item of $69,421.03 of outstanding liabilities the amount owing by the partners to the estate is not included.

On February 1, 1919, an agreement, styled a partnership agreement was entered into between Philomene Butruille of the Town of Trochu in the Province of Alberta, Widow, *as administratrix of the Estate of Jean Butruille*, deceased, hereinafter called the party of the first part, and Theodolo Theodoli, Edgar Pappillard and Hardouin De Reinach Werth of Trochu aforesaid, Merchants, dealing under the firm name of the Trochu Valley General Store, hereinafter called the parties of the second part.

The recitals set forth that there is owing to party of the first part by virue of the agreement with Jean Butruille including principal and interest $33,750 and to other creditors $34,488.20.

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On April 7, 1921, it was renewed for 6 months. The agreement was signed "Philomene Butruille" and under seal without reference to her official capacity, as was also a certificate of limited partnership setting forth that she had contributed $33,750, which certificate was filed with the clerk of the Court. This certificate, however, was not under seal.

On the books of the partnership was an account "J. Butruille" the deceased, in which he appeared as a creditor for $21,120 and which was transferred Jan. 31, 1919, by an entry on the books made by Blackfield, the bookkeeper on the instructions of Pappillard to Capital. That the propriety of such cross entry was questioned was first brought to his attention by Freeze, the manager of the trust association in January, 1922. Under this agreement various sums of money by way of the monthly payments were made to Philomene Butruille by Pappillard and the trust association respectively, while managing the business. The trust association officials had not seen the partnership agreement until June, 1921, and up to that time they were relying upon information contained in the books of the company and that received from Pappillard after that time. They became aware 2½ years ago of the partnership agreement and that the amount owing to Jean Butruille was purported to have been changed into an investment. They did not enquire as to the right of Mrs. Butruille to make this investment.

Pursuant to the agreement, Philomene Butruille purchased goods at the store and received some of the monthly instalments and an entry was made in the books at one time giving her credit of 5% of profits as provided for in para. 15 of the agreement.

At the time this agreement was entered into 3 of the children were minors and 2 over 21 years of age. One of the latter, Phillip Butruille, who, along with his sister who had attained her majority, is objecting to this agreement, upon his return from France had serious differences with his mother, the administratrix, over the management of the estate which resulted in the appointment under sec. 56 ch. 119, Ord. Alta. 1911, on January 18 last, of the applicant as judicial trustee, who now asks for the construction and interpretation of the document entitled partnership agreement and its effect in relation to the estate.

The first paragraph of the agreement says "That the said Philomene Butruille, will and doth hereby expressly and absolutely postpone her claim as a creditor of the said business to rank after the other liabilities, past, present and future of the

said business." In the last lines of the paragraph she agrees to and "doth hereby release and waive any and all manner of claim against the said business, the good will, stock in trade and other goods and chattels thereof." It purports to both postpone and release the debt. If she released, why talk about postponing?

In the second paragraph the parties again recognise that the debt is still in existence because the proviso that the release or waiver shall not operate against them personally but they are to remain personally, jointly and severally liable and that the release shall not operate against their personal property "subject, however, to the prior claims of any or all creditors from time to time of the said business." This is a further postponement. They desire if need be that the creditors of the business should rank ahead of her even on their own individual assets apart from the business.

By Clause 8 she "shall receive from the business ..... interest on the said sum of $33,750 at the rate of 8% per annum." She is to receive monthly payments of $250 which shall be applied, if the interest is not in arrears "on account of the principal sum advanced by the party of the first part."

By Clause 9 provision is made for him and her household buying goods on certain conditions "so long as she shall remain a special partner or as long as the parties of the second part shall be indebted to her." This provision ensures to her own personal benefit. Her household may or may not include the minor children. As a matter of fact it now includes her husband, she having since married, one of the partners, who was also her bondsman.

A "certificate of limited partnership" was drawn up in which the name of the partnership business is set out as "Trochu Valley General Store," the party of the first part is described "Philomene Butruille administratrix of the Estate of Jean Butruille deceased" as special partner and refers to her as "having contributed $33,750.00 to the capital" and is signed "Philomene Butruille." This was filed on April 7, 1919.

This certificate and the registration thereof violate the Partnership Ordinance, C.O.N.W.T. 1899, ch. 7 in three respects.

Section 48 of Ord. Alta. 1911, ch. 94, provides that special partners are those "who contribute in actual cash payments a specific sum as capital to the common stock." This she did not do. Placing upon it the best possible construction, at most, she transferred a debt, but in my opinion she simply endeavored to

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arrange for a postponement of payment and to have it rank after other creditors.

Section 53 provides for filing with the clerk of the proper Court and says "the certificate shall be recorded by such clerk or deputy clerk at full length in a book to be kept for that purpose." An examination of the records in the clerk's office shews that this was not done.

Section 55 provides:—

"No such partnership shall be deemed to have been formed until a certificate has been made, filed and recorded as above directed; and if any false statement is made in such certificate all the persons interested in the partnership shall be liable for all the enjoyments thereof as general partners." This was not complied with.

Section 58 provides for "A firm name in which the names of the general partners or some one of them only shall be used." This was not complied with.

The compliance with these provisions are all conditions precedent under which a special or limited partnership may be formed. Section 47 confers power upon "two or more persons upon the terms with the rights and powers and subject to the conditions and liabilities hereinafter mentioned" of which the above are some to form a limited partnership.

These conditions precedent not having been complied with no special or limited partnership was formed.

Slingsby Mnfg. Co. v. *Geller* (1907), 17 Man. L.R. 120.

If a general partnership resulted by operation of the statute by reason of the violation of any of the above sections concerning which I make no finding, it was not a partnership with the estate as one of the members. The widow had no authority to enter into any such agreement either from the deceased, he having died intestate, or by law in her capacity as administratrix. This was a debt of the estate. She was bound to collect or use every reasonable endeavor to collect it within a reasonable time. She was appointed on May 3, 1918, administratrix, when according to the financial statement of January 31, 1919, the debtor partnership had large assets with comparatively small liabilities. The deceased died on April 25, 1916. It was her duty to realise on this asset without further delay. Nearly 3 years having elapsed since the death of the testator and nearly 9 months since her appointment, she not only did not endeavor to collect the debt but entered into a written agreement in an endeavor to release certain assets of the partnership business from this

liability as a partnership debt and forcing the claim of the estate to be ranked after that of other creditors. She clearly had no authority whatever to do this nor to enter into any agreement to this effect. There is also an ingenuous attempt in the agreement to treat this as an investment of the funds of the estate. Not a dollar was paid, no new capital was brought into the business. It was simply a matter of bookkeeping and the agreement. What appeared on the books as a liability was made to appear as capital. She was a trustee under the Trustee Ordinance and as such her investments are limited by the Trustee Ordinance ch. 11 N.W.T. Ord. 1903 (2nd Sess.), secs. 2 and 3, and she had no authority to make any such investment and no authority to enter into such an agreement.

Counsel on behalf of the creditors contends that the estate should be regarded as (a) a special partner or (b) a general partner and as such their claims should rank ahead of the estate. If the estate is a special partner there can be no doubt as to the rights of the creditors to rank ahead of the claim of the estate in fact the estate would be liable to the extent of the amount contributed "in actual cash payments." I have already found, however, that no limited partnership was ever created so that his contention in this connection must fail.

If the estate is a general partner there can be no question about the right of the creditors to rank ahead of the estate and even more no question as to the unlimited liability of the estate until the claims of the creditors are satisfied. Is the estate a general partner? "A partnership may be formed in one of three ways: (1) by statute, (2) by contract either (a) express or (b) implied or (3) the defendant may be estopped from denying for certain purposes, the existence of a partnership." Per Phippen, J.A., *Slingsby Mnfg. Co.* v. *Geller*, 17 Man. L.R. 120. If a partnership in this case is created by statute it is created by reason of the failure of the parties to comply with the conditions precedent above referred to and the general partnership results therefrom.

As to whether or not the administratrix, in her personal capacity, became a general partner as a result of this I have not to decide nor do I express any opinion thereon. To hold the estate as a general partner would be to hold that it was bound by the provisions of the statute creating a general partnership upon failure to comply with the conditions precedent to the formation of a limited partnership notwithstanding the fact that the administratrix acted unreasonably without authority and un-

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lawfully in entering into an agreement to become a special partner under which agreement she herself was to receive a benefit even though slight and which was to the prejudice of the estate in its manifest endeavor to release the partnership assets and postpone the payment of the claim of the estate to that of other creditors. The estate did not become a general partner by reason of the statute.

As to the second method of creating a partnership there is no express or implied provision in the agreement making the estate a general partner in the business and the estate did not become a partner by this method.

As to the third way in which a partnership may be created, it was agreed by the parties present that the findings should be based upon the agreement and other documents and the affidavits submitted, all of which were to be used insofar only as might be necessary in construing the agreement itself and not to shew estoppel by the conduct of the parties as they were not prepared with evidence on this point. Leave was reserved to counsel for the creditors to raise the question of estoppel in any subsequent proceeding or if he so desired to arrange with the applicant to enlarge the scope of the originating notice herein and submit evidence at a later date. In my view of my findings as to the effect of the agreement it is not necessary for me to express an opinion as to the effect of the execution in the manner in which it was executed in binding the estate.

In my opinion the real purpose of the agreement is simply an endeavor couched in language suitable to the creation of a limited partnership on the part of the partners to make an arrangement with the administratrix whereby there would be a postponement of the payment of the debt owing by the partnership to the estate of the deceased and to have the claim of the estate rank after those of the other creditors of the partnership business to enable them to procure further credit with the bank for the purposes of the business as set out in one of the recitals to the agreement in which they give as the reason for the desirability of her converting her claim "into a special or silent partnership," amongst others, "particularly of arranging a line of credit with the bank." There is no doubt that this heavy liability of $33,750 outstanding seriously hindered them in obtaining further credit with the bank.

The agreement as against the estate is null and void and consequently not binding upon the judicial trustee the applicant herein. The debt owing from Pappillard, Theodoli and Werth

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as partners under the name and style of "The Trochu Valley General Store" to the estate so far as the agreement is concerned is a valid and subsisting debt and the estate is a creditor of the partnership therefor subject to any payments which may have been made on account thereof.

The originating notice was not directed to the creditors or their solicitor nor to F. de Roussy de Sales, one of the beneficiaries but both were represented by their counsel and they shall be deemed to have been served with the notice.

No costs will be allowed to the partners, nor to the creditors, nor to the widow. Costs of all others to be paid out of the estate in the meantime and deducted from the share of Philomene Butruille on distribution.

Judgment accordingly.

HUTCHINSON v. BERRIDGE.

Alberta Supreme Court, Appellate Division, Stuart and Beck, JJ.A., Simmons, J. (ad hoc), Hyndman and Clarke, JJ.A. May 16, 1922.

MECHANICS' LIENS (§IV—15) — *Mechanics' Lien Act, 1906 (Alta.) ch. 21—Coal mining property—Opening up and developing mines—Construction of statute—Validity of claims—Validity of claim of person employed around camp and bunk houses.*] —Appeal by defendants from the trial judgment declaring a lien under the Mechanics' Lien Act, upon the defendants' interest in the lands in questions. Affirmed.

S. W. Field, K.C., for appellants.

G. B. O'Connor, K.C., and *A. C. L. Adams*, for respondents.

STUART and BECK, JJ.A. and SIMMONS, J. concur with Clarke, J.A.

HYNDMAN, J.A.:—I would dismiss this appeal for the reasons given by the Chief Justice with the exception however of the claim of A. Losso, the cook.

With great respect I cannot appreciate why it should be said that the work of a cook attending to the physical needs of the labourers upon the property is in effect doing or causing work to be done upon or in connection with the clearing, excavating . . . . . of any mine.

In *Davis* v. *Crown Point Mining Co.* (1901), 3 O.L.R. 69, in the Divisional Court there was a claim by a blacksmith whose duty it was to sharpen the tools of the workmen and a claim by a cook who acted in that capacity for the men engaged on the work. The claim of the blacksmith was allowed but that of the cook refused. MacMahon, J. at pp. 70-71 said: "But

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with regard to Harrington's right to a lien; that, I consider, stands in a different position. It was necessary that the workmen at the mine should be fed, but the cooking of the food could not be regarded as 'any work or service upon or in respect of the mine.' In *McCormick* v. *Los Angeles City Water Co.* (1870), 40 Cal. 185 the plaintiff was employed by the contractor or superintendent to cook for the men engaged in excavating the reservoir, and the cooking was done on the ground, as the work progressed. It was held that the plaintiff was not entitled to a lien. The Court said: 'If any lien exists, it arises not from the place where the cooking was done, but from the nature of the services and its relation to the work which was being constructed. If the plaintiff can assert a lien on the facts proved, he could as well have done so had the cooking been performed at any other place; and the mere fact that a person is employed to cook for labourers engaged in erecting a building entitled him to a lien the same result would follow if he had furnished the provisions also,' p. 187."

Although I have examined many of the authorities on the subject I have failed to find any decision to the contrary. I think the reasoning in the case mentioned sound and in conformity with the true spirit of the Act which is one primarily for the protection of mechanics and workmen doing actual work upon the property affected.

I would therefore allow the appeal as against the plaintiff Losso, (in so far as his claim is for work as cook only) without costs, and set aside the judgment in that respect, without costs. As the claim of the unsuccessful plaintiff is but a small fraction of the aggregate the appeal as to the remaining plaintiffs should be dismissed with costs throughout.

CLARKE, J.A.:—Appeal by defendants from a judgment of Harvey, C.J. declaring a lien under the Mechanics' Lien Act 1906, (Alta.) ch. 21, in favor of all but two of the plaintiffs upon the defendant's interest in the lands in question consisting of mining property, and referring it to a mining engineer to ascertain how much of the work of the plaintiffs was substantially development work and deferring all further questions until after the referee shall have made his report.

The work in respect of which the liens are claimed was performed at the instance of Brookdale Collieries Ltd. in opening up, developing, and perhaps to a certain extent operating a coal mine, owned by the defendants under leases from the Crown, the company having an option from the defendants to purchase, under the terms of which it was required at its own cost and

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expense to provide the necessary labour and material and proceed to erect the necessary buildings, plant, machinery, tools and other appliances as shall be requisite and necessary for the proper and efficient working of the mines, seams and beds of coal in, on or under the said land, and removing and making marketable and marketing the same. The defendants were to receive a royalty on the output and were to have access to the property and plant and the workings thereof during the currency of the option agreement.

There are seven grounds of appeal:

1. That the trial judge erred in holding that any work done by the plaintiffs constituted an improvement to the property.

In *Wester* v. *Jago* (1917), 33 D.L.R. 617, 11 Alta. L.R. 52, this Court decided that work done by miners in mining coal under a lease at the request of the lessee cannot sustain a mechanic's lien so as to bind the owner. The trial Judge distinguished that case from the present. It appears that the work in question here was largely development work necessary to be done before the mine could be called an operating mine and consisted of erecting and constructing tipples, buildings, railway, grades, tunnels, &c., all of which seem necessary for the purpose of enabling the mine to be operated for commercial purposes. I do not think it can be said that the construction of a tunnel which does not lead to marketable coal and for that reason has been abandoned is not an improvement within the meaning of the Act, the development of the mine should be considered as a whole. I would hold that for such work a lien would attach whether or not it improves the value of the property. The interpretation section of the Act provides as follows: "'Works or improvements' shall include every act or undertaking for which a lien may be claimed under this Act," and sec. 4 which specifies the matters which give rise to a lien, deals with the physical nature of the works therein mentioned without reference to any effect they may have in enhancing the value of the property. I think this ground of appeal fails.

2. The work done by the plaintiffs was not authorised by the defendants.—

Under sec. 4 the lien is apparently confined to work done and material supplied at the request of the owner of the land, and sec. 2, sub-sec. 4 provides as follows:—"'Owner' shall extend to and include a person having any estate or interest legal or equitable, in the lands upon or in respect of which the work is done . . . . at whose request and upon whose credit or on

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whose behalf, *or with whose privity or consent*, or for whose direct benefit any such work is done. . . ."

The decision of the majority of the Supreme Court of Canada in *Marshall Brick Co.* v. *York Farmer Colonisation Co.* (1917), 36 D.L.R. 420, 54 Can. S.C.R. 569 in construing the Mechanics' and Wage Earners Lien Act, R.S.O. 1914, ch. 140, seems to be an authority against holding the interest of the defendants to be subject to the plaintiff's liens by reason of anything contained in the option agreement for want of direct dealing between the plaintiffs and defendants but sec. 11 of our Act provides as follows:—

"Every building or other improvement mentioned in the fourth section of this Act constructed upon any lands with the knowledge of the owner or his authorised agent . . . . shall be held to have been constructed at the request of such owner or person having or claiming any interest therein, unless such owner of person having or claiming any interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said lands or upon the building or other improvement thereon."

There was knowledge and no notice was posted. It follows that the defendants must be treated as having requested the work done by the plaintiffs and thus there was a privity between them.

The effect of this sec. 11 was considered in *Scratch* v. *Anderson* (1909), 33 D.L.R. 620, 11 Alta. L.R. 55, affirmed in appeal *sub. nom. Limoges* v. *Scratch* (1910), 44 Can. S.C.R. 86. I do not consider that sec. 32 which limits the owner's liability to the sum owing by him to the contractor applicable as there is no contractor within the meaning of this section or if there is the plaintiffs would be the contractors under that section, and so be entitled to the full amounts owing to them, under the direct contracts created by sec. 11. This ground of appeal fails.

3. The reference directed by the trial Judge should have been to ascertain how much of such work was an improvement to the property. This ground is dealt in connection with the first ground and fails.

4. The solicitor for the lien holders could not make the affidavit required by the statute in support of the mechanic's lien.

This ground fails for the reasons given by the trial Judge. The statute does not require that the affidavit must be made by

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the lien holder and were it otherwise the omission is cured by sec. 14, there being no prejudice to the defendants.

5. The defendants had no interest in the land to which a mechanic's lien would attach.

It is sufficient under sec. 11 that they have or claim an interest in the land. They hold mining leases from the Crown which gives them an interest in the land. This ground fails.

6. The trial Judge erred in holding that the plaintiff A. Losso was entitled to a lien for any work done.

Notwithstanding decisions to the contrary in other jurisdictions I think this ground fails also. This plaintiff is described in the evidence as a bull cook for the camp, taking care of the bunk houses, wash house, hauling coal around to the places and keeping things warm and clean. He was employed by the company, and it is to be assumed that the expense incurred for his services was necessary for the undertaking of opening up the mine. That being so it is difficult to see why there should be any distinction made between his right to a lien and that of a labourer who handles a spade in the tunnels or on the railway. Both are necessary and both devote their time and strength for the benefit of the undertaking. Section 4, so far as applicable to the question under consideration, reads as follows:

"Every . . . labourer . . . doing or causing work to be done upon *or* . . . *in connection with* . . . the excavating, filling, grading, tracklaying, draining or irrigating of any land in respect of a . . . mine at the request of the owner of such land, shall by virtue thereof have a lien or charge for the price of such work. . . . "

The interpretation clause provides as follows:

" 'Labourer' shall mean, extend to and include every mechanic, miner, artisan, builder, or other person doing labour for wages."

A dictionary definition of "labourer" is "a person who does work that requires strength rather than skill, as distinguished from artisans and from the professional classes." But for the interpretation clause it is at least doubtful if the four classes named therein would be comprised in the term "labourer" but however that may be, it could not have been intended to restrict the meaning of the word to such classes and cut out those who fall within the ordinary meaning of it. I think the requisite qualification is contained in the last words of the interpretation clause, "or other person doing labour for wages." A reference to the title of the Act " An Act for the Benefit of Mech-

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anics and Labourers" and to sec. 10 which contains the words "Every mechanic, labourer or other person who performs labour for wages" supports the view that the benefit of the Act is intended for all persons who perform labour for wages, if other conditions exist entitling them to a lien.

I think the work of this bull cook was work in connection with the excavating &c. If it were intended to confine the benefit to those who do the actual work of excavating &c., there was no object in adding these words "in connection with." The only other condition is that the work should be done at the request of the owner which I have already dealt with.

7. The trial Judge erred in holding that the plaintiffs were entitled by reason of having done work which was not an improvement to revive a lien which had at that time expired for work which might constitute an improvement.

Section 13 provides that every lien shall cease to exist in case of a claim for wages owing for work at or about a mine after the expiration of 60 days after the claimant has ceased from any cause to work thereon; provided, however, that any labourer shall not be held to have ceased work upon any mine until the completion of the same, if he has in the meantime been employed upon any other work by the same contractor unless &c. (here follow provisions for registration of the lien).

In the opinion of the trial Judge the completion of the mine refers to the completion of its development as distinguished from its operation for commercial purposes and he finds upon the evidence that the development work was continuing right up to July 31. The plaintiffs' liens were filed within 60 days thereafter and I gather from the evidence that for all the time claimed of they were working at or about the mine, and if the plaintiffs can be said to have ceased their work at or about the mine or in connection therewith more than 60 days before the registration of the liens, it would appear that they were in any event employed on other work within the meaning of the section. I think this ground also fails.

I would dismiss the appeal with costs.

Appeal dismissed.

EVANS v. SCHNEIDER.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh, Hyndman and Clarke, JJ.A. May 18, 1922.

CONTRACTS (§ID—51)—*Verbal agreement—Subsequent correspondence—Enclosure of note to be signed—Refusal to sign note—Evidence that no concluded bargain made—Onus of proof*

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—Rights of parties—Claim for feeding cattle.]—Appeal only from that part of the judgment at the trial which made the plaintiff liable to the defendant for the price of certain cattle sold by him to the plaintiff and disallowed the plaintiff's claim for feeding these cattle through two winters.

H. P. O'Savary, K.C., for plaintiff.

A. M. Sinclair, K.C., and *A. C. McWilliams*, for defendant.

The judgment of the Court was delivered by

WALSH, J.A.:—It was found by the trial Judge that the plaintiff had agreed to buy these cattle if he could make the necessary financial arrangements with the bank, that this put him under an obligation to advise the defendant whether or not he had been able to do so, that he did not so advise him and, therefore, the defendant was entitled to assume that he had made them and to hold the plaintiff liable for the purchase price as he was in possession of the cattle. A careful reading of the evidence satisfies me that this finding as to the agreement cannot be maintained.

Only two witnesses gave evidence upon this branch of the case, namely the parties themselves. The plaintiff while admitting that the purchase of these cattle by him was a subject of discussion between him and the defendant in the course of which a price was set on them by the defendant denied emphatically that any agreement either absolute or conditional was made by him for their purchase. The defendant's story is that while, at the outset of their negotiations, the plaintiff would not buy until he knew what arrangements he could make for the money, he eventually had an interview with his banker after which the deal was made. His account of it is that after the plaintiff's interview with the banker he, the defendant, told the plaintiff that he could have the cattle for $2,765 to which the plaintiff replied "All right then." After a reference to the money which the defendant owed him on other accounts and which was to be deducted from the purchase price the plaintiff, according to the defendant's evidence concluded by saying "and when this money comes through" (referring to the loan applied for) "I will pay you the balance." It is quite clear from the defendant's version of the transaction that in his view the agreement was an absolute and not a conditional one and that the receipt by the plaintiff of the loan applied for merely fixed the time for the payment of the balance of the purchase price and in no sense determined the character of the agreement. The finding of the trial Judge as to its conditional character therefore finds no support in the evidence of either party. What then is the proper finding?

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The contract, if there was one, was made on the occasion above referred to. There was undoubtedly before then discussion and negotiation in which price and terms of payment were mentioned but admittedly there was no concluded agreement. Unless one was made in the talk following the plaintiff's interview with his banker, none was ever made. The parties are in hopeless conflict as to the outcome of that talk, and there is nothing except the memorandum, ex. 5 written by the defendant and then handed by him to the plaintiff which assists in determining the truth as between them. That memorandum which was made partly at one time and partly at another contains two different lists of the cattle and certain figures. The figures $2,765 appear which, though unexplained in writing, it is agreed represent the price the defendant was asking for the cattle. There is a deduction of $423.60 and a striking of the balance of $2,341.40. The details of this item of $423.60 are given which shew that it is made up of sheep a|c, interest and freight less commission. Admittedly these figures shew the price asked for the cattle less the amount owing the plaintiff in respect of the items which go to make up the credit of $423.60. That is all there is on the slip. There is nothing on its face to indicate what it is. Parol evidence was necessary to shew that. The defendant's explanation of it is that he made out this slip to shew what the plaintiff owed him and what he owed the plaintiff. If that is so, it is inaccurate, for on his own statement he owed the plaintiff a further sum of over $800 which was to be deducted from the price of the cattle and it is silent as to that amount. The plaintiff's explanation of it is that the list of the cattle was prepared because he was looking after them and he wanted to know how many there were of each class, that the figures $2,765 indicated the price which the defendant asked for them, and that the sum of $423.60 was deducted "in case I bought them." I do not think that this slip helps to settle the question. With the case left in this unsatisfactory shape on the oral evidence, the subsequent correspondence between the parties is very helpful to determine the truth of the matter.

The talk which the defendant says resulted in a contract took place on August 26, 1920, and the parties then separated. The next thing that happened was that the defendant sent to the plaintiff by mail a conditional sale agreement covering these cattle in which the purchase price is named as $2,342.90 and apparently a promissory note for the same amount due in 2 months. The covering letter is undated but the evidence shews

it to have been written on September 13, 1920. It reads as follows:—

"Enclosed please find note to cover amount of price set on cattle. I have to borrow this money from the bank and if you sign enclosed notes, you can either keep the cattle, or if you wanted me to come up later on, we could sell them and you would get yours first. Hoping, that this will meet with your approval."

There are two things in this letter and the enclosures which make very strongly against the defendant's contention. He speaks of the note as covering the "amount of price set on cattle." That is not so even on his evidence as to what that was to be for he says that the amount payable by the plaintiff after all adjustments were made was only a little over $1,400. The rest of the letter is entirely opposed to the idea of a concluded bargain. It suggests to my mind the idea of the note being required as an accommodation to the defendant in his borrowing of money from his bank against which the plaintiff would have the protection of either keeping the cattle or selling them and retaining the amount of this note out of their sale price.

The plaintiff answered this on September 20. He ignored entirely the defendant's request to sign the note. The only reference made in it to the purchase of these cattle is in the following sentence: "I think you should see him, get your money" (referring to another transaction) "deduct what is due me from the price of the cattle that are here and I will take them off your hands at the price agreed on when you were here." This is suggestive of anything but a concluded agreement to buy. It indicates to my mind nothing more than a willingness to buy for the price which was undoubtedly put upon them and agreed to if a sale resulted.

The defendant answered this on September 25, but he did not refer in it to the cattle, even indirectly. He wrote him again on October 8, asking him to sign the note sent him in his first letter but making no further reference to this transaction. The plaintiff answered that on October 11, the only material part of which is this sentence, "When you get the money let me know," (referring to another transaction) "and by that time I will most likely be able to handle the cattle without giving a note as that is something I am not in the habit of doing." This, while shewing quite clearly that there was still in the plaintiff's mind the idea of buying the cattle is far from suggestive of a concluded

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contract for them. The next letter is a long one from the plaintiff on December 18 in which he offers to buy the cattle at a new price to which the defendant replied on December 24 affirming that he had sold them to the plaintiff under the contract now set up. The plaintiff replied on December 27 in which he speaks of his offer to buy on terms that were not accepted and repudiates the idea that any agreement had been reached between them. The correspondence closes with a letter from the plaintiff on January 8, 1921, which contains nothing that lends colour to the defendant's contention but is quite the reverse. When the December and January letters were written, the price of cattle had fallen so seriously that each of the parties was then, undoubtedly, anxious to unload these cattle on the other and so, I am not inclined to pay very much attention to them.

The trial Judge has not found that an absolute sale was made. The onus of proving it is on the defendant. There is nothing in the oral evidence to justify the conclusion that his version of the transaction is more worthy of belief than the plaintiff's account of it. The correspondence quite fails to shew a concluded agreement. To my mind, it indicates exactly the contrary of this. It is strongly suggestive of negotiations still on foot for a sale. Clearly if sec. 6 of the Sale of Goods Ordinance, (Ord.) Alta. 1911, ch. 39, our substitute for sec. 17 of the Statute of Frauds, had been pleaded, these letters could not have been held to satisfy it. For these reasons, I would reverse the judgment appealed from in this respect, and hold the plaintiff free from liability to the defendant for the purchase price of these cattle.

This leaves for consideration the plaintiff's claim for feeding these cattle for 2 winters. There was no express request by the defendant to him to do this. It is admitted that if he had not done so, they would have died. They were in a sense in his care. They were brought to his place and after being branded, turned loose on the adjoining range, with at least a tacit understanding, I think, that the plaintiff would keep an eye on them. In his letter of December 18 to the defendant he told him that he had been feeding the stock since the previous Monday and that he would feed them well in the meantime. The defendant in his answer made no reference to the feeding. In his letter of December 27 the plaintiff said, "these cattle are eating 1,500 lbs. of hay a day at 60 cents per hundred. There will be a large feed bill against them if not done something with soon." In his

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letter of January 8 he said he did not intend wintering stock that did not belong to him. The defendant did not answer either of these two latter letters.

I think that a request to feed them may be implied from all of these facts and that the defendant should pay a fair and reasonable sum therefor. There is nothing but the evidence of these two men as to what that sum is. The plaintiff claims $9 a day for 215 days making $1,935 in all, based on an average consumption of 1,500 pounds of hay a day at $12 per ton. The defendant puts it at between $7 and $8 a head for each winter. An allowance of $7.50 a head is fair on his figures for each of the 58 head and that gives $435 for each winter and $870 in all.

The onus is on the plaintiff to prove his claim. There is no reason why we should accept his figures in preference to those of the defendant and considering where the onus lies I think we may fairly adopt the latter. I would, therefore, allow the plaintiff $870 on this account.

In the result, therefore, the judgment entered for the defendant for $1,265.42 will be set aside, and in lieu thereof there will be entered a judgment for the plaintiff as of February 28, 1922, for $2,369.58 made up of the sum of $1,499.58 found due to him by such judgment in respect of his other claims against the defendant and the above sum of $870. The plaintiff is entitled to his costs of the action and of this appeal under column 4. Rule 27 not to apply.

Judgment accordingly.

REX EL REL MACKAY v. GOOD.

Manitoba King's Bench, Macdonald, J. February 16, 1922.

QUO WARRANTO (§ IV—40)—*Against municipal councillor—Affidavit that motion made at instance of relator—Affidavit tendered but not filed—Man. Rules 535 and 536—Necessity of filing.*]—A motion on behalf of S. J. Mackay that an information in the matter of *quo warranto* be exhibited against Alexander Good to shew cause by what authority the said Alexander Good claims to exercise the office or franchise of councillor for Ward 4 of the Rur. Mun. of Charleswood in the Province of Manitoba for the term of 1921-22. Motion dismissed.

A. E. Moore, for applicant; *H. M. Leach*, for Good.

MACDONALD, J.:—The affidavit of the applicant shews that at a meeting called for the purpose of nominating candidates for councillor for Ward 4 of the said municipality the said S. J. Mackay was legally nominated as a candidate for councillor

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for the said Ward 4, and that such nomination was accompanied by written acceptance thereof by the said candidate; and that the said nomination was delivered to the officer appointed for that purpose and was named in the notice calling the said nomination meeting; that Alexander Good was also regularly nominated as councillor for the said ward; that subsequent to the date of said nomination the said S. J. Mackay considered the question of resigning and he called up the clerk and returning officer of the said municipality and asked if he could do so and he was advised that he could do so but that the resignation had to be sent in in writing. He afterwards decided that he would not resign and did not tender or send in any resignation and the returning officer was so advised. But notwithstanding that fact, the said returning officer neglected and refused to post the names of the persons nominated at said nomination meeting, as provided by sec. 82, ch. 133, R.S.M., 1913, the Municipal Act, and in consequence no election was held and the returning officer declared Alexander Good one of the parties nominated, to be elected by acclamation, and the said Good has since January 1, 1922, exercised and from thence continually afterwards has used and exercised and still does use and exercise the office of councillor for said ward.

Section 192, sub-sec. (c) of the Municipal Act, provides that a municipal election may be questioned by an election petition on the ground that the person whose election is questioned was not duly elected by a majority of authorised votes, and it is contended by counsel for the respondent that the proper proceeding is an election petition and not proceeding by way of *quo warranto.*

In *Re St. Vital Municipal Election; Tod* v. *Mager* (1912), 1 D.L.R. 565, 22 Man. L.R. 136, it was held:—

"Where there are two candidates . . . . . the returning officer has no jurisdiction to deal with an objection that one of the nominees is disqualified nor to declare the other candidate elected without the votes being polled on the ground of the disqualification of his opponent, although the disqualification alleged was that the candidate as . . its paid officer . . . . . The right to the office is properly tried upon an information in the nature of *quo warranto.*"

In *R.* v. *Beer,* [1903] 2 K.B. 693, 72 L.J. (K.B.) 608, the remedy by *quo warranto* is taken away only where an election petition will lie.

An election may be questioned by an election petition on grounds (a) (b) and (c) in sec. 192 of the Municipal Act, and

I do not think that the grounds questioned in the election in this application are covered by either of these sections. I think, therefore, that the *quo warranto* proceeding here is the correct proceeding but I am of the impression that the preliminaries requisite to their launching this motion have not been complied with. An affidavit stating that the motion for *quo warranto* is made at the instance of the relator must be filed. There is no such affidavit here. An affidavit has been tendered but it has not been filed and our Rules 535 and 536 provide that the affidavit shall be filed before the service of the notice of motion or a petition. On this ground alone the application must fail.

Costs against the applicant.

Motion dismissed.

IMPERIAL GRAIN & MILLING CO. v. SLOBINSKY BROS.

Manitoba King's Bench, Galt, J. April 8, 1922.

DISCOVERY AND INSPECTION (§ IV—20)—*Contract for sale and purchase of rice—Affidavit as to custom of the business of selling rice—Witness in other Province having knowledge of custom—Evidence of.*]—Application for leave to take evidence on commission. Refused.

P. J. Montague, for plaintiff; *C. E. Finkelstein*, for defendant.

GALT, J.:—Appeal from the Referee.

The plaintiffs have their head office in Vancouver and the defendants carry on business in Winnipeg under the name of Slobinsky Brothers & Sons. The plaintiffs have brought this action to recover $3,907.95, together with interest, in respect of a sale by the plaintiffs to the defendants of certain large quantities of rice. Two different contracts were made between the parties, the first of which was dated January 16, 1920, and the second February 2, 1920. The contracts appear to have been made on similar printed forms so for the purposes of this motion one of the forms only will be referred to.

The action is ready for trial but the plaintiffs have applied for leave to take the evidence of Duncan Gavin and J. McLorie, of Vancouver and Victoria respectively, on commission.

The application before the Referee was based upon an affidavit made by the plaintiffs' solicitor, who states, amongst other things, as follows:—

"(3) That I am informed by A. E. Mason, the vice president of the plaintiff company, and Messrs. Griffin, Montgomery & Co., Barristers of Vancouver—the Vancouver solicitors of the said

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plaintiff company—and verily believe that the said proposed witnesses are connected with other rice importing and milling companies in the Province of British Columbia, and have had much experience in the selling of rice, and are familiar with the trade customs relating to such business, and will give evidence to prove the allegations made in para. 4 of the amended statement of claim, and further that is is not possible to arrange for the attendance of the said proposed witnesses at the trial.

(5) That I am informed by the said A. E. Mason, and verily believe that there are only three companies in Canada who are importers and millers of rice, and none of these are established in any way within the Province of Manitoba, and further that the evidence of the said proposed witnesses is such that it cannot be obtained within the jurisdiction of this honourable Court."

The defendants opposed the issue of the said commission upon various grounds but the Referee, notwithstanding, made an order for its issue. The defendants appeal from that order. In supporting the appeal Mr. Finkelstein mainly relied upon *Canadian Railway Accident Insurance Co.* v. *Kelly* (1908), 17 Man. L.R. 645, and argued that the material filed by the plaintiffs on the present motion is entirely hearsay evidence, and is not nearly so strong as that filed in the *Kelly* case, in which an order for a similar commission was set aside by the Court of Appeal.

The object alleged by the plaintiffs for taking evidence of the witnesses in Vancouver is set forth in para. 4 of the statement of claim, as follows:—

"At the time the said contracts of January 16, 1920, and February 2, 1920, were entered into between the plaintiffs and the defendants, and at all times subsequent thereto, it was a custom of the trade of those engaged in buying and selling rice that the words "shipment from Vancouver not later than" as contained in each of the said contracts, meant that the defendants were to specify shipment of, or give shipping instructions as to portions of the said rice at such times before the dates mentioned in the contracts, as they desired, but that they were, by the dates mentioned in the contracts, to specify shipment, or give shipping instructions as to the balances of the rice, and the plaintiffs were not bound to ship such balances unless such shipping instructions were given. If these were not given, the plaintiffs might cancel the contract, but if they did not do so, the contracts continued in force."

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Mr. Montague for the respondents says that this is not the case of a plaintiff trying to take his own evidence abroad but that it is in order to secure the evidence of other witnesses, who could not be compelled to attend the trial at Winnipeg.

The circumstances under which commissions have been issued in previous cases differ very greatly and this must be borne in mind in applying other decisions to the one in hand but in all these cases it is material to consider the nature of the evidence sought to be established by the commission. In the present case the contract expressly fixes the date of shipment which was to be made from Vancouver "not later than April 30th, 1920." As a matter of fact, it appears that only a small portion of the rice contracted for was shipped on or before the date specified. The plaintiffs seek in para. 4 of their statement of claim to avoid this difficulty by setting up a custom wholly at variance with it. The custom alleged by the plaintiffs is said to be a custom of the trade of those engaged in buying and selling rice. The parties whom the plaintiffs seek to examine appear to be connected wholly with the selling of rice, whereas the buyers are here in Winnipeg and elsewhere throughout the province.

I am of opinion that the material filed by the plaintiffs on their application was quite insufficient to justify the making of the order, as laid down in the *Kelly* case, and I am further of opinion that the evidence sought to be obtained is immaterial and inadmissible for the purposes of the trial. The appeal must, therefore, be allowed with costs and the order for a commission set aside.

Appeal allowed.

MOYLE v. McLAUCHLAN.

Manitoba King's Bench, Macdonald, J. February 17, 1922.

PLEADING (§I N—110)—*Defence and counterclaim—Amendment of—Adding party defendant.*]— An appeal from the order of the local Judge of the Dauphin Judicial District adding Katherine McRae McLauchlan as a defendant, and allowing the defendant to amend his statement of defence and counterclaim. Affirmed.

E. D. Honeyman, for appellant.
E. K. Williams, for respondent.

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MACDONALD, J.:—The grounds of this appeal are:— (1) That the order as moved for and the order as issued do not provide what amendments shall be allowed. (2) That the local Judge erred in adding a second defendant at the original defendant's request against the wishes of the plaintiff. (3) That the counterclaim introduced by the suggested amendment to the statement of defence prays for relief against a criminal offence without disclosing that any criminal charge has been laid by the defendant for such criminal offence. (4) That the relief claimed in the counterclaim in the suggested amendment is not the proper subject of a counterclaim but the basis of an original action. (5) The suggested amendments to the defendant's counterclaim are not supported by sufficient or any evidence.

The first ground is met by the particulars of the proposed amendment being attached to the affidavit of the defendant in support of the motion to amend.

In support of the second ground is cited *Imperial Paper Mills of Canada* v. *McDonald* (1906), 7 O.W.R. 472, where it was held that:—

"It is not for the defendant to bring in another defendant against the opposition of plaintiff—one against whom plaintiff makes no claim, but who is sought to be added for the convenience of the original defendant. There must be a very clear and a very strong case made, to induce the Court to introduce a new defendant against whom the plaintiff does not wish to proceed, and whose presence is not necessary to determine the matters involved in the action as constituted between the original parties."

Under Rule 220 (2) of the King's Bench Act, R.S.M. 1913. ch. 46,

"The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the court or judge to be just, order that the name of any party, whether as plaintiff or defendant, improperly joined, be struck out, and that the name of any party, whether plaintiff or defendant, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the action, be added."

And section 25 (k) of the same Act provides that

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"The court in the exercise of the jurisdiction vested in it by this Act, in every cause or matter pending before it, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to it shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The plaintiff in his statement of claim alleges that he allowed the defendant and his family to reside in the premises and buildings and asked for an order directing the defendant to give up peaceable possession of the buildings referred to and an order giving him possession in entirety of the said buildings and also a declaration that the defendants are trespassing.

Now, the defendant sets up in his statement of defence, that the plaintiff in consideration of the defendant and his wife working together with the plaintiff to improve the said land and make a home for themselves, promised the defendant that the plaintiff would leave his property, including the land in para. 2, of the plaintiff's statement of claim, to the defendant and his wife, and that during the lives of plaintiff and defendant the said land should be the home of the plaintiff and defendant.

It seems to me on this allegation that the defendant is entitled to have his wife made a party in order to have all possible matters in dispute between them finally adjusted.

The defendant's reply to the third ground is sec. 13 of the Criminal Code:—"No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence."

In *Gambell* v. *Heggie* (1905), 6 O.W.R. 184, at p. 186, it is held:—

"The old cases, e.g., Ross v. Merritt, (1846), 2 U.C.R. 421, depend greatly on the rule supposed to exist that if rape was proved 'the trespass merged in the felony,' and in the later decisions subsequent to Brown v. Dalby (1850), 7 U.C.Q.B. 160, upon the theory that it was for the Court during the trial to interpose if the evidence of the girl proved that a felony had been committed. It was not a matter of defence but one depending upon public policy and the vindication of the criminal law. All that has been changed by the enactment in the Criminal Code, sec. 534,

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that no civil remedy for any act shall be affected or suspended by reason that it amounts to a criminal offence."

Grounds four and five: All the parties being before the Court, I cannot see any objection to the counterclaim. It might, of course, be the subject of a separate cause of action but it can equally be disposed of by way of counterclaim. The third party may be a necessary party to the counterclaim. . . . . .

The amendments will be allowed, and the order of the local Judge sustained. Costs in the cause.

Judgment accordingly.

GARLAND v. NEWMAN.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. March 10, 1922.

BROKERS (§IIB—10)—*Sale of land—Real estate agent's commission—Custom among agents—Implied rate.*] — Appeal by plaintiff from the trial judgment in an action to recover commission on the sale of real estate. Reversed.

[See Annotation, 4 D.L.R. 531.]

R. D. Guy, for appellant.

J. P. Foley, K.C., for respondent.

The judgment of the Court was delivered by

DENNISTOUN, J.A.:—The defendant who is a real estate agent in Portage la Prairie sold the plaintiff's house for $6,500. He has deducted a commission of $325 equal to 5% on the purchase-price and has remitted the cash payment to the plaintiff less this commission.

The plaintiff offers a commission of $187.50, being 5% on $1,000, 2½% on $5,500 and brings action to recover $137.50.

As there was no agreement between the parties in respect to remuneration, the defendant is entitled to a fair and reasonable allowance for his services, and it is the duty of the Court to determine what it should be.

At the trial, several witnesses were called to testify that they were carrying on real estate businesses in Portage la Prairie and each of them stated that in his own office he had made a practice of charging 5% on sales of town property in recent years, but no witness would undertake to speak of any general custom or practice.

The trial Judge in his reasons for judgment says:—

"Now the evidence, it seems to me, compels me to find that the customary and ordinary rate of commission charged in Port-

age la Prairie on the sale of town property is 5%. That naturally carries with it the right of the defendant to charge 5% under these circumstances. In the face of the evidence here it seems to me that I can do nothing else but allow the defendant 5% commission on that sale."

The trial Judge did not attempt to place any value on the defendant's services. He expresses no opinion as to whether $325 is a reasonable charge or not. He feels bound by the evidence to give judgment for that sum without making any attempt to determine what the commission should be on the basis of *quantum meruit*.

"In the absence of an express contract on the subject, a contract to pay remuneration may be implied from the circumstances of the case. The mere fact of employment of a professional agent itself raises the presumption of a contract to remunerate him, the amount of the remuneration and the conditions of its payment being ascertainable from the usages of his profession. But he is not entitled to any further or other remuneration than the usages of the profession justify, unless he does work not strictly ancillary to the agency, in which case, and also in the case of a non-professional agent, the implied contract is to pay reasonable remuneration, having regard to the circumstances of the particular case." 1 Hals. 194.

The commission is here claimed by a non-professional agent and, in my view, the implied contract is to pay a "reasonable remuneration having regard to the circumstances of this particular case."

The plaintiff Garland lived in Portage la Prairie up to 1912. He was in the real estate business himself and the rate of commission then charged was 5% on the first $1,000 and 2½% on the balance, and he and the defendant transacted business on that basis.

While the evidence given by the estate agents of Portage la Prairie falls short of establishing anything more than individual practice at the present time, there is evidence that in other parts of Manitoba real estate agents have increased their charges in recent years to 5% on the first $3,000 and 3% on the remainder.

This is in keeping with the general rise in prices and charges since the war, and is recognised by the plaintiff as reasonable, for by his letter of November 9, 1920, to the defendant he says: "I note you have charged a straight 5% commission instead of 5% on the first $3,000 and 3% on the excess over $3,000." This I construe to be an offer to pay $255.

The plaintiff has since receded from the position taken in

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this letter and is now willing to pay only the pre-war rate which amounts to $187.50.

The sale in this case was made without any difficulty. The agent appears to have shewn the purchaser through the house, and to have closed the bargain without the necessity of advertising, or of incurring any expense, or expending any more time than was necessary to close the sale. What sum under these circumstances will it be fair and reasonable to allow him? In my view $255, the sum offered by Garland and from which he has since withdrawn, is a proper allowance to make.

The cases relied on by the defendant, such as *Eicke* v. *Meyer* (1813), 3 Camp. 412, and *Cohen* v. *Paget* (1814), 4 Camp. 96, are old cases based on the custom of London, which are authority for recognition of an ancient and universally accepted practice with respect to factors and shipping brokers in the Port of London and can have no application to a case of this kind.

Even if the brokers of Portage la Prairie had established a custom as among themselves, such custom would not be binding upon those who enter into business relations with them in the absence of notice express or implied, that such custom is to be the basis for their charges for services when rendered to customers. *The "Freiya"* v. *The "R.S."* (1922), 65 D.L.R. 218, and cases cited.

I would allow the defendant a commission of $255, following the reasons given by this Court in *Higgins* v. *Mitchell* (1920), 57 D.L.R. 288, 31 Man. L.R. 60, though on a higher scale than was allowed in that case, in view of the plaintiff's offer, and to give effect to this conclusion, would allow the plaintiff's appeal with costs, and direct judgment to be entered in the County Court for $70 and costs of trial.

Appeal allowed.

Re ADANAC GRAIN Co.

Manitoba King's Bench, Macdonald, J. February 17, 1922.

BANKRUPTCY (§III—26)—*Grain company assigning bills of lading to bank as security—Bills of lading not owned by company—Bankruptcy of company—Payment by bank to trustee of amount in excess of its claim—Right of owners of bills of lading to share in money paid to trustee—Right of bank to be repaid amount of forged bill.*]—Motion on behalf of a trustee in bankruptcy for an order declaring as to the title of the trustee in certain property.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

H. P. Blackwood, K.C., for the authorised assignee.

E. Loftus, K.C., for the bank.

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MACDONALD, J.:—The Adanac Grain Company, Limited, is a body corporate and politic, incorporated under The Companies Act, R.S.M. 1913, ch. 35, of the province of Manitoba with the powers and privileges (*inter alia*) of carrying on the business of grain brokers and dealers to buy, sell, ship, handle, or in any way deal in wheat, oats, barley, flax, etc.

A number of farmers consigned their grain in carload lots to the said Adanac Grain Co., with bills of lading with one exception made out in the name of the company as consignees.

The exception was the bill of lading made out in the name of W. P. Fitzsimmons, which represented 1,040 bushels of wheat, and which was consigned to his own order at Port Arthur.

This bill of lading was handed by Mr. Fitzsimmons to the agent of the company for eventual sale by the company on commission. This bill of lading purporting to be endorsed by Fitzsimmons was handed to the Imperial Bank with a number of other bills of lading as well as an assignment of a seat on the grain exchange of the said company as security for moneys advanced to the said company by the said bank.

I find that the endorsement of this Fitzsimmons bill of lading was and is a forgery and that the property in the said bill of lading and in the grain represented therein never passed to the said bank and Fitzsimmons is entitled to the proceeds from the sale of the said grain by the bank. The evidence before me shews that this grain realised the sum of $1,750.

With respect to the other bills of lading and the assignment of the seat on the grain exchange referred to, I find that the bank advanced moneys to the said company on the security of the said assignment of the seat referred to and on the security of the said bills of lading under the *bonâ-fide* belief that the company was the owner of the grain represented by the said bills of lading. The position of the bank, therefore, is that it is entitled to retain out of the proceeds of the sale of the grain represented by these bills of lading the moneys remaining unpaid after applying the amount received from a sale of the seat on the grain exchange.

The sale of the grain represented by the bills of lading realised $932 in excess of the amount of the indebtedness due by the company to the bank.

The grain company has made an authorised assignment under the Bankruptcy Act, 1919, ch. 36, to the Traders Trust Co., as authorised trustees under the said Act, and the bank has paid over to the said trustee the said sum of $932, being the excess

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money realised by the bank from the sale of the grain over and above its claim, and also handed over to the said trustee three of the bills of lading, being those covering the grain belonging to J. E. Roziere, Edward Rosher, and Simon P. Wourms, and also handed over to the said trustee the certificate for the seat of the said company on the grain exchange.

The bank falling short in the payment of its claim by the amount realised on the Fitzsimmons' bill of lading, is entitled to be repaid such shortage by the authorised trustee. This disposes of the bank's claim and the claim of Fitzsimmons, and there remains to be settled the claims of the remaining consignors to the moneys realised over and above the claim of the bank.

The security of the seat on the grain exchange owned by the Adanac Grain Co. and assigned to the bank as security is the only security actually owned by the company. The other securities in question here were handed to the bank in fraud of the owners of the grain represented by such securities, and it seems to me in equity and good conscience that the property thus owned by the company should be the first to be appropriated towards the payment of the bank's claim, particularly in view of the fact that the moneys realised from the sale of the said grain were the means by which the said seat was protected from sale, and I so direct.

The proceeds from the sale of the grain belonging to J. B. Roziere, D. H. Lussier and L. D. Worts, being traced into the hands of the trustee, the said parties are entitled to the proceeds arising from the sale thereof in proportion to their respective shares, and I direct the trustee to pay those claimants accordingly.

The costs incidental to this application to be paid out of the bankruptcy estate.

Judgment accordingly.

SMITH v. EGGERTSON.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton, and Dennistoun, JJ.A. March 23, 1922.

COVENANTS AND CONDITIONS (§IID—22) — *Sale of land—Building restrictions—"Any building or dwelling house"—Meaning of.*]—Appeal by defendant from a judgment granting an injunction restraining him from erecting certain stores on property purchased. Reversed.

H. A. Bergman, K.C., and *H. F. Gyles*, for appellant.

T. A. Hunt, K.C., and *F. G. Warburton*, for respondent.

The judgment of the Court was delivered by

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FULLERTON, J.A.:—The plaintiff and defendant are the owners of adjoining lots of land in the same subdivision. The plaintiff, relying upon a restrictive covenant binding on the defendant, asks in his statement of claim for an injunction restraining the defendant from continuing to erect stores on his lot. The material part of the covenant reads as follows:

"The party of the second part agrees with the party of the first part that any building or dwelling-house which he shall erect upon said lot . . . shall be of the value of at least twenty-five hundred dollars ($2,500) actual cash spent and that the front of the said house, verandah or porch or the projection nearest the street shall be at least twenty (20) feet back from Arlington street frontage of said lot."

On the return of a notice of motion for an interlocutory injunction the application was by consent turned into a motion for judgment. Macdonald, J., who heard the motion, granted the injunction, being of the opinion that the covenant in question prohibited the construction of any building other than a dwelling-house. I am unable to agree with the view taken by the Judge.

The covenant does not purport to deal with the class of buildings which may be erected, but merely says that "any building or dwelling-house which he shall erect" must be of a certain value and be placed at least 20 feet from the street line.

Apart from these restrictions there is nothing whatever in the agreement to indicate that the parties intended to limit the class of building which might be erected.

The words "any building" would rather point to the conclusion that no such limitation was intended. Counsel for the plaintiff contended that the wording of the provision dealing with the location of the structure to be erected on the lot shewed clearly that a dwelling-house only was intended to be referred to and for that reason the words "any building or" in the earlier part of the clause should be treated as surplusage The elimination of these words, however, would not help the plaintiff. The covenant would then be confined to the value and location of a dwelling-house. The argument of counsel for the plaintiff amounts in effect to this—although there are no express words in the covenant prohibiting the construction of a store on the lot, there are certain surrounding circumstances which point to the conclusion that the parties intended to make the district residential and, therefore, the Court should import into the covenant words which will carry out such intention. To accede

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to this argument the Court would have to make a new contract for the parties, which of course it cannot do.

I would allow the appeal with costs, dissolve the injunction and dismiss the action with costs.

Appeal allowed.

Re LIVINGSTON ESTATE

Manitoba King's Bench, Galt, J. April 10, 1922.

EXECUTORS AND ADMINISTRATORS (§IVC—102)—*Construction—Wife appointed executrix—Time fixed for division estate—Discretion of executrix—Vested interest in son—Son in needy circumstances—Power of Court to order payment of share.*]—Originating motion order Rule 928 Man. for payment of such portion of his father's estate as he may be entitled to under a will. Application refused.

W. W. Coleman, for applicant; *McLeod*, for executrix.

GALT, J.:—This is an originating motion made under the provisions of Rule 928, and by it P. R. Livingston, the eldest son of the late W. Livingston, applies as one of the devisees for payment to him of such portion of his father's estate as he is entitled to according to law.

The applicant who is about 28 years old, has filed an affidavit alleging that he has had no permanent employment for 15 months and is in a very necessitous condition, and that he is advised that he is entitled to immediate possession of certain of his father's estate and if he fails to receive the same he will be compelled to pledge his rights in the said estate on the best terms that he can secure in order to protect his wife and child.

Probate of the last will and testament of the said W. Livingston was issued on September 8, 1921; and it says that the testator died on or about August 8, 1921, at Morden. Under his will the testator nominated and appointed his wife Lydia to be sole executrix of his will. The will contains the following amongst other provisions:—

"I direct my executrix, hereinafter named, to pay all my just debts, general and testamentary expenses, as soon as may be after my decease.

I give, devise and bequeath all my real and personal estate, share and share alike, to my wife Lydia and to my sons Peter and Frank to the end that they shall each receive one third of my estate, but my sons shall not be entitled to their shares until Frank shall have attained the full age of 21 years but in the meantime my sons shall be entitled to the income on their respective shares the same being payable to them at such time as to my

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executrix shall seem desirable. Upon my son Frank becoming of age I give my executrix full power to convert my estate into cash for the purpose of distribution and for so doing she shall have complete right to sell and convey all my real and personal estate or any part thereof and to execute all documents which may be necessary or desirable."

The inventory filed in connection with the probate proceedings shews the total estate of the testator to amount to $60,358.23, the assets consisting very largely of agreements of sale, in some of which the testator only held a one-third or one-half interest, mortgages, etc. The personal estate consists of household furniture amounting to $200, certain stock in the Grain Growers Co. and Dominion Linseed Oil Co., Victory Bonds, a promissory note, and $1,000 life insurance.

Lydia B. Livingston, the executrix, opposes the application and files an affidavit from which I extract the following statement:—

"(2) The estate and effects of the said deceased consisted, at the time of his death, and still consist, of real estate, mortgages of land, agreements of sale of land, book debts, promissory notes and stocks, and other properties of various kinds of small value. The greater part of the said estate and effects, both real and personal, is situated in the district of Morden, in Manitoba, and I am advised, and believe that owing to the crop failure in the said district in the year 1921 the said estate and effects could not be converted into money, or otherwise realised, even if such were necessary, without grave and substantial loss to the estate, and I have not converted the said estate and effects, but I still hold the said estate and effects substantially in the same properties and securities and form the estate was in at the time of the death of the said deceased."

Mr. Coleman on behalf of the applicant shewed that the younger son Frank is now only 14 years old, or thereabouts, and the applicant contends that he is not bound to wait until Frank becomes of age before receiving his one-third of the estate.

The law relied upon by the applicant is set forth very clearly in Williams on Executors, 11th ed., at p. 1127, as follows:—

"It should here be remarked, that where a testator gives a legatee an absolute vested interest in a defined fund, so that, according to the ordinary rule, he would be entitled to receive it on attaining twenty-one, but by the terms of the Will payment is postponed to a subsequent period, e. g., till the legatee attains the age of twenty-five, the Court will, nevertheless, order payment on his attaining twenty-one; for at that age he has the power of charging or selling, or assigning it, and the Court will

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not subject him to the disadvantage of raising money by these means, when the thing is absolutely his own. So, notwithstanding a legacy is directed to accumulate for a certain period, e. g., until the legatee attains the age of thirty, yet if he has an absolutely indefeasible interest in the legacy, he may require payment the moment he is competent, by reason of having attained twenty-one ,to give a valid discharge."

The above statement of the law is verified in the footnote by reference to several cases, but in order to apply it the facts must shew that the legatee has an absolute vested interest in a defined fund. Can it be said in this case that Peter has such an interest?

On behalf of the executrix Mr. McLeod points out the complicated condition of the estate as it exists today. There are debts outstanding amounting to several thousands of dollars. It would be highly prejudicial to the estate to sell the interests in lands under existing conditions and no definite assets have been devised to the applicant.

In addition to this Mr. McLeod points out that the period of one year from the death of the testator has not yet elapsed. Referring again to Williams on Executors, at p. 1113, the matter is thus dealt with:—

"On the same principle that the assent of an executor to a legacy is necessary, he cannot, before a competent time has elapsed, be compelled to pay it. The period fixed by the civil law for that purpose, which our Courts have also prescribed, and which is analogous to the Statute of Distributions . . is a year from the testator's death, during which it is presumed that the executor may fully inform himself of the state of the property. But within that period he cannot be compelled to pay a legacy, even in a case where the testator directs it to be discharged within six months after his death."

As I understand it, the executrix is paying to the applicant from time to time as large a proportion of the income from the estate as she thinks she can pay safely. It may be that before very long the debts will have been all cleared off and the estate be in such a condition that the executrix will be justified in paying to the applicant his one-third share, either of the whole estate or of some portion of it. It is a family matter and ought not to be made the subject of litigation. But the present application is certainly premature and must be dismissed.

Costs of both parties out of the estate.

Judgment accordingly.

GILLESPIE v. TILLIE.

Manitoba King's Bench, Galt, J. April 21, 1922.

SALE (§IIIC—72)—*Threshing outfit—Purchaser unable to read—Vendor shrewd business man—False representations as to condition of machine—Purchaser signing lien notes without inspecting machine—Reliance on truth of representations made—Machine worthless—Liability of purchaser on notes.*] Action to recover on lien notes given for the purchase price of farm machinery; counterclaim for damages. Action dismissed; counterclaim allowed. [See Annotation, 58 D.L.R. 188.]

F. G. Taylor, K.C., for plaintiff; *W. D. Card*, for defendant.

GALT, J.:—This action was tried before me at Portage la Prairie last week. The plaintiff sues upon two lien notes, dated August 20, 1920, the first of which is for $400, payable on November 1, 1920, and the second for $600 payable on November 1, 1921. The notes are drawn on identical printed forms and after providing in the usual language for payment, there is added:—"with interest at the rate eight per cent. per annum till due, and twelve per cent. per annum after due until paid, given for one Rumley separator."

Then follows a clause in small print:—

"The title, ownership and right to the possession of the property for which the above note is given shall remain at my own risk in the vendor or assigns, until this note, or any renewal thereof, or any judgment recovered thereon, is fully paid with interest and if I make default in payment of this or any other note in their favor or should I sell, or dispose of, or mortgage my landed property, or if the vendor or his assigns should consider this note insecure, they have full power to declare this and all other notes made by me in their favor due and payable forthwith, and even though judgment may have been recovered against me hereon, they may take possession of the property for which this note is given, and hold it until this note is paid, or sell the property at public or private sale, the net proceeds thereof (after payment of all expenses of taking possession, removal and sale including a commission on the re-sale), to be applied in reducing the amount unpaid hereon, and the holders hereof notwithstanding such taking possession or sale shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance then found to be due hereon. The entering of suit or recovering of judgment by the vendor or his assigns, against me on this note shall not merge or waive the right of ownership and right of possession of the vendor to the said goods."

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Both notes purport to be signed by "Edd. Tillie."

The second note for $600 contains the following endorsement in pencil:— "If I, E. Tillie, has a crop failure you are to carry me over till 1922.".

This endorsement is signed by the plaintiff.

The defendant pleads that the notes in question were given by him to the plaintiff in consideration of the sale by the plaintiff to the defendant of one Rumley separator which the plaintiff represented and warranted to be as good as new, in good running order and ready for belt, and the defendant signed the said notes without seeing or examining said separator (although he asked to see the same he was induced by the plaintiff not to) relying entirely upon said representations and warranty which were in fact untrue. The defendant also counterclaims for damages incurred by him by reason of the plaintiff having sold him a defective machine.

The defendant is a man of 45 years of age who resides with his mother and with a brother who is deaf and dumb, and they have between them about a section of land.

The plaintiff appears to be a shrewd business man. He has lived in the vicinity of Sydney for some 24 years and had been engaged for about 9 years in threshing but about the time of this transaction he had decided to give up threshing and was desirous of selling the separator, which he had used in his business for 3 or 4 years.

The defendant can neither read or write and his intelligence seems to be below the average but for all that it appeared from evidence given by people who knew him he is a simple-minded, truthful man. His account of the transaction in question may be gathered from the following notes of his evidence:—

"In 1920 I had 700 or 800 bushels of barley, etc. I was cutting wheat with my brother. Gillespie spoke to us. He said 'Do you want to buy a separator?' I said, 'No, the crop is hardly big enough for that.' He said, he wanted a thousand dollars for his separator, a Rumley, and he would also give a box of tools worth $100 and a $30 cable. He said the machine was in good shape, that he had run it two years and his boys two years. It was ready to run. He started writing out notes. He wrote on one of them that he would carry me over in case of a bad crop. We went to the house; mother was there and she wanted us to leave it alone. At the house Gillespie, speaking of the separator, said she was in first-class shape and ready to have the belts on. I at length decided to take the machine and I signed the notes at the house. I held the pen and he signed it. I had never seen the separator up to that time. In the field I

had said to him I would like to get a good separator man to inspect the machine first. Gillespie said he was a good separator man and I could rely on him."

The defendant goes on to shew that after the notes were signed he went out to Gillespie's farm and inspected the separator, but as he was not at all conversant with this machine he could not be expected to know whether the machine was in good order or otherwise. Later on he got the tool box but found that the only articles in it were, one wrench, some broken bolts and pieces of a broken governor. However, the defendant had the machine taken over to his own place and he employed a man named Joseph Contois to look it over and prepare for threshing the crop. Contois had been farming for 24 years and had been engaged as a thresher during a considerable portion of that time. He spent several days in putting the machine in order and then commenced to run it but it would not run properly, owing mainly to defects in the feeder. Then Tillie telephoned to the plaintiff to come and see if he could run it. A large amount of evidence was given by both parties as to the plaintiff's visit but in the end the plaintiff admitted that he could not make it run and told Tillie that he must get an expert. Tillie had engaged several men to do his threshing, some of whom had teams, but owing to the break-down which occurred in running the separator the men and teams were for the most part idle. After several days' efforts Tillie felt obliged to employ another thresher in order to garner his crop. Later on Tillie says that he got his wife to write a letter to Gillespie telling him the condition of the separator and notifying him to either take it away or come and put it in workable repair. Gillespie admits receiving this letter, for indeed he wrote a letter in answer which was produced at the trial, but he was unable to produce Tillie's letter and he says he must have burned or destroyed it. Tillie did not pay the note for $400 which fell due on November 1, 1920. The plaintiff demanded payment of it and a few months later, he says, he decided to take advantage of the printed clause on the notes which authorised him to declare the second note to be due and payable forthwith. The plaintiff says he did this and then brought his action on August 24, 1921.

Counsel for the plaintiff argues that the plaintiff was not guilty of any morally wrongful act as he had no reason to doubt that the machine was in good order. It had been used by himself and his sons for 4 years and nothing much seems to have gone wrong with it, but the plaintiff had to admit that the ordinary life of a feeder is only 3 or 4 years so that this portion of the

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machine at least he must have known to be in a moribund condition. I am not at all impressed with the argument that the plaintiff did nothing morally wrong. He was an old friend of the Tillie family. Mrs. Tillie, the mother of the defendant, says that when she objected to her son buying the separator on the ground that he knew nothing whatever about separators, the plaintiff reminded her that he was an old friend of the family and was not likely to take any of them in.

The following extracts from the plaintiff's examination for discovery throw a strong light upon his actions in this case: [The judge here cited the extracts and proceeded]

It is difficult to believe that a vendor dealing thus with a purchaser whom he knows could neither read nor write can be absolved from the imputation of fraudulent overreaching. The use which the plaintiff made subsequently of the clauses which he did not read to the defendant reflects even more strongly upon him.

Mrs. Tillie, mother of the defendant, was called as a witness and gave her evidence in a very satisfactory manner.

During the argument attention was called to certain laxities in the pleadings, for instance, that the defendant had not specifically relied upon the endorsement which Gillespie had made on the note for $600. It is clearly shewn by the defendant in evidence that his crop in 1921 was a failure, yet the plaintiff not only refused to carry him over till the following year, as agreed, but claimed the right to call in the money many months before it was originally due.

During the argument counsel for the defendant asked for leave to amend if necessary and I considered that this is a case in which the pleadings may well be moulded in accordance with the evidence adduced. There was no question of surprise which could be urged against such amendment.

I find that during the conversations between the plaintiff and defendant out in the field and at the house the plaintiff did represent and warrant the machine to be as good as new and in good running order, but that as a matter of fact the feeder had outlived its usefulness and that in several other respects the machine was not in good running order.

Mr. Taylor on behalf of the plaintiff, in accordance with the best traditions of the Bar, drew my attention to two cases decided (adversely to the learned counsel's argument) by Mathers C.J. K.B. in 1910, viz., *American-Abell Engine Co.* v. *Tourond* (1909), 19 Man. L.R. 660, the headnote of which is as follows:—

"When a man capable of reading and understanding a document, and having an opportunity to do so, affixes his signature

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to it, though without reading it, he should be held bound by its contents. But that rule does not apply when a man incapable of reading a document, is induced to sign it by a representation that it is an entirely different document.

The plaintiff's agent, in negotiating the sale to the defendant of a second hand threshing outfit, assured him that the separator was in first class condition and would do first class work and, if not, he should be at liberty to return it. The defendant agreed to take it upon these terms and, not being able to read English, signed the usual form upon being assured by the agent that it was a paper showing the bargain made.

Held, that the defendant was not bound by anything contained in the order which was an addition to or inconsistent with the verbal agreement made between the plaintiff's agent and himself, and that he had a right to return the machines when he found that they were not as represented, and to have the promissory notes he had given delivered up and cancelled."

The Judge found that the separator was not in first-class condition and would not do good work but was a very old and out-of-date machine of which the woodwork was, to use the language of one of the plaintiff's own witnesses, pretty old and rotten.

The second case was *Streimer* v. *Nagel* (1909), 19 Man. L.R. 714. There:—"the defendants signed an agreement to purchase a flour mill from the plaintiff for $13,000, payable $1,000 cash and the balance in quarterly instalments. The agreement contained a clause providing that, upon any default being made in payment, the whole purchase-money should become due and payable at once. This clause was not asked for by any of the parties, but found its way into the agreement simply because it happened to be in the printed form used by the solicitor who prepared it and acted for both sides. The defendants were foreigners who understood English very imperfectly and the trial Judge found as facts that they were entirely ignorant of the existence in the agreement of the clause referred to, that it was not explained to them either by the solicitor or by any other person in a manner that they could understand and that the plaintiff, who spoke the defendant's language, had undertaken to explain the agreement to them and that they had depended on him to do so. Held, that the defendants were not bound by the clause in question and the plaintiff could only recover the amount of the overdue instalment."

These two cases apply very strongly to the present case. No authorities were referred to (according to the report) in either case by either the Judge or by counsel.

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As against these decisions Mr. Taylor referred to the following statement of the law as contained in 10 Hals., sec. 690:—

"It is not necessary to the execution of a deed that it should be read over by or to the executing party before or at the time of its delivery, even though he be illiterate or blind; for if he be content to dispense with so informing himself of the contents of the deed he will be estopped from averring that it is not his deed."

A number of authorities are cited by the author in the footnote to the above statement. They commence with *Thoroughgood's* case (1582), 2 Co. Rep. 9 a, 9 b. I have examined these authorities and find that they by no means justify the statement in the text. I will refer to one or two of the more recent ones.

Howatson v. *Webb*, [1908] 1 Ch. 1, 77 L.J. (Ch.) 32 (cited in the above footnote):—

"The defendant, a solicitor, who was formerly a managing clerk to one H., acted as his nominee in a building speculation relating to certain property at E. of which H. was the owner. Shortly after leaving H.'s employment he was requested by H. to execute certain deeds, and on asking what those deeds were he was told by H. that they were deeds transferring the E. property. The defendant thereupon signed them. One of the deeds so signed was a mortgage between the defendant, as mortgagor, of the one part and W. of the other part, and contained the usual covenant by the mortgagor for payment of principal and interest. In an action by a transferee of the mortgage for payment of the principal debt and interest the defendant pleaded non est factum: Held, (affirming the decision of Warrington, J., [1907] 1 Ch. 537, 76 L.J. (Ch.) 346), that, the misrepresentations being only as to the contents of a deed known by the defendant to deal with the property, the plea failed, and that the defendant was liable on the covenant. . . . . *Quaere*, whether the old authorities on the plea of non est factum extend beyond cases where the party is blind or illiterate."

In delivering judgment in the Court of Appeal, Cozens-Hardy, M.R. says ([1908] 1 Ch. at pp. 2-3):—

"In my opinion there is no ground for interfering with the judgment of Warrington, J. The law as stated by him as to the plea of non est factum appears to me to be stated with absolute accuracy, and to be based on decisions of this Court which are binding on us, and I think it would be a waste of time if I were to do more than say that I accept and approve of every word of his judgment."

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Farwell, L.J., says ([1908] 1 Ch. at pp. 3, 4):—"I think myself that the question suggested, but not decided, by Mellish, L.J. in that case will some day have to be determined, viz., whether the old cases on misrepresentation as to the contents of a deed were not based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man; see *Thoroughgood's* case, *supra*, and Sheppard's Touchstone, p. 56; and whether at the present time an educated person, who is not blind, is not estopped from availing himself of the plea of non est factum against a person who innocently acts upon the faith of the deed being valid. I agree that the appeal ought to be dismissed."

The judgment of Warrington, J., [1907] 1 Ch. 537, at p. 543, which was thus approved, was in part as follows:—

"I come, then, lastly, to the plea which is the most important and the most interesting to lawyers—the plea of non est factum, that is, that the deed is void. Can that plea, in the circumstances of this case, be supported? First, what is the law? I need not go back to *Thoroughgood's* case, because there have been more modern statements of the law in recent cases. The earliest of these is *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704, 38 L.J. (C.P.) 310. . . . ." At pp. 544-5:—

"Byles, J. in giving judgment says: (I.R. 4 C.P. 711) 'It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read'—so he extends the proposition to one who forbears to read as well as one who cannot read—'has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.' I pause there for a moment to remark that it seems to me to be essential to the proposition which is there stated that the contract which the signer means to execute should be of a nature entirely different from the contract in dispute. It will not be contended that if, in reading over a contract to a blind or illiterate person, the reader merely omits or misstates some material clause, the contract is altogether void. It may be void-

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able or it may be a subject for rectification, but it is not void. It is true that later in the judgment there are some expressions which would appear to carry the rule further than the passage I have read."

The Judge then went into the evidence of the case before him and said at p. 549:—

"Under these circumstances I cannot say that the deed is absolutely void. It purported to be a transfer of the property, and it was a transfer of the property. If the plea of non est factum is to succeed the deed must be wholly, and not partly, void. If that plea is an answer in this case I must hold it to be an answer in every case of misrepresentation. In my opinion the law does not go as far as that."

Applying these cases to the present action it appears to me that the verbal bargain made between the plaintiff and defendant for the sale and purchase of the separator was wholly different from the bargain expressed in the two promissory notes. Under the verbal bargain it was an out-and-out sale by the plaintiff to the defendant with the usual consequence that title to the property would pass immediately to the purchaser, but under a clause in the notes which was not read to the defendant the title did not pass until the notes were paid. The intention of the plaintiff to take advantage of the defendant is palpably shewn by his conduct in endeavouring to act upon the unread clause by declaring the second note due before it became due, and in direct breach of the endorsement which he had placed upon the second note providing for an extension of payment in case the defendant's crop for 1921 proved a failure, which it actually did prove.

In all the cases contemplated by the above quotation from 10 Hals., the rights of third parties had intervened. It is impossible to believe that the cases there cited could have been successfully relied upon by the very party who had been guilty of the misrepresentation.

The law applicable to the present case is stated in 7 Hals., commencing on p. 354. I make the following extracts:—

"732. It follows from what has been stated above under the heading of offer and acceptance that it is an essential of a valid contract that the parties should assent to the same thing in the same sense—they must have the same intention, and this intention must be declared. If there is no evidence as to the intention of the parties there can be no contract, and similarly, if it appears that they were negotiating or contracting with regard to different things or in contemplation of diverse terms, there

is an absence of the essential mutuality and consequently no contract.

733. The mere signing of a contract does not necessarily imply consent. Thus, if a blind man, or a man who cannot read, or one who for some reason (not involving negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, or if the contents of the document are otherwise misrepresented to the person signing, then, at any rate if there is no negligence, the signature so obtained is of no force. The principle applies to negotiable instruments, and a person who signs in the belief that he is signing a document of a different kind is not liable even to a holder in due course.

This principle is subject to the limitation that if a man executes a deed knowing that it is one purporting to deal with his property, he cannot set up a misrepresentation as to the contents of the deed so as to support a plea of *non est factum*.

734. A contract, although mutually assented to, may be voidable by one of the parties on the ground that his consent was obtained by . . . . fraud, or in certain classes of cases by misrepresentation not amounting to fraud, and although the contract is not void or voidable, relief of various kinds, according to the circumstances, may be given on the ground of mistake or innocent misrepresentation."

I am of opinion in the present case that the defendant was induced to purchase the separator by fraudulent misrepresentations of the plaintiff, and that the defendant was fully justified in writing to the plaintiff in the fall of 1920 to either take the machine away and call off the deal or put the machine in working order. The plaintiff refused to recognise any further duty to put the machine in working order and so the defendant was fully justified in treating the contract as at an end.

The defendant has counterclaimed for damages and I think he is entitled to the extent at least of $400. At the time of the purported bargain the plaintiff inquired of the defendant what expense he expected to be put to in threshing his crop that year. The defendant replied about $400, whereupon the plaintiff made use of that to fix the amount of the first promissory note payable in the fall of the same year at $400. As a matter of fact the defendant's threshing cost him a great deal more than $400 but he did get a certain amount of work done by the machine, viz., about one-third of what it should have done, which reduced his actual expenses to about $400.

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For the above reasons I am of opinion that the action should be dismissed with costs, and that the counterclaim should be allowed to the extent of $400 and costs.

The examination of the plaintiff for discovery was of great value so I grant a fiat for the costs of it. I think the conduct of the plaintiff and the difficulty and importance of the case warrant me in removing the statutory bar as to costs.

Action dismissed.

LEGRIS & BRASSARD v. McNAB-YOUNG CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 29, 1922.

SALE (§IIC—39)—*Of goods—Inspection—Acceptance—Portion unfit for use—Refusal to accept—Wilful misrepresentations of vendor leading to sale—Damages.*]—Appeal by plaintiff from the trial judgment in an action to recover the price of hay sold and delivered. Affirmed.

G. H. Barr, K.C., for appellants.

A. M. McIntyre, for respondent.

The judgment of the Court was delivered by

TURGEON, J.A.:—This is an action brought by the appellants to recover the purchase price of hay sold and delivered. The respondents counterclaimed for damages, on the ground that the hay was not as represented and was unfit for re-sale by them. The trial Judge gave judgment for the appellants for $1,395.88, the amount which he estimated to be the balance of the purchase price, with costs, but he also gave judgment for the respondents on their counterclaim for an equal amount, with costs with a right of set-off. From this judgment the appellants (plaintiffs) appeal. There is no cross-appeal by the respondents.

The respondents are dealers in hay, which they buy in large quantities for re-sale at retail. The appellants are farmers, and in the autumn of 1919 they were the owners of certain hay, which they had cut and stacked during the summer, on sections 13 and 15 in tp. 50, range 23 w/3rd. meridian. Being desirous to sell this hay, they asked one James Underwood to find a buyer, agreeing to take $8 per ton for themselves, Underwood to keep anything that the hay might bring above that figure. Through Underwood's agency, a deal was arranged with the respondents, the effect of which was that the respondents agreed to buy the hay for $9 per ton, $1 to go to Underwood, as his commission, and $8 to the appellants.

The letter which began the negotiations for the sale was written by Underwood to the respondents on October 14, 1919, and describes the hay as follows:—"I have an option on about 600

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tons of hay all prairie wool put up in good shape dry and before the frost."

The respondents sent one Bowes, an employee of theirs with a good knowledge of hay, to the land where the hay was stacked, with instructions to inspect the hay and to complete the purchase if it was found to be satisfactory. Bowes, Underwood and the two appellants visited the stacks together, and Bowes performed his inspection. His method of inspection consisted in putting his hand into each stack, pulling out a handful of hay, examining it, and asking the appellants whether the handful was a fair sample of the contents of the stack. All the hay he examined in this manner was in good condition, and the appellants in each case told him that the bulk of the hay corresponded to the sample. He also asked the appellants whether any of the hay had been put up in a wet condition, and they told him no. The evidence shows that this inspection was the only sort of inspection that was practicable under the circumstances, because, in order to reach and examine the bulk of the hay, it would have been necessary to dig into the stacks and pull them to pieces. After completing this inspection Bowes bought the hay on behalf of the respondents. The hay was to be baled and removed by the respondents, and the appellants knew that the respondents were purchasing the hay for the purpose of re-selling it to the public. The contract was made on December 18, 1919.

Later, the respondents' balers went upon the land to bale and remove the hay. That portion of the hay which was on section 15 was found to be in good condition, was baled and removed and paid for by the respondents, and was re-sold by them at prices ranging from $26 to $29 per ton. When the balers proceeded to section 13, they found that there was only sufficient good hay to make up 31 bales. The rest of the hay was found, when the stacks were dug into, to be frozen and rotten so that it could not be baled, and devoid of any value as feed, except a small quantity on the outside of the stacks, probably 1 foot deep. The evidence is absolutely convincing that the condition of the hay must have been caused by its having been put up in stacks when wet, so that it rotted on the inside, and could not have been caused by rain falling on the outside of the stacks. Bowes was sent by the respondents to look into the matter, and, as he found the hay to be in the condition reported by the balers, the respondents withdrew the balers and left the hay upon the land.

I have no doubt that Bowes was misled into purchasing the hay on behalf of the respondents by the misrepresentations made

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by the appellants as to the hay having been put up dry. The misrepresentation was not an innocent misrepresentation, such as will not give rise to an action for damages, but, in my opinion, was made wilfully, the appellants knowing of its untruth, in order to induce Bowes to buy the hay. One of the witnesses, M. Gaston, a neighbouring farmer, swears that he saw the appellants putting up this hay on sect. 13 under weather conditions which, according to him, were bound to lead to the hay turning bad, as it did.

There is a conflict of evidence upon some of the points involved, but, by reviewing the evidence in the appeal book and giving due effect to the findings of the trial Judge, I am of opinion that the foregoing is the true version of the facts.

As the property in the hay had passed to the respondents, the trial Judge gave judgment against them for the balance of the purchase price, but awarded them damages in an equal sum for the quantity of the hay which was unfit. I agree with his disposition of the case, and I would dismiss the appeal with costs.

Appeal dismissed.

TOWN OF KAMSACK v. CANADIAN NORTHERN TOWN PROPERTIES Co.

Saskatchewan King's Bench, Taylor, J. March 17, 1922.

DISCOVERY AND INSPECTION (§IV—31)—*Examination ex juris of officer of company—Sask. Rules 271 and 272.*]—Appeal from an order granting to the plaintiff leave to examine one Nichols, alleged to be an officer of the defendant, for discovery, in the city of Winnipeg. Objection was taken that, notwithstanding the amendment to the Rules, *McMillan* v. *C.N.R.*, [1920] 2 W.W.R. 575, still applied, and that an order should not be made for an examination for discovery *ex juris* of an officer of a litigant company. Affirmed.

P. H. Gordon, for appellant.

C. M. Johnstone, for respondent.

TAYLOR, J.:—For many years prior to the decision in *McMillan* v. *C.N.R.*, *supra*, orders had been made under the practice prevailing in this province for the examination *ex juris* of officers of a litigant corporation, and it seems to me that it is now clear beyond question from the amendments made to the rules that an officer or servant of a corporation who is not in Saskatchewan may by order of the Court or a Judge be examined. Rule 271, so far as it relates to the matter in point,

provides that an officer or servant of a corporation and liable to examination who resides in Saskatchewan shall attend for examination upon service of the appointment and of the order, etc. Rule 272 provides that one who is an officer or servant of a corporation and liable to examination, who is not in Saskatchewan, may by order of the Court or a Judge be examined. The officer or servant of the corporation must certainly be either residing in Saskatchewan or not in Saskatchewan. I do not at all follow the narrow construction asked to be put upon Rule 272, that we should put a meaning therein to confine it to a person who is ordinarily domiciled or resident in Saskatchewan and temporarily absent therefrom. The intent of the rule, in my opinion, was to cover the whole class of officers and servants of corporations, those in and those out of Saskatchewan.

While going so far, the Local Master expressly refused to designate Nichols as the proper person to be examined under Rule 266, whose evidence might be used as evidence against the corporation on the trial. The notice of motion does not ask that he should be so designated, and it is therefore unnecessary to reach a conclusion thereon.

The appeal is dismissed with costs.

Appeal dismissed.

LEASK CATTLE Co. Ltd. v. DRABBLE & SONS.

Saskatchewan King's Bench, Mackenzie, J. May 29, 1922.

SPECIFIC PERFORMANCE (§IE—30)—*Assignment of Government ranching lease—Approval of Government obtained—Completion of necessary steps required by Government to complete transfer—Delay in completing transfer—Request for return of deposit—Tender of transfer—Refusal to accept—Company struck off register and dissolved before bringing action—Companies Act, R.S.S.* 1920, *ch.* 76, *sec.* 31 (2 *and* 3)—*Construction—Rights and liabilities of parties.*]—Action for specific performance based upon an assignment of a ranching lease.

J. E. Lussier and *J. J. F. MacIsaac*, for plaintiff.

R. Robinson, for defendants.

MACKENZIE, J.:—This is an action for specific performance based upon an assignment of a lease. In finding the facts I might say that on points of conflict between the evidence of the witnesses for the plaintiff and the defendants, respectively, I prefer to give credence to those for the plaintiff. The senior defendant, George Drabble, who was the principal witness for the defence, did not impress me as a trustworthy vehicle for the facts. For one instance of his incredibility, reference may be

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made to his statement when examined for discovery that the deal was off after his talk with Major M. Mansell in the early or middle part of November, a statement which was wholly refuted by his own letter to Wills, dated December 11, 1920. Then to try and remove the damaging effect of such letter, he attempted an explanation of it at the trial, which was so unreasonable to my mind as to be absurd. I feel, therefor, I must treat him as an unreliable witness.

To proceed, I find the facts as follows:—The plaintiff is a ranching company incorporated under the Companies Act of Saskatchewan, R.S.S. 1920, ch. 76. The senior defendant is a farmer residing near Speers, and the other two defendants are his sons, and have been living with him. For some time prior to the year 1920 the plaintiff held the lease from the Department of the Interior to some seven sections of land near Leask, for ranching purposes. In the month of March, the manager of the plaintiff company, one R. Mansell, died. The only shareholders and directors of the company then were his wife, her father, F. S. Matthews, and her brother, S. M. Matthews. The last named, the secretary, then became its manager. It was decided by those shareholders that the company should sell its lease preparatory to relinquishing its ranching business. This information came to Major M. Mansell, the brother of the deceased manager, who in June met the senior defendant. The said defendant told him he would like to get a lease. Mansell reported this to the shareholders of the plaintiff company, and he was then instructed by them to take the matter up with the said defendant, and try and make a deal. M. Mansell accordingly had another interview with the senior defendant, and as a result all the defendants went up with M. Mansell and S. M. Matthews and inspected the said land, on or about July 20, 1920. Matthews, thereupon returned to Leask, but Mansell proceeded with the defendants to their home at Speers, and on the following day the defendants decided to purchase the lease. A document was therefore drawn up, which is the alleged agreement in writing referred to by the plaintiff in the first paragraph of its statement of claim. The said document reads as follows:—

"July 21, 1920. Received from George Drabble and Sons the sum of $500, to be held in trust by me pending completion of transfer by the Leask Cattle Co. Ltd., to George Drabble and Sons of the lease known as the "Oil Well Lease," situated in township fifty, Ranges seven and eight west of the third meridian (containing about seven sections) for the consideration of

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$2500. Vendors to deliver said lease with rent and taxes paid to end of 1919. Balance of purchase price to be paid at Leask on delivery of legal papers. The purchaser to have temporary possession pending completion of papers. Fence and equipment on property is included in sale. If lease is not transferred by January first Nineteen hundred and twenty one this agreement is cancelled and I agree to return this deposit on demand.

(Signed) Minton Mansell.

I concur in and agree to this agreement.

(Signed) George Drabble."

Upon the execution of said document by M. Mansell and the senior defendant, each of the younger defendants paid Mansell $250 by cheque, thus making the sum of $500 alleged to have been paid to the plaintiff in para. 3 of the statement of claim. M. Mansell then returned to Leask and produced said document to the shareholders, who all approved of it. S. M. Matthews was thereupon required to obtain from the Department of the Interior approval of the proposed transfer of the lease. He wrote the department from which no answer was forthcoming till October 7 following, when the department replied, informing him of the steps necessary to conclude the transfer of the lease. As a result Matthews sent a statutory declaration to the senior defendant for the purpose of satisfying the department of his British citizenship. The senior defendant made this declaration and duly forwarded it to the department. It was not till November 27, following however, that the formal transfer to the defendants of the lease was actually executed by the plaintiff company. It was then done under the seal of the plaintiff company, and signed by all the shareholders individually, under their respective seals. Just before this the senior defendant appears to have written S. M. Matthews regarding the progress of the matter, from which it would seem that he was growing somewhat anxious about it. Shortly afterwards, that is, about the end of November or the beginning of December, the senior defendant sought out M. Mansell, and asked him if he could get a buyer for the lease, as he thought he would sell it. Mansell replied that he thought he could, and that he should get about $4,000 for it. The senior defendant then wanted to know if the plaintiff would grant an extension of time for payment of the balance of the purchase price, as he had had a bad crop, and would have to mortgage his farm if no extension were granted. If, however, an extension were granted, he would not want to sell the lease. Mansell replied to such inquiry in the affirmative. The senior defendant then desired Mansell to approach the plaintiff about the proposed extension, and ascertain if it

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would take $500 more down and the balance in the autumn of 1921. Mansell accordingly saw S. M. Matthews, and advised the plaintiff's assent to the defendant's proposition. This, apparently, the shareholders were willing to do. About December 9, 1920, a real estate agent at Prince Albert, named George Wills, at Mansell's instance, wrote the senior defendant and asked him about selling the lease. On December 11, the said defendant replied that he had spoken to his sons and that they were not disposed to sell it. Having received a further request from the Department of the Interior for a statutory declaration of the junior defendants, establishing their British citizenship, S. M. Matthews, on or about Christmas day, 1920, went to the defendant's residence and obtained it. At this time the senior defendant spoke to Matthews about the extension of the time for the payment of the balance of the purchase money, and Matthews told him that the extension would be satisfactory. Nothing further seems to have transpired till the following February, 1921, when, on the 17th of that month, the senior defendant wrote to Mansell, and on the 21st, to S. M. Matthews, informing him that as the lease had not been transferred by January 1, he considered the agreement cancelled, and desired the return of his deposit. The plaintiff seems to have paid no attention to these letters, and in the following April, the Department of the Interior, having then passed and registered the plaintiff's transfer of lease, S. M. Matthews went and tendered such transfer to the senior defendant. The latter, however, then refused to accept it.

There can be no doubt that the senior defendant, who was representing the other two defendants, as well as himself, in this matter, intended to acquire said lease and was prepared to do all he could to that end from the date of the alleged agreement until Christmas, 1920. After this he apparently changed his mind and decided that he did not want the lease. As might be expected the legal grounds put forward by the defendants to support such a *volte-face* savour somewhat of technicality.

The objection was taken by the defendants' counsel preliminary to the trial, and again on his argument subsequent thereto, that at the time the action was commenced, the plaintiff had no status to bring it. He submitted in proof of this contention the *Saskatchewan Gazette*, dated December 15, 1920, p. 11, in which notice was published that on the expiration of 3 months from December 2, 1920, unless cause shewn to the contrary, the plaintiff's name would be struck off the register and the company dissolved; and the *Saskatchewan Gazette* dated March 31, 1921, p. 12, in which notice was published that the plaintiff company was thereby struck off the register and

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the company dissolved. This action was not commenced until March 26, 1921. To meet this objection the plaintiff tendered a certificate dated February 16, 1922, under the hand and seal of the Provincial Registrar of Joint Stock Companies, stating that the plaintiff is licensed to carry on business in Saskatchewan for the year ending December 31, 1922. I allowed him to put this certificate in evidence, but I do not think it is sufficient in itself to meet the above objection. The above notice, striking the plaintiff company off the register and dissolving it were given pursuant to the provisions of sub-secs. 2 and 3 of sec. 31 of the Companies Act. The procedure to be followed in order to have a company previously dissolved and struck off under this enactment, restored to the Registrar, is set forth in sub-sec. 4 of said sec. 31, as follows:—

"If the company or a member or creditor thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this or any other section of this Act, the company or member or creditor may apply to the Court upon notice to the Registrar; and the Court, upon hearing the Registrar and the applicant, may, if satisfied that the company was at the time of striking off actually carrying on business or in operation and that if it is just and proper so to do, order the name of the company to be restored to the register on the payment of such fees as are prescribed in the regulations for such purpose, in which event the Registrar shall forthwith publish in *The Saskatchewan Gazette* a notice that the name of the company has been restored to the register; and thereupon the company shall be deemed to have continued in existence as if the name of the company had never been struck off."

From this provision it is clear that the final condition of which fulfilment is necessary before such restoration can be deemed complete is publication of the notice of restoration in the *Saskatchewan Gazette*, and as the whole matter of striking off and of restoration is one of statutory creation, the statutory conditions must be strictly complied with in order to obtain the desired result. Before the Court can properly be satisfied, therefore, that the plaintiff company has recovered its statutory status, proof will have to be afforded it of the publication of the notice of restoration in the said *Gazette*. Counsel for the defendants argued, however, that even granting that such proof of restoration to the register could now be made, it could not give the plaintiff company a status to bring this action, which it did not possess at the commencement thereof. I cannot agree with this argument. It is to be noted that the words of the statute regarding the effect of the publication of the notice of

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restoration are "and thereupon the company shall be deemed to have continued in existence *as if the name of the company had never been struck off.*" To my mind the intention of the Legislature in passing this provision was to make it as remedial as possible. It must therefore be held to be retrospective as well as prospective in its operation. See 27 Hals. p. 159, para. 305, and *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672, 52 L.J. (Q.B.) 44, 31 W.R. 75, therein cited. Accepting this as the law applicable to this statutory provision it cannot matter that notices of dissolution under sub-secs. 2 and 3 of above sec. 31 were published before the commencement of this litigation, for once the Court is satisfied that notice of this restoration has been subsequently published, it must treat it as if its corporate existence had continued without cessation since its incorporation. Counsel for the defendants admits that this objection was not pleaded, or notice thereof given to the plaintiff before trial. His explanation for this omission was that he was not himself aware of the grounds for it until the day before (i.e. February 16, 1922) but that in any event, the objection being one in point of law, the Court must give effect to it, if well founded, whether pleaded or not. Regarding this contention it seems to me that the following statement of Beck, J.A. in *MacDonald* v. *Pier* (1922), 63 D.L.R. 577, at p. 600, is appropriate "No doubt a party has a right to raise a point of law at the trial *ore tenus*, but the fact that it is raised for the first time *ore tenus* at the trial must have an important bearing upon the course which should be taken by the trial Judge." There can be no doubt that plaintiff's counsel were not aware of the ground for this objection, and that when it was brought to their notice, it took them by surprise, so the plaintiff did not have an opportunity to meet it properly or to remedy before the trial the circumstances which gave rise to it. I think, therefore, the plaintiff should be given a reasonable opportunity to deal with such objection as it would have had if the same had been pleaded. I will therefore provide for this in the terms of the relief which I propose to give.

Counsel for the defendants also contended that by the plaintiff's dissolution the lease in question must be held to have reverted to the lessor, citing 5 Hals., p. 568 where the following statement occurs: "The lease to the company does not (i.e. on dissolution) vest in the Crown where no contract disposing of it has been entered into; reversion is accelerated and the land reverts to the lessor." But this quotation is not applicable to the present case as a contract was entered into by the plaintiff company to dispose of the lease on July 21, 1920, and the

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formal assignment of such lease was executed by it on November 27, following, all of which was some months before the final notice of plaintiff's dissolution was published in the *Saskatchewan Gazette*. It is also to be noted that the above quotation is founded upon the decision in *Hastings Corporation* v. *Letton*, [1908] 1 K.B. 378, 77 L.J. (K.B.) 149. In this case the dissolution on which the lease came to an end was one which followed after the affairs of the company had been fully wound up under the English Companies Act of 1862, which, as Darling, J., says, makes death a very painless affair for them because it is provided before they die they shall have nothing. Such a final dissolution resulting upon the winding up of a company is a very different matter from that arising under sec. 31 above, which is merely in the nature of a penalty which may be remitted without further consequence upon the fulfilment of the prescribed conditions. Attention might also be drawn to the fact that the view taken by the Court in *Hastings Corporation* v. *Letton* is questioned by the author of Stiebel's Company Law, 1912, p. 993. I must hold, therefore, that the temporary dissolution of the plaintiff company has not affected the existence of the lease in question.

The principal defence put forward by the defendants is (1) that the document relied upon by the plaintiff company and set forth above is not a contract, and did not establish privity of contract between the plaintiff and the defendant. (2) That such document does not satisfy the Statute of Frauds. As it is not suggested that there was any contract between the parties other than such as may be contained in the said document, these defences may properly be considered together. Counsel for the defendants argued that the said document is a receipt or declaration of trust, as if that would preclude it from being a contract. I cannot follow this argument. It is manifest that under certain conditions the said document might be legally considered a receipt, and under other circumstances as a declaration of trust, but that does not prevent it from being relied upon as a contract if it fulfils the requirements of such. Dealing with these requirements it appears to me that the said document does fulfil them. Thus, two of the parties, the plaintiff and the senior defendant are indicated by name, and the other two defendants by description, sufficiently to identify them. The promise or obligation may be ascertained unequivocably as the transfer and delivery of the lease by the plaintiff, who is subsequently described as the "vendors," to the defendants, who are also subsequently described as the "purchaser." It was not suggested that either the lease or the property covered by

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it was insufficiently described. The consideration is fully set forth, and the mode and terms of payment may be readily ascertained; namely $2,500 of which $500 was paid to M. Mansell to be held by him as a deposit pending the completion of the transfer, and the balance to be paid upon the delivery of the papers. The agreement of the defendants to the terms charged appears on the face of the document. It is signed by the senior defendant. There was extrinsic evidence which shews he signed, not only for himself but on behalf of the two junior defendants. That this may be so proved, see *Young* v. *Schuler* (1883), 11 Q.B.D. 651. The senior defendant's authority to thus represent not only himself but his two co-defendants was not seriously disputed. If any further evidence were wanted to confirm his action and authority in executing the said agreement, it is to be found in the fact that each of the junior defendants upon such execution gave to M. Mansell his cheque for $250, on account of the purchase price.

It is not to be questioned that an assignment of a lease falls within the Statute of Frauds. See *Buttemere* v. *Hayes* (1839), 5 M. & W. 456, 151 E.R. 193, 9 L.J. (Ex.) 44. As all the above matters are in writing, however, there can be no question that the defence resting upon the Statute of Frauds cannot stand. See Leake on Contracts, 5th ed. 178 *et seq.*

The defendants' counsel also sought to question the authority of M. Mansell to bind the plaintiff company in making the agreement in question, since there was no resolution of the company appointing him to enter into it or subsequently ratifying it. The evidence shewed that the plaintiff company was composed of only 3 members and shareholders, all of whom were of the same family, and at the time of the transaction in question, living in the same house. While it is apparent that they acted most informally in taking corporate action, the evidence is clear that they all concurred in instructing Mansell to enter into the negotiations with the defendant and approved of the agreement after it was made. This is strongly confirmed by the fact that all 3 shareholders have signed the assignment of the lease. It has been held that a company is bound by the acquiescence of its shareholders to be inferred from their conduct, even though the statutory mode of adoption is by special resolution. See *Ho Tung* v. *Man On Insurance Co.*, [1902] A.C. 232, 71 L.J. (P.C.) 46. I must come to the conclusion, therefore, that in this case M. Mansell had the requisite authority to bind the plaintiff company, and that it is bound by the agreement of July 21, 1920.

Then counsel also contended that as such agreement provides

"if the lease is not transferred by January 1st, 1921, then the agreement is cancelled," and the fact is that it was not transferred by the said date, it cancelled itself, so that the defendants had a legal right to do what they did in declaring its cancellation in February 1921. Against this contention it is to be recalled that in November 1920, the defendants requested the plaintiff for an extension of time for the final payment of the purchase price, until the fall of 1921, a request which the plaintiff granted. Counsel for the defendants suggested that even granting that time for such payment was extended, this did not extend the time for delivery of the lease beyond January 1, 1921. I must hold otherwise, because it is to be noted that according to the agreement the balance of the purchase price is to be paid "on delivery of the legal papers," making the performance of the one practically contemporaneous and dependent upon the performance of the other. This being so, the agreement for the extension of the time for payment must necessarily imply an extension of the time for delivery of the lease. The defendants' counsel also contended that the plaintiff company had rendered the lease liable to forfeiture at the instance of the Department of the Interior, because there was no evidence to shew that the plaintiffs kept on the ranch the number of cattle called for by the regulations. It seems to me that the evidence of S. M. Matthews and M. Mansell *prima facie* established compliance with the regulations in this respect, besides which the department itself passed the assignment which would go to shew that the lease was in good standing. In any event, it seems to me that this objection might better be taken by the department than by the defendants.

Counsel for the defendant also contended that the lease itself had never been tendered to the defendants. Regarding this, I might say that after the senior defendant's letters to M. Mansell and S. M. Matthews in February 1921, submitting cancellation of the agreement and calling for return of the cash deposit, no tender of the lease or assignment was legally necessary, as the defendants had thereby repudiated their existence of the agreement. Counsel for the plaintiff sought to shew that in the autumn of 1920 the junior defendants had entered upon the land in question, and taken possession of it. The evidence, however, failed to satisfy me of this.

It was proved that the defendant Charles Drabble was born on January 21, 1901. He was therefore a minor on July 21, 1920, when the agreement in question was made. He cannot, consequently, be bound by it. I therefore dismiss the action

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against him with costs. As to the rest, I must conclude that the plaintiff is entitled to the relief which it asks for. I therefore direct that upon the plaintiff (1), filing with the Local Registrar at Prince Albert by July 1 next a copy of the *Saskatchewan* Gazette purported to be printed by the King's Printer, containing the publication of the notice of the restoration to the register of the plaintiff company; and (2) upon delivery by him to the said Local Registrar on or before the said date of the lease in question, or, in case of its loss or destruction, a certified copy thereof, and of the assignment of the said lease, it shall have judgment against the defendants George Drabble and Phillip Drabble for the sum of $2,000. The plaintiff will also be entitled to include in such judgment debt interest on the said sum at the legal rate, if not by agreement, at any rate by way of damages, from January 1, 1921, till the signing thereof, and to its costs of the action. The plaintiff shall be at liberty to issue execution for such judgment debt and costs. Upon the payment into Court by the said defendants or either of them of the amount due to the plaintiff under such judgment for debt and costs or upon proof of the satisfaction of such execution in case execution be issued the Local Registrar shall deliver to them or him the said lease or certified copy thereof, and the assignment thereof. In case the plaintiffs fail to file or deliver said documents, or any of them, by the first of July next, as aforesaid, this action shall stand dismissed against them, with costs.

Action dismissed.

Re HAMER; Ex parte ROYAL BANK OF CANADA.

Saskatchewan King's Bench in Bankruptcy, MacDonald, J. November 26, 1921.

BANKRUPTCY (§III—28)—*Chattel mortgage given to bank—Sale of bank's assets to other banks—Assignment for creditors by mortgagor—Renewal statement to acquiring bank—Chattel Mortgage Act R.S.S. 1909 ch. 144 as amended by R.S.S. 1920 ch. 200, sec. 22—Validity of mortgage—Bankruptcy Act sec. 6 (3); secs. 10, 25 and 35—Right of trustee to bring action—Right of creditor to compel trustee to take action—Bills of Sale and Chattel Mortgage Act R.S.O. 1914, ch. 135.*]—Action by a trustee in bankruptcy to set aside a chattel mortgage.

[See Annotations, 53 D.L.R. 135, 56 D.L.R. 104, 59 D.L.R. 1.]

E. S. Williams, for trustee.

F. L. Bastedo for Royal Bank of Canada.

MACDONALD, J.:—On February 1, 1921, one Adolphus T. Hamer made an authorised assignment under the Bankruptcy Act 1919 (Can.) ch. 36 to W. H. Briggs as authorised trustee.

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On May 7, 1918, said Hamer gave to the Northern Crown Bank a chattel mortgage covering certain property therein named to secure an indebtedness of $8,000. The said chattel mortgage was duly registered in the Kindersley registration district, being the proper district in that behalf, on May 22, 1918. Subsequent to the execution of the said chattel mortgage and prior to the registration of the first renewal thereof the Northern Crown Bank did, under an agreement in writing approved on March 8, 1918, by the Minister of Finance and Receiver General, sell the whole of his assets including the aforesaid chattel mortgage to the Royal Bank of Canada, and such agreement was approved by the Governor-in-Council on July 2, 1918.

There was registered in the Kindersley registration district on April 22, 1920, a form of renewal statement reading in part as follows:—

"Statement exhibiting the interest of Royal Bank of Canada of Plato, Sask., in the property mentioned in a chattel mortgage dated 7th day of May, 1918, made between the Royal Bank of Canada of Plato, Sask., of the one part, and Adolphus T. Hamer of Plato, Sask., of the other part, and filed in the office of the registration clerk of the Kindersley registration district on 22nd May, 1918."

On April 19, 1921, there was filed in the said registration district a further renewal statement which recites the chattel mortgage given to the Northern Crown Bank and a purchase by the Royal Bank of Canada of the assets of the Northern Crown Bank and this exhibits a statement of the amount due under the mortgage.

The Royal Bank of Canada claims to rank as a secured creditor of the insolvent in respect to the said mortgage and the trustee contends that the said mortgage is void against him for two reasons: First: that the renewal statement was not filed within 30 days before the expiration of 2 years from the date of the registration of the mortgage, and secondly; that what purports to be such renewal statement is not a renewal statement of the mortgage at all but purports to be a renewal statement of a mortgage from the insolvent to the Royal Bank of Canada.

In my opinion the first so called renewal statement which on the face of it purports to be a renewal statement of a chattel mortgage from the insolvent to the Royal Bank of Canada cannot by any rule of construction be regarded as a renewal of the chattel mortgage given by the insolvent to the Northern Crown Bank even though as a fact the Royal Bank

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of Canada had before such renewal acquired the assets of the Northern Crown Bank. Nor can the reference to the Royal Bank be regarded as within the principle *falsa demonstratio non nocet* for if the false description of the mortgage be rejected there would not be sufficient description left to identify at all the mortgage referred to. I am therefore clearly of opinion that there was not within the meaning of the Act a renewal statement filed and therefore under the provisions of the Chattel Mortgage Act then in force, ch. 144, R.S.S. 1909, as amended by ch. 55 of the Statutes of 1919-20, [now R.S.S. 1920, ch. 200, sec. 22] the same ceased to be valid "as against the creditors of the person making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof." This makes it unnecessary to deal with the first objection raised to the renewal.

It is contended however that while the mortgage ceased to be valid as against the creditors of the mortgagor and against subsequent purchasers and incumbrancers in good faith for valuable consideration the same is good as against the trustee herein, the argument being that the chattel mortgage was good as between the insolvent and the Royal Bank of Canada and it is therefore good as against the authorised assignee of the insolvent.

In this connection attention is called to sec. 2 of the Chattel Mortgage Act as enacted by sec. 1 of ch. 55 of 1919-1920, (Sask.) which repealed certain sections of the Chattel Mortgage Act, being ch. 144 R.S.S. 1909 now R.S.S. 1920, ch. 200, sec.2, and enacted among other clauses the following:—

"2. In the application of this Act the word 'creditors' where it occurs shall extend to creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors and to the assignee for the general benefit of creditors within the meaning of *The Assignments Act* as well as to the creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff."

It will be noticed that said section is not a definition of the word "creditors" but it is an extension thereof. Accordingly, in my opinion the word creditors retains in the Act its ordinary meaning and said meaning is also extended as in said sec. 2 provided. Creditors means ordinary creditors and the word is not limited to execution creditors. *G.T.P.R. Co.* v. *Dearborn* (1919), 47 D.L.R. 27, 58 Can. S.C.R. 315.

In the case of *Houlding* v. *Canadian Credit Men's Trust Ass'n Ltd.* (1921), 60 D.L.R. 533, 14 S.L.R. 356, Taylor, J. held that

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the authorised assignee or trustee in bankruptcy can maintain an action to set aside a transaction for want of compliance with the provisions of the Chattel Mortgage Act.

A study of the provisions of the Bankruptcy Act leads me to the conclusion that the authorised assignee or trustee represents the creditors as well as the insolvent or bankrupt and that according to the whole scheme of the Act it is the intention that creditors should not, except in special cases provided for, commence actions against the debtor or with respect to his property but that any actions that it may be necessary to bring should be brought on behalf of the creditors by the trustee. So far as a trustee under a receiving order is concerned sec. 6 of the Bankruptcy Act provides that on the making of a receiving order the trustee shall be thereby constituted receiver of the property of the debtor and thereafter, except as directed by the Act, no creditor to whom the debtor is indebted in respect to any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose. And sub-sec. 3 of said sec. 6 provides that "on a receiving order being made against the debtor the property of the debtor shall forthwith pass to and vest in the trustee." In the case of an authorised assignment by an insolvent debtor under sec. 10 said assignment vests in the trustee all the property of the debtor excepting such thereof as is held in trust and such as is against the assignor exempt from seizure or execution under legal process in accordance with the laws of the Province within which the property is situate and the debtor resides.

Sub-section 2 of sec. 13a provides that on the making of an authorised assignment every action, execution or other proceeding against the person or property of the debtor pending in any Court other than the Court having jurisdiction in bankruptcy for the recovery of a debt provable in authorised assignment shall subject to the rights of secured creditors to realise or otherwise deal with their securities stand stayed unless and until the Court shall otherwise order.

Section 35 of the Act provides: "that if at any time a creditor desires to cause any proceeding to be taken which in his opinion would be for the benefit of the bankrupt's or authorised assignor's estate and the trustee under the direction of the creditors or inspectors refuses or neglects to take such proceedings after being duly required to do so the creditor may

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as of right obtain from the court an order authorising him to take proceedings in the name of the trustee" etc.

Section 20 of the Bankruptcy Act provides among other things that the trustee may with the permission in writing of the inspectors bring, institute or defend any action or other legal proceeding relating to the property of the debtor.

Considering the whole scope of the Act I agree with the opinion expressed by the author in Cameron's Law of Bankruptcy in Canada in his annotation 53 D.L.R. 135 at p. 172, following sec. 35 of the Act as follows:—

"The Act gives exclusive right to the trustee to take proceedings but this section however enables the creditor to apply to the court to compel the trustee to bring action if he does not wish to do so upon the trustee being indemnified as to costs."

In *Re Levine* (1921), 61 D.L.R. 219, at p. 220, 50 O.L.R. 316, Orde, J., says as follows:—

"The claim by the mortgagee to hold the mortgage as security for any moneys or goods afterwards advanced cannot stand in view of the terms of the mortgage itself and of the failure to comply with the requirements of sec. 6, of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914 ch. 135."

That was the case in which the trustee under an authorised assignment moved to set aside a chattel mortgage, and the provisions of ch. 135 of R.S.O. 1914, as to the effect of non-compliance with the Act are the same as in our Chattel Mortgage Act, namely, they provide that where the Act is not complied with the chattel mortgage shall be void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for valuable consideration.

In *Re Andrews* (1877), 2 A.R. (Ont.) 24 it was held by Patterson, J.A., that an assignee under the Insolvent Act of 1875 represents the creditors for the purpose of avoiding a mortgage for want of compliance with the Chattel Mortgage Act. It is true that sec. 39 of the said Act expressly gives to such assignee the power to take both in the prosecution and defence of all suits all the proceedings that any creditors might have taken for the benefit of the creditors generally, but as I read the judgment of the Judge even if the Act had not contained said provision he would have arrived at the same opinion, for he says at pp. 29, 30:—

"Carrying this a step farther towards its legitimate consequences, it maintains that a transaction which a creditor could successfully impeach becomes impregnable, and excludes the

creditors as soon as insolvency intervenes. The law is not so defective as to permit this result. Treating of the Statute 13 Eliz. ch. 5, and of the rights of creditors to avoid conveyances under that statute, the following passage from May on Fraudulent Conveyances, at p. 149, states the English doctrine: 'The representatives of creditors are considered as creditors within the statute. An assignee therefore, or trustee of an insolvent or bankrupt, although in right of the debtor he only takes such interest as the debtor was beneficially entitled to, yet he represents the creditors also for all purposes; and, if any fraud against creditors exists in a transaction to which the insolvent or bankrupt was a party, the assignee or trustee may take advantage of it. A deed, which is void as against creditors, is void also as against those who represent creditors. It was, indeed, said by Abbott, C.J., in *Robinson* v. *M'Donnell* (1818), 2 B & Ald. 134 at pp. 136-7, 106 E.R. 316, "The bill of sale might be void under the statute of Elizabeth as against creditors, but not as against the parties who executed it, and their assignees are in this respect in no better situation." But it is submitted that the assignees are to be looked at in a double character; not only as representing the bankrupt (one of the parties to the deed), but also as standing in the place of, and entitled to exercise all the rights of creditors. *Qua* the representatives of the bankrupt they can have no power to set aside the deed, but *qua* the representatives of the creditors they have that power; for as Lord Loughborough said in *Anderson* v. *Maltby* (1793), 2 Ves. 244, 245, 30 E.R. 616, "Assignees have all the equity the creditors have, and may impeach transactions which the bankrupt himself would be stopped from impeaching," in fact assignees have frequently been allowed as creditors under the statute without question.' "

In *Re Barrett* (1880), 5 A.R. (Ont.) 206 it was held, Burton, J.A. dissenting, that the assignee of an insolvent mortgagor under the Insolvent Act of 1875 can for the benefit of creditors impeach a chattel mortgage for non-compliance with the Chattel Mortgage Act.

To the same effect is the decision in *Snarr* v. *Smith* (1880), 45 U.C. Q.B. 156.

I am therefore of opinion that the authorised trustee herein as representing the creditors of the debtor has a right to attack the chattel mortgage in question for non-compliance with the provisions of the Chattel Mortgage Act, and as I have already held that the chattel mortgage in question herein did not comply with the provisions of the Chattel Mortgage Act it follows that

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the said chattel mortgage is not a valid security on the goods of the debtor.

The Royal Bank of Canada must pay the costs of the trustee herein.

Judgment accordingly.

CAIN v. COPELAND

Saskatchewan King's Bench, Taylor, J. January 16, 1922.

BOUNDARIES (§IIA—8)—*Division line between quarter sections—Alleged old mound and stake—Mistake in planting—More recent surveys not shewing—Rights of parties—Dominion Lands Act, R.S.C. 1906, ch. 55, sec. 64—Saskatchewan Surveys Act, R.S.S. 1920, ch. 70, sec. 26—Construction.*] — Action to establish the proper division line between the plaintiff's and defendant's quarter sections, and for an injunction and for damages.

H. E. Sampson, K.C., for the plaintiff; *E. B. Jonah*, for defendant.

TAYLOR, J.:—The plaintiff and defendant are adjoining neighbors, the plaintiff owning, as it is admitted, the southwest quarter sect. 18, tp. 17, r. 16, west 2nd meridian, in the Province of Saskatchewan, and the defendant the southeast quarter. This is a boundary dispute.

In the summer of 1920 the defendant proceeded to and did erect a fence purporting to divide the east and west quarters in the southerly half-section. The plans of the surveys of the section shew the respective quarter-sections as equal in area, each containing 160 acres, although the measurements shewn on the plans may make the actual acreage in each case a fraction of an acre short of this. Notwithstanding this, the defendant's contention is that the fence should be built on a division line which would take from the plaintiff over 2 acres and add it to the defendant's portion, and his contention is that at the time of the survey of the township a mound and stake erected under the Dominion Lands Act R.S.C. 1906, ch. 55, then marked the exact division line between the southwest and the southeast quarters, and although the mound and stake may have been erroneously placed off the true line by a careless surveyor or workman, nevertheless the error, if any, then made must be perpetuated for all time, and that mound govern the division of the half-section into southwest and southeast quarters; and this notwithstanding the fact that the defendant has never at any time been supposed to have had more than 160 acres, and the mound and stake are not alleged to have been erected on this

section at all, but on the southern boundary of a road allowance south of the section in question, and which is the north boundary of another section (seven) in the same township.

Crown grants have long since issued and certificates of title been granted to the owners of the respective quarter-sections. Certified copies of three plans have, under leave given, been filed as exhibits. The legends would shew surveys in 1881 (two) 1883, 1905, 1911 and 1916. A certified copy of the survey made by J. L. Reid in the summer season of 1883 is filed, the original whereof is, according to the certificate, on file in the Department of the Interior at Ottawa. Another plan, marked "Second edition, corrected," and confirmed by the surveyor-general on January 26, 1910, is also filed; and lastly, a certified copy of the plan of the township of record in the land titles office, approved and confirmed under date of April 26, 1917, and, I take it, transmitted to the registrar pursuant to sec. 67 of the Dominion Lands Surveys Act, 1908, ch. 21, made applicable to this Province by sec. 26 of the Saskatchewan Surveys Act, now R.S.S. 1920 ch. 70, enacted at the session of 1912-13. The plan in the registry office purports to be compiled from the official surveys to which I have referred.

The earliest plan contains no data as to mounds. According to it the southeast and southwest quarter-sections of sect. 18 are equal in area, the southerly limit of each quarter being 39.97 chains. The plan of January 26, 1910 likewise shews each of the above quarters to contain 160 acres, the southerly limit of each quarter to be 39.97 chains, and shews mounds and iron posts at three corners, and a mound and wooden post at the other corner (in some cases across the road allowances) to mark the boundaries of sect. 18. There are also mounds on the east and west section lines to mark the boundaries of the north and south halves; there is a further mound shewn in the northerly limit of sect. 7, across the road allowance from sect. 18, and this mound is shewn to be equi-distant from the east and west boundaries of sect. 7, the northerly limit of each quarter in sect. 7, which would be the same as the southerly limit of each quarter in sect. 18, being given as 39.97 chains. It is to be noticed, in considering the evidence advanced on behalf of the defendant, that while the mound is shewn in this northerly limit of sect. 7 at the dividing line between the quarter-sections there is no legend of any stake.

On this last plan the side lines of the quarter- sections in questions in sect. 18 are each placed at 40.00 chains. There must have been a re-survey following this plan. On the plan in the

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registry office, whilst the westerly boundary of the southwest quarter of 18 is still fixed at 40.00 chains, the easterly boundary of the southeast quarter of 18 is changed from 40.00 chains to 40.02 chains, and the northerly boundaries of the quarter-sections in sect. 7, which would be the same as the southerly boundaries of the quarters in sect. 18, are altered from 39.97 chains to 39.98 chains. According to the legend on this plan the mound in the north boundary of sect. 7 to which I have referred, marking the division between the east and west halves of sect. 7, was established by one Reid in 1883. All of these plans or records of survey shew the southerly limits of the east and west halves of sect. 18 equal in length, and it follows that if a mound were established in the north boundary of sect. 7 other than at the point at the centre of the limit, as some of the witnesses have suggested, it was so placed in error. There is not now, I find, on the ground any evidence of any mound at this point or in its immediate vicinity. All evidence of the mound erected by Reid has disappeared. Biddell, a surveyor employed on behalf of the plaintiff, in the summer of 1920 ran the line between the east and west halves of sect. 18 and established a mound at a point which he says is equi-distant from the east and west boundaries, purporting to re-establish the mound in the north boundary of sect. 7. He does not find the northern limit of sect. 7 equal to the length shewn on the plans to which I have referred, making each quarter 39.953 chains in place of 39.97 chains and 39.98 chains. The line run by Biddell is approximately one chain east of the fence erected by the defendant, and it is plain that the line so run by Biddell is for all practical purposes on the division line between the east and west halves of sect. 18 as it is shewn on the plans, and this division gives to the plaintiff and the defendant that portion of the quarter-sections, each having approximately 160 acres, which each was intended to have.

In the face of these plans and such a clear indication of intention is it open to contend that a mound clearly erected at a wrong point governs the dividing line? Counsel based his contention upon sec. 64 of the Dominion Lands Act, R.S.C. 1906 ch. 55, which reads as follows:—

"64. Except as hereinafter provided, only a single row of posts or monuments, to indicate the corners of townships or sections, shall be placed on any survey line thereof; such posts or monuments shall, on north and south lines, be placed in the west limit of the road allowances, and on the east and west lines, in the south limit of the road allowances, and in all cases

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shall fix and govern the position of the boundary corner between the adjoining townships, sections, or quarter-sections, on the opposite side of the road allowance."

But, as pointed out by Taylor, C.J., in *Pockett* v. *Poole* (1897), 11 Man. L.R. 508, at pp. 516, 517, the Dominion Lands Act applies exclusively to the public lands in this Province (sec. 3) and, to quote the language of Taylor, C.J.:

"As to the sections for which patents had issued, they had ceased to be public lands and had become subject to the laws of Manitoba affecting property and civil rights. When the Crown issued the patents it parted with all estate and interest in the lands: *Kennedy* v. *Toronto*, 12 O.R. 211. If so, all questions of boundary, of the rights of adjoining owners and such matters would then be subject to the laws of the Province. Possibly even in the case of lands taken up as homesteads and pre-emption the rights and interests acquired by the occupants ceased to be the property of Canada, and became subject to the Provincial laws: *Ruddell* v. *Georgeson*, 9 Man. L. R. 54, 407."

The plan of re-survey approved and confirmed by the surveyor-general on April 26, 1917, now of record in the land titles office, although the survey was made and plans thereof drawn and forwarded under Dominion legislation, must be taken to have been made effective to all intents and purposes by Provincial legislation, for in the Saskatchewan Surveys Act, R.S.S. 1920, ch. 70, sec. 26, it is provided:—

"26. Sections 56, 58 and 60 to 67 inclusive of *The Dominion Lands Surveys Act*, being chapter 21 of the Statutes of Canada 1908, are in so far as it is within the competence of the Legislature of Saskatchewan so to enact declared to apply and to have applied to all lands within the province which were originally Dominion lands within the meaning of *The Dominion Lands Surveys Act*, and which have been or shall hereafter be transferred or otherwise disposed of by His Majesty in the right of the Dominion of Canada to any person whatsoever and to any rights which have been or shall hereafter be acquired, or which have been accrued or may accrue or which are accruing under such transfers or other dispositions of land in the same manner as if the said sections had been enacted at the date of the coming into force of the said *The Dominion Lands Surveys Act* by the Legislature of Saskatchewan."

Under the sections so made applicable in this Province the confirmed plan of 1917 is now *the official plan* shewing the direction and length of the boundaries. There is a saving of rights claimed or set up under the old plan prior to the date of con-

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firmation; the re-survey becomes and is declared to be *the original survey* of the lands, and upon the confirmation the boundaries established by the previous survey cease to have any force or effect. (sec. 60). Boundary lines as defined by monuments placed at the corners of authorised sub-divisions shall after confirmation of the survey or re-survey be the true boundaries, whether the same upon admeasurement are or are not found to contain the exact area or dimensions mentioned or expressed in any official plan or in any letters patent, grant or other instrument of or affecting—the parcel of land, (sec. 62). In reference to this section, it is to be noted that the only mounds which could be taken to be so confirmed are those shewn on the confirmed plan of 1917, and the mound to indicate the division between the east and west halves of sections 7 and 18 is at the exact centre of the section.

It is to be noted also that the surveyor Biddell in re-establishing the lost monument proceeded in accordance with the directions contained in sec. 66 of the Dominion Lands Surveys Act, Can. Stats. 1908, ch. 21, having first endeavoured to ascertain the point at which it had been previously erected, by enquiry; that by the Saskatchewan Surveys Act he is authorised for the purpose of ascertaining the limits of any legal subdivision to take evidence on oath and compel the attendance of witnesses; that when he interviewed the defendant's witness Covey, on whose testimony the defendant now so much relies, Covey stated something to the effect that he would not be prepared to swear to the location of the original mound, and it was only after such enquiries that Biddell proceeded to re-establish the mound in accordance with the directions contained in the Act.

In a case tried before Wetmore, C.J., in 1910, *Rohrke* v. *Marshall* (1910), 3 S.L.R. 82, he had to determine, as I have, the boundary line between two quarter-sections previously patented. At page 84 he states:—

"I must now determine where the line between the two quarter-sections is situate. In doing so I must be governed, as I will endeavour to point out, by the provisions of the Dominion Lands Act, 1879, the Act in force at the time Fafard's survey was made. . . . . The parties are entitled to have their rights adjusted as established by that survey and as interpreted by the Act of 1879. That is what the respective parties obtained from the Government by their patents."

That was probably correct in 1910, but since the enactment of the Saskatchewan Surveys Act, ch. 23, 1912-13, the provisions of the Dominion Lands Surveys Act to which I have referred,

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assented to on March 17, 1908, must be taken to have applied to all lands within the Province which were originally Dominion lands since the date on which the Dominion Lands Surveys Act received the assent of the Crown, and certificates of title under the Land Titles Act having issued for each of these quarter-sections the real question now to determine is, what land is included in the description contained in these certificates of title, and what, in interpreting the descriptions in these certificates, shall be taken to be the boundary of the quarter-sections and the location of the line dividing the respective quarters.

I take it that the canons of construction established in the common law for the interpretation of deeds and similar documents can, except where modified by statute expressly or impliedly, be taken as applicable to the construction of a certificate of title, and I find this rule laid down by Strong, J., in the Supreme Court of Canada, in *Grassett* v. *Carter* (1884), 10 Can. S.C.R. 105, at pp. 114, 115:—

"When lands are described, as in the present instance, by a 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. In construing the description contained in the deed, in cases where land is conveyed by a private owner, and where no statutory regulations apply, but the deed has to be interpreted according to common law rules of construction, extrinsic evidence of monuments and actual boundary marks found upon the ground, but not referred to in the deed, is inadmissible to control the deed, but, if reference is made by the deed to such monuments and boundaries, they govern, although they may call for courses, distances or computed contents which do not agree with those stated in the deed."

I have already pointed out that the plan of survey confirmed by the surveyor-general in 1917 was transmitted to and made a record in the land titles office. The last certificate of title issued to the plaintiff's quarter-section is dated February 16, 1909, and does not refer to the plan or survey, but the certificate of title issued to the defendant was issued on April 7, 1919,

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and is to the southeast quarter of sect. 18 (and other lands) according to the Dominion Government survey thereof.

In my opinion the Dominion Government survey therein referred to must be taken to be the official plan declared (saving vested rights) to be the original survey of the lands; and that plan of survey, so then of record as required by law in the office issuing this certificate of title, should be considered as incorporated in the title, and the contents and boundaries of the lands affected 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. And going farther also in the language of Strong, J., extrinsic evidence of monuments and actual boundary marks upon the ground, but not referred to in the certificate of title, are inadmissible to control the description in the certificate of title, and it is not open to the defendant to control the said description by evidence that there was at one time a mound placed to designate a boundary not shewn in the plan.

I have gone into this question to a length greater than is rendered necessary by the evidence adduced at the trial. For in my opinion the evidence adduced by the defendant was not sufficient to establish that the alleged lost mound had been erected at any particular point. The evidence of the main witness, Covey, as I have already observed, is subject to great doubt, it seems to me, because of the stand which he took when Mr. Biddell interviewed him. Then when there is not now upon the ground any mark to indicate the position of the lost mound, it is so difficult to locate from memory the exact point at which it had been established that any evidence endeavouring to do so must necessarily be considered of doubtful value. It would require much more than has been adduced to shew that the mound was erected in a place other than that shewn on the plan. This has not been the first attempt made in this Province to so establish a lost monument. I have referred to *Rohrke* v. *Marshall*, *supra*, and I might refer also to an unreported case, *Wakefield* v. *Lederle*, tried before the Chief Justice of the King's Bench, at Moose Jaw, in 1919. In both of these cases the trial Judges had to consider, as I have had, a mass of evidence adduced on each side to determine the location of lost monuments. I, therefore, considered the questions of law as fully as I have in an endeavour to indicate to some extent the nature of the undertaking which one farmer seeking to add to his own acreage at the expense of his neighbour must contemplate. Ordinarily, arbitration under the Lines Fence Act, R.S.S. 1920 ch. 166, will be

found a much cheaper and better method of determining boundary disputes between adjoining owners.

Judgment should go declaring that the division line between the respective quarter-sections of the plaintiff and the defendant referred to in the statement of claim is as shewn upon the land of tp. 17, r. 16, west 2nd meridian, in the Province of Saskatchewan, of record in the land titles office for the Assiniboia Land Registration District, and that the mound erected by Biddell on or about August 20, 1920, purporting to mark said division line, correctly marks the same, and that the fence erected by the defendant is not upon the said division line, encroaches upon the lands of the plaintiff, and any fence to be erected as a boundary fence should be erected on the line as now fixed in this declaration. There will be an injunction as prayed in the plaintiff's statement of claim, and, in the event of the fence erected by the defendant, not being removed by the defendant on or before April 1, 1922, a reference to the Local Registrar to ascertain what damages the plaintiff has sustained by reason of the erection of the fence as now erected. It necessarily follows that the plaintiff has the right to remove it, and if it is not removed by the defendant the cost of removal by the plaintiff will be assessed as damages against the defendant.

I do not think the plaintiff is entitled to costs of survey claimed by him, but is entitled to the costs of the action, to be taxed on the King's Bench low scale.

Judgment accordingly.

Re DUMFERMLINE TRADING Co.; Ex parte RELIABLE TRADING Co.

Saskatchewan King's Bench in Bankruptcy, MacDonald, J. February 17, 1922.

BANKRUPTCY (§I—6)—*Examination of debtor under sec. 56 of Bankruptcy Act—Use of evidence by trustee against person claiming to be a creditor.*]—Appeal from the decision of a trustee disallowing a claim against the estate of the assignor. Reversed.

[See Annotations, 53 D.L.R. 135, 59 D.L.R. 1.]

J. S. Rankin, for Reliable Trading Co.

H. Ward, for trustee.

MACDONALD, J.:—A preliminary question I am called upon to decide is whether the trustee can on this appeal use against a person claiming to be a creditor, the examination of the debtor, held under sec. 56 of the Bankruptcy Act, 1919 (Can.) ch. 36.

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In *Re Christie Grant Ltd.*, [1921] 3 W.W.R. 264, it was ordered that such examination might be used.

In *Re Brunner* (1887), 19 Q.B.D. 572, 56 L.J. (Q.B.) 606, 35 W.R. 719, it was held that the answers of a debtor at his public examination cannot be used in subsequent motions in the same bankruptcy against parties other than the debtor himself.

In *Re Bottomley* (1915), 84 L.J. (K.B.) 1020, such answers are held not to be evidence against the trustee.

The provisions of the English Bankruptcy Act with respect to the examination of a debtor are however different from those of sec. 56 in our Act. Sub-section 8 of sec. 15 of the English Act 1883, ch. 52, provides, among other things, that the debtor's answers "may . . . . save as in the Act provided, be used in evidence against him."

To my mind this contains an implication that such answers may not otherwise be used. No such provision is to be found in our Act. Section 56 of our Act corresponds, not to sec. 15 but to sec. 25 of the English Act and see *Re Carill-Worsley*, [1915] 2 K.B. 534, 84 L.J. (K.B.) 1414, under General Rule 4 all matters and applications shall be heard and determined in Chambers unless the Court or a Judge shall in the particular matter or application otherwise direct. On an application in Chambers the affidavit of the debtor might be used and I cannot see any reason why this examination should not be held of equal probative value. I therefore hold the examination may be used against the claiming creditor.

The Reliable Trading Co.'s claim is based on three promissory notes. The Dumfermline Trading Co. was a partnership consisting of two members—F. G. Miller and I. Selchen. The Dumfermline Trading Co. bought out the Reliable Trading Co., and the notes in question represent part of the purchase-price. Two of these were signed only by Miller. The third is signed in the name of the partnership by both partners. As to the former no claim against Selchen could be based on them, but I will allow the creditor to amend his claim so far as these two notes are concerned so as to base it on the purchase-price of the business sold.

I do not think it is necessary for me to discuss the somewhat voluminous evidence before me. I need only say that with the amendment allowed the claiming creditor will have shewn a valid claim against the debtor for I am satisfied that while the store and business which were the subject matter of the sale were not taken over till the beginning of January, 1920, the partnership between Miller and Selchen existed at the date of

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the notes, a fact which was the real question in dispute before me.

The appeal will therefore be allowed with costs and the creditor's claim ordered to rank. The trustee will have its costs out of the estate.

Appeal allowed.

CANADA DRUGS Ltd. v. ATTORNEY-GENERAL FOR SASKATCHEWAN.*

Saskatchewan King's Bench, Taylor, J. June 12, 1922.

CONSTITUTIONAL LAW (§I—3)—*Saskatchewan Temperance Act and amendments 1920 ch. 70 and 1921-22 ch. 76—Construction—Validity.*]—Action to have it declared that certain legislation regarding the export of liquor is *ultra vires* and that the plaintiff company is not subject thereto.

A. J. Andrews, K.C., and *D. A. McNiven*, for plaintiffs.

T. D. Brown, K.C., for defendant.

TAYLOR, J.:—The plaintiffs in this action are a company duly incorporated by letters patent of the Government of Canada, under the Companies Act, ch. 79, R.S.C. 1906, and empowered to engage in and carry on in Canada and elsewhere among other things the business of importing and exporting liquor as defined in ch. 194 sec. 2, sub-sec. 5 of the Saskatchewan Temperance Act R.S.S. 1920.

This action is brought to have it declared that certain legislation passed by the Legislature of this Province is *ultra vires* and that the plaintiff company is not subject thereto. It was intimated by counsel that it was the desire of counsel to have the question at issue between them disposed of as expeditiously as possible, the avowed intention being, as it should be in such matters as this, to take the opinion of the highest Court.

The parties agreed upon and submitted certain questions and for the purpose of the action admitted certain facts in the pleadings, and further agreed in the submission to admit such as were necessary to support the questions. In so far as these are questions relating to the power of the Province to enact the legislation in question it seems to me proper that the Court should make declarations in accordance with the request of the parties; but in so far as they purport to deal with the interpretation of a particular section in my opinion they should not be answered. Penalties are made for the breach of these several provisions, and the Court should not, in the view I take, compose a dissertation on what may or may not be penalised in a particular

*Reversed by Court of Appeal. Will be reported in 67 D.L.R.

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section of the Act for the benefit of those who desire to travel as closely to the fringe of the penalty as they can do in safety. And on the other questions, were I not assured that it is the intention of the parties to take the opinion of a Court having more weight than mine, and did it not appear that probably the whole question may, by reason of certain bills already introduced in the Dominion Parliament, become academic, I would have preferred to have stated my reasons for the conclusion at which I have arrived more extensively, and to have referred to the many authorities which supported that conclusion, even if the doing so would necessarily delay the parties in obtaining the opinion of the appellate Courts.

All of the questions relate to those provisions of the Saskatchewan Temperance Act and the amendments thereof in ch. 70 of the statutes for 1920, and ch. 76 of the statutes for 1921-22, relating to the business of exporting liquor from the Province. The importation of intoxicating liquor into, and the sale of liquor in, the Province, as a beverage has, by the combined effect of the Saskatchewan Temperance Act and the Canada Temperance Act, been prohibited in this Province. The legislation interfered with the consumption in a dwelling house by prohibiting further importation, and other legislation of the Dominion of Canada prescribes stringent conditions upon the manufacture. The United States of America have also passed legislation prohibiting the manufacture and the use of liquor in the United States except for limited purposes, and prohibiting the importation thereof into that country.

Both in the United States and in this Province great numbers of persons, notwithstanding the legislation, are prepared in defiance thereof to purchase intoxicating liquors. This demand in the Province makes the enforcement of the penal provisions of the Saskatchewan Temperance Act forbidding sale for use within the Province, and the administration of the Act, one of great difficulty. The great demand in the United States has opened up in this Province a new field for a very profitable business commonly termed "rum running" and "whisky running," which the plaintiffs attempt to dignify under the name of "exporters of intoxicating liquors."

The stretch of invisible boundary line between the United States and this Province and the system of open highways leading from the Province into the States to the south afford the exporter an easy opportunity to evade the police officers of the States to the south. The land along the border is mostly open prairie land settled on each side of the boundary by farmers and

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ranchers who "neighbour" with each other as might be expected under such circumstances; and in some places the Canadians along the boundary line avail themselves without any objection or interference of the privileges afforded by the small marketing places across the line in the States, and in the same way no practical restriction is put upon the housewife in the States who disposes of her small farm produce in the Canadian market town near the border; nor has any restriction ever been placed on the tourist traffic between the States bordering our boundary and this Province, nor the use by the people of those States of the summer resorts on the lakes near the border. The friendly intercourse is not only pleasurable but profitable. These are local conditions within the Province. In other Provinces in Canada there may be conditions somewhat similar, but a glance at the map would shew that the boundary line is in other Provinces largely some natural barrier, and not as in the prairie Provinces, purely artificial.

Granting the legality of the export of intoxicating liquor from this Province into the United States, there is thus created a purely local condition. Men who are prepared to obey the laws of the country in which they live and have respect for the laws of the neighbouring States do not care to be compelled to associate in their daily business with the class who have been attracted to this Province by the opportunity to export liquor into the United States across our southern boundary. The laws of this Province provide for a system of highways in the Province, require the municipalities to keep the highways in repair, and impose upon them responsibility for damages occasioned by non-repair. It is to be expected that men who engage in the business of breaking the law of a country with which we are on friendly terms are of the type that are restrained from breaking our own laws by reason of their penal provisions and police activity, rather than by any feeling of moral obligation.

The legislation which is attacked in this action prohibits the location of export warehouses in cities of less than 10,000 population, and at the present time therefore effectively confines the business to three cities in the Province, all located at least 100 miles north of the boundary. It takes from the exporter the use of facilities for which the Province is responsible and over which it has control. Railways and navigation are exclusively within the jurisdiction of the Dominion Parliament, and the legislation does not purport to affect the use of those transportation facilities which are exclusively within that jurisdiction. The legislation further prescribes somewhat stringent conditions and regu-

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lations for the export liquor business itself. Such a business is required to keep certain records of its transactions and to make returns to officials appointed by this Province of the names and addresses of persons with whom it does business. Penalties are provided, not perhaps in some instances what a lawyer would call a logical penalty, but the penalty and the severity thereof is a matter I take it now well settled to be within the scope of the Legislature itself. As to the penalty provided for failure to comply with the provisions in sec. 12 of the main Act, that the exporter shall enter in reference to each sale of liquor in a book to be kept for the purpose certain particulars regarding the sale, and the exporter's failure to do so shall in any prosecution under the Act be *prima facie* evidence that he illegally sold liquor, I hesitate to express an opinion that if by virtue of the Dominion legislation or the lack thereof it is legal to conduct the business, the imposition of such a penalty is within the competence of the Province. This it seems to me, however, is one of those matters on which the Court should in this proceeding refrain from expressing any opinion.

On the general question as to the power of the Province to prescribe the conditions and regulations, which they have prescribed under which this particular class of business is to be carried on, limiting it to certain areas within the Province, and taking from it the right to use certain facilities for traffic otherwise afforded to and provided by the Province and its municipalities for travellers and wayfarers generally, in my opinion these are *intra vires* of the Province. They are not provisions regulating corporations only, but regulating and to some extent limiting every person establishing or carrying on this particular business in the Province. In their main aspect they are designed as traffic and police regulations to prevent this particular business from becoming an intolerable nuisance to other businesses, and to allow other persons in this Province engaged in more peaceful and commendable pursuits the better to follow them. The legislation is directed to a "local evil" touching "civil rights and property in the Province."

I just desire to add further to this judgment, that whilst it was assumed on argument by counsel for whose opinions I have much respect that it had been authoritatively determined that notwithstanding the law now existing in the United States of America, which as I understand it has practically put the manufacture, importation and consumption of liquor in the category of crimes, that a contract to sell liquor for export into that country is a valid contract, that I am unable to find any case or

expression of opinion which holds that a bargain made in this Province to assist in breaking such a law in the United States when such a transaction is not only penalised there but transactions of a like class are forbidden here, is regarded as a valid bargain and such business as legal. Such expressions of opinion as that of Chitty, J., in delivering the judgment of the Court of Appeal in *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321, 58 L.J. (Ch.) 721, 37 W.R. 696, lend no support to the contention. The point was not, however, argued before me.

The prayer of the plaintiffs for a declaration that the legislation in question is *ultra vires* is dismissed.

Judgment accordingly.

Re LAND TITLES ACT AND CAVEAT REGISTERED BY RUR. MUN. OF McCRANEY.

Saskatchewan King's Bench, Bigelow, J. January 16, 1922.

LAND TITLES (§IV—40)—*Hospital bill against wife—Caveat registered against lands of husband—Rural Municipality Act R.S.S. 1920 ch. 89 sec. 20—Construction.*]—Application to continue a caveat. Dismissed.

F. A. Sheppard, for the R.M. of McCraney.

A. S. Sibbald, for the Western Canada Sawmill Yards, Ltd., the owners.

BIGELOW, J.:—This is an application to continue a caveat registered against certain lands owned at the time by one George Fitzsimmons. The caveat was registered for money paid to a hospital under the Rural Municipality Act, ch. 89, R.S.S. 1920, for Josephine Fitzsimmons, the wife of the said George Fitzsimmons. Although the caveat does not mention the amount of the claim, the affidavit filed for the applicant shews payments to a much larger amount than could be properly claimed. Section 199 of the Act limits the claim to $2.50 a day and for 68 days this would be $170 which is the maximum claim which the applicant could have.

Where there is a question of law raised or the facts are in dispute I would generally order the caveat to be continued and an action brought, but Mr. Sheppard for the applicant states that all the facts are before the Court and it was agreed by both counsel that the point in question should be determined by me summarily to save the further costs of an action.

Section 20 of the Rural Municipality Act provides that the municipality shall have a charge upon the lands of the patient

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and such charge shall have precedence over all other incumbrances except taxes and first mortgages.

The only question here is whether when the wife is the patient the municipality has a charge on the lands of the husband. No doubt medical attendance for the wife is necessary for which the husband would be liable, but that is not the question. The question is whether the municipality has a charge on the husband's lands when the wife is the patient. I think such an Act must be strictly construed, and if the Legislature intended the construction contended it should say so in clear and unambiguous language. The Legislature has limited the charge to the lands of the patient and I do not think I can extend that language to include the lands of the husband of the patient.

The application to continue the caveat is dismissed with costs, such costs to include reasonable negotiations by the owner to have this caveat removed before these proceedings were taken.

Application dismissed.

CITY OF REGINA v. ROBINSON'S CLOTHES Ltd.

Saskatchewan King's Bench, MacDonald, J. May 31, 1922.

DISCOVERY AND INSPECTION (§IV—31)—*Examination of officer of company under Sask. Rule 266 (3)—Designation of officer who has most personal knowledge of facts and circumstances.*]—Appeal from an order of the Master in Chambers designating the local manager of the defendant company to be examined under Sask. Rule 266 (3). Appeal allowed.

C. M. Johnston, for appellant.

G. F. Stewart, for respondent.

MACDONALD, J.:—This is an appeal from an order of the Master in Chambers designating F. L. Brennan, the local manager at Regina of the defendant company, as the officer of the defendant company to be examined under R. 266 (3) for the purpose of using such examination as evidence against the corporation.

In this action the City of Regina sues the defendant to recover a balance alleged to be due to the city for electric energy supplied by the city to the defendant, and, in short, the action is founded on the allegation that the servant of the municipal corporation, whose duty it was to read the meter shewing the electric energy consumed, made mistakes in such reading with the result that the defendant company was called upon to pay and did pay the sum of $990.90 less than they should have paid. The

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mistakes are said to have occurred from September 12, 1919, to October 8, 1921. The statement of defence denies practically all the allegations in the statement of claim, alleges payment for all the electric energy supplied and further alleges that the defendant, acting on the belief that the statement of account sent to it by the city during the period in question was correct, relied on the same in fixing the price to be charged to the public for its goods and the salaries and bonus to its employees, and, that if the defendant is now compelled to pay the amount claimed the defendant will be prejudiced and that the city is therefore estopped from alleging that the charges were incorrect.

The evidence before me shews that Brennan, designated by the Master as the person to be examined as aforesaid has been manager at Regina for only 2 months and has no personal knowledge whatever of the matters in issue in this action, and he states that information as to the method adopted by the officers of the defendant company in fixing the prices for their goods and as to the extent the said officers take into consideration the overhead expenses of the Regina branch in estimating such prices is in his belief within the knowledge of M. C. Robinson, of Montreal, the president of the company.

Counsel for the city argues on the authority of *Giddings* v. *C.N.R.* (1919), 12 S.L.R. 381, and other cases that an officer of a company is bound to acquaint himself with the facts which are within the knowledge of other officers, servants or agents of the company who personally had knowledge of the facts or circumstances in question, which knowledge they acquired in that capacity. But this principle does not carry one very far towards a determination of who should be designated, for which ever officer is designated the duty of so informing himself will devolve upon him.

It seems to me however that *prima facie* that officer should be designated who has the most of personal knowledge of the facts and circumstances relevant to the issue in question in the action, and it seems to me much more just and convenient in the present case that the president of the company should be designated as the person to be examined rather than the local manager who has no personal knowledge whatever of the matters in question, and who could only get his information from the higher officers and from the records of the company. I am therefore clearly of opinion that the order of the Master should be set aside and that instead of Brennan, said Robinson should be designated as the person to be examined. As Robinson is resident in Montreal it is necessary for me to name the person

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before whom and the place at which the examination shall take place. For this purpose the counsel may speak to me when settling the order.

The appellant will have its costs of this appeal.

Appeal allowed.

JONES AND COLQUHOUN v. FINCH.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 15, 1922.

BILLS AND NOTES (§IIID—79)—*Holder for value in due course—Note assigned to plaintiff without value—Loss of note—Subsequent finding and endorsement of note to plaintiff—Set off and counterclaim for amount of commission on sale of real estate—Finding of trial—Judgment for "claim and costs, and counterclaim dismissed with costs"—Appeal—Rights of parties.*]—Appeal by the defendant from the dismissal of a counterclaim with costs.

T. D. Brown, K.C., for appellant.

H. E. Sampson, K.C., for respondents.

The judgment of the Court was delivered by

MCKAY, J.A.:—The plaintiff Jones brought this action, as a holder for value in due course, against defendant as maker of a promissory note, dated December 13, 1918, for $662.95 in favour of plaintiff Colquhoun, which note plaintiff Colquhoun purported to assign to plaintiff Jones, without value, by an assignment in writing, while the said note was lost, in order to deprive defendant of his claim of set off or counterclaim. After the assignment, the plaintiff started this action on December 23, 1920, while the note was still lost. Shortly before the first trial, which took place on the 28th and 29th March, 1921, the note was found and indorsed to plaintiff Jones.

The first defence denied that defendant made said note and that plaintiff Jones was such holder, and in the alternative set off against the said note a sum of $304.40 and another sum of $16.27, which defendant alleged plaintiff Colquhoun received on his behalf, and paid into Court the sum of $418.00 with his defence.

In March, 1921, after hearing evidence, the trial Judge added plaintiff Colquhoun as a plaintiff, and allowed defendant to amend his pleadings, and adjourned the trial.

The pleadings were amended, and defendant pleaded a counterclaim, claiming the above two sums of $304.40 and $16.27, and setting them off against said note as before.

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The plaintiff Colquhoun replied that he was entitled to said two sums and took them in payment of a commission of $320 due to him by defendant on the sale of two quarter sections belonging to the defendant, one to Thomas C. Watson, and the other to D. Byzick.

The trial was resumed in June, 1921, and the trial Judge holding that plaintiff Jones was not the holder of the note sued on, allowed to defendant against both plaintiffs all costs occasioned by plaintiff Jones having been named a party, and also his costs of the day of the hearing in March, 1921. Save as above Colquhoun will have judgment for "the claim and costs, and the counterclaim will be dismissed with costs."

The defendant appeals from the latter portion of the judgment appearing in quotation marks. There is no cross appeal.

Among other things the defendant's counsel contends that, even if Colquhoun's evidence is to be believed, he is only entitled to a share of the profits on the sale of the two quarter sections to Thomas C. Watson and Byzick, the $304.40 being part of the first deferred instalment due by T. C. Watson and Byzick, and the $16.27 being no part of the said transaction he is not entitled to these sums.

I agree with this. When Colquhoun was asked about his claim to commission, the strongest evidence in his favour is as follows:—

"Q. Now did Mr. Finch agree to pay you a commission? A. I won't go so far as to say that he said 'I will pay you a commission.' I will go this far, that before he signed the document, as an inducement for him to sign, when he was holding back, I pointed out that there was two dollars for him and one for me in the transaction. We were selling at an advance of three dollars per acre. Before I ('I' evidently intended for 'he') signed the papers, as an inducement for him to sign."

The defendant denies that plaintiff Colquhoun ever told him there would be $2 per acre for him and $1 per acre for Colquhoun on the resale, and both he and his brother say that Colquhoun said he would not charge any commission on the sale to T. C. Watson and D. Byzick.

When the trial Judge allowed the commission, I take it that he believed Colquhoun as to above evidence, and disbelieved the two Finches that there would be no commission on the sale of the two quarters. This finding that Colquhoun is to be believed in preference to the two Finches should not be disturbed. But I think this Court is at liberty to give its own interpretation to the evidence of Colquhoun. And I construe this evidence to

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mean that Colquhoun was to share in the profits with the defendant. When he told defendant that the two quarters would be resold at an advance of $3 per acre and that there would be $2 per acre in it for defendant and $1 per acre for him, the defendant signed the purchase and sale agreement with John E. Watson. And this act was an acceptance of the terms on which Colquhoun offered to resell. Colquhoun resold at an advance of $3 per acre, and is entitled to his $1 per acre after John E. Watson is paid off. There appears to be 162 acres in each quarter, but Colquhoun claims only $320, Colquhoun, therefore, was not entitled to apply the $304.40, or the $16.27 on his share of the profits in the way and at the time he did, as John E. Watson was not then paid off. The defendant was entitled to these sums when they were paid to Colquhoun; he had the first right of appropriation. Colquhoun should have notified defendant that he had these two sums of money, but he did not do so. In my opinion, defendant is right in asking to have these two sums applied on his note, as he does in his defence by way of set-off, and these sums with the $418 paid into Court are sufficient to pay the note sued on. The evidence shows that defendant was paid in full some time during the winter of 1920-21, but it does not show whether it was before or after this action was started. The defendant is , therefore, entitled to all costs on the claim and defence.

With regard to the counterclaim, the defendant contended that Colquhoun was not entitled to anything on the sale to T. C. Watson and Byzick. Colquhoun's defence to this was that he was, on the lines above indicated, and, as above stated, in my opinion, he was entitled to commission by way of sharing in the profits, hence the counterclaim should be dismissed, with costs to plaintiff Colquhoun.

The plaintiff Colquhoun does not ask for judgment in the alternative for the $1 per acre, nor does he claim the $418 paid into Court, but as the judgment of the trial Judge holding that plaintiff Jones was not the holder of the note is not appealed from, under the circumstances of this case, I think the pleadings should be treated as amended, as though Colquhoun claimed the $418 and the $320, and judgment given in his favour to avoid the necessity of another action with its attendant costs.

The result is that there will be judgment for plaintiff Colquhoun for the $418 and $320, together amounting to $738 with costs of the counterclaim. The defendant will be entitled to all costs on the claim and defence, with the right of set-off.

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As the defendant fails in his contention that there was to be no charge on the sale of the two quarters, in the taxation of his costs, he will not be allowed witness fees for any witnesses he may have called to prove such contention.

The defendant will be entitled to the costs of the appeal.

Judgment accordingly.

BROOK & ALLISON v. HENDRICKS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. May 29, 1922.

BROKERS (§IIB—10)—*Sale of land—Agents' right to compensation*]—Appeal by defendant from the trial judgment in an action for commission on the sale of land. Affirmed.

[See Annotation 4 D.L.R. 531.]

F. L. Bastedo, for appellant,
G. W. Thorn, for respondents.

The judgment of the Court was delivered by

TURGEON, J.A.:—In this case the District Court Judge has given the respondents judgment in the sum of $200, with costs, for commission earned by them upon the sale of the appellant's house to one Thomson. This house was listed for sale by the appellant with the respondents, who are real estate agents, and also with McAra Bros. & Wallace, another real estate firm. It was sold to Thomson under circumstances which the respondents claim entitle them to a commission.

The facts are reviewed at length by the trial Judge in his judgment, and I do not think any serious objection can be taken to his narration of the various important incidents pertaining to the transaction, or to his findings in matters where the evidence conflicts. There seems to be no doubt that the respondents found Thomson as a purchaser of the house. The price originally fixed by the appellant and made known to Thomson by the respondents was $7,500. A. T. Brook, a member of the respondents' firm, took Thomson to visit the house on Friday, November 4, 1921, and endeavoured to get him to meet the appellant; but failing in this, on account of the appellant being absent from his office when Thomson called, he telephoned the appellant and informed him of having secured Thomson as a prospective purchaser, naming Thomson to him, as the trial Judge found, and as, in my opinion, he was justified in finding. From that time on Thomson endeavoured to buy the house, but at a reduced figure; his offer being $6,800 for the house and an electric heater

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and stove then in the house, and which, according to the evidence, were worth about $245. At his request, the respondents endeavoured to secure a reduced price for him from the appellant, but the best they could get was an offer to sell at $7,200, including the heater and stove. Brook communicated this offer to Thomson by telephone on Monday. Thomson said he would not accept. He persisted, however, in his endeavours to secure the house on his own terms, and went to McCrae of the firm of McAra & Wallace, whom he had seen on Saturday for the first time when he went to him to inquire about a price for the appellant's house. From that time on he negotiated with the appellant through McCrae, and finally purchased the house on Thursday, paying $6,800 for the house alone, without the electric heater and stove.

In these circumstances, I think the trial Judge was right in holding that the respondents were entitled to their commission. This case is distinguishable from *Dicker* v. *Willoughby-Sumner Co.* (1911), 4 S.L.R. 251, where the vendor dealt directly with the purchaser and sold him the property, without having been introduced to him in any manner by the agent and after having refused offers made to him by the agent for a sale of the land to the purchaser, whose name and identity the agent did not disclose, on terms different from those on which the property had been listed for sale. It is also distinguishable from *Herbert* v. *Bell* (1912), 8 D.L.R. 763, 6 S.L.R. 10, where the agent brought the property to the attention of the purchaser, who examined it and decided not to buy, but was induced later on by another agent to buy the same property; there being an interval between the services rendered by the first agent and those rendered by the second agent, during which the matter was closed, and the eventual purchaser did not occupy the position of a prospective purchaser at all, any more than any other member of the public. Both the *Dicker* case and the *Herbert* case were cited on the argument on behalf of the appellant, as well as a number of other cases, none of which I think are authority for holding that the disposition made of this case by the District Court Judge was wrong. In my opinion, the relationship of vendor and purchaser was established between the appellant and Thomson by the respondents, and their services were the effective cause of the sale. They are, therefore, entitled to their commission, and the appeal should be dismissed with costs.

Appeal dismissed.

FROST BROS. v. ARENA RINK CO.

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Saskatchewan King's Bench, Maclean, J. April 29, 1922.

COSTS (§II—29)—*Taxation of claimant—Mechanics' lien action—Appeal—Jurisdiction of District Court Judge—Mechanics' Lien Act R.S.S. 1920 ch. 206—District Court Rule No. 3—King's Bench Rule 698.*]—Appeal from the District Court Judge reviewing a bill of costs in a mechanics' lien action.

Schull, for the Security Lumber Co., claimant lienholder.

MacTaggart, for defendant.

MACLEAN, J.:—This is an appeal from a District Court Judge reviewing the taxation of the bill of costs of the Security Lumber Co., a claimant lienholder in a mechanics' lien action. The appeal first came before Taylor, J., in Chambers and at that time objection was taken that the appeal did not lie to a King's Bench Judge. The Judge held that a review of taxation by a District Court Judge in a mechanics' lien action was an interlocutory, and not a final order, within the meaning of sec. 56 of the District Court Act, R.S.S. 1920, ch. 40, and that, therefore, the appeal was properly taken. With great deference to his opinion, I am inclined to think that this review of taxation by the District Court Judge in a District Court action is a final order, and that an appeal therefrom does not lie to a King's Bench Judge. However, the order made by Taylor, J. stands and the matter of reviewing the taxation came before me in Chambers.

The first two items objected to by the appellant are the first two on the bill of costs, namely: "Instructions to attend on return motion and notice of trial," and "perusing notice of motion." It appears to be the practice in some judicial districts that the plaintiff in a mechanics' lien action serves on other lienholders and on other parties who appear on the abstract of title a notice of motion, along with the notice of trial which by sec. 32 of the Mechanics' Lien Act R.S.S. 1920, ch. 206, the plaintiff must serve on other lienholders. In my opinion, this notice of motion is an unnecessary proceeding. The notice of trial is sufficient notice to other lienholders. Should there be other persons interested in the land in question and whose names appear on the abstract when the action is commenced, it is the duty of the plaintiff to make those persons parties to the action, if their interests are such as may be affected by the result of the action. If the names of persons appear on the abstract of title subsequent to the commencement of the action, it is the duty of the plaintiff to serve those persons with a copy of the order *nisi*. In this particular case, only the

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names of lienholders appeared on the abstract of title, and the service of the notice of motion was unnecessary. The solicitor for the lienholders contends that, being served with a notice of motion it is his duty to peruse that notice, and that he should be allowed to tax therefor. It is undoubtedly his duty to peruse the notice, but the notice being unnecessary, and not being served by the defendant, the perusal should not be at the expense of the defendant. Those two items were allowed on review, and are disallowed by me.

The third item of the bill, "perusal of notice of trial," was allowed by the District Court Judge, and is allowed by me, as coming within item 41 in schedule 1 of the tariff and for the amount allowed by item 41.

The 4th and 5th items objected to in the bill are, "attending for abstract and G. R. and paid," and "attending to receive same." These two items are entered on the bill at a total of $4. It is the duty of the plaintiff to file abstract and G. R. and one abstract and G. R. should be sufficient for all purposes, and as far as the circumstances in this case are concerned, were sufficient without the perusing or filing of one by each lienholder brought in by notice of trial. Both items are disallowed.

The 6th item on the bill is, "counsel fee advising on evidence to be adduced at trial." No defence was filed, no witnesses were heard, and the evidence before the clerk was by affidavit. I can find no authority for allowing counsel fee on affidavit evidence, and I disallow this item.

The next item of the appeal is No. 14 on the bill. "Instructions to prove claim taken over from the Acme Electric." It appears that the Security Lumber Co., in addition to holding lien for goods supplied by itself, took an assignment of a lien from the Acme Electric, and the claim of the Security Lumber Co. must be considered as including its own original claim and the assigned claim. Item 7 on the bill is "instructions to prove claim of the Security Lumber Co." That was allowed, properly so,—and that item must be taken to include the assigned claim. This item 14 is disallowed.

Item 5 on p. 3, "counsel fee on settlement re same," was disallowed by the taxing master, and allowed by the District Court Judge. It appears that the Security Lumber Co. did effect a settlement with some of the other parties in respect of some matter in dispute. The defendant abandoned its appeal in respect to that item, and the item stands as allowed by the District Court Judge.

The next items of the appeal are 27 and 28, on p. 3, "attending to accept service certificate as completed," and "perusal." The

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certificate of the clerk is filed and is made the basis for the order *nisi*, which order *nisi*, is signed by the clerk, after perusal, by the claimant. The items following the two in question, and which are not disputed, are for perusal of the draft order *nusi*, approval of same, attending on return, and attending in chambers when order signed. In view of the procedure indicated by those items, the service of the certificate is unnecessary, and neither the service of the certificate nor the perusal should be at the expense of the defendant. The two items 27 and 28 are disallowed.

The next items of appeal are 8 to 31, p. 4, and 1 to 13 on p. 5. Items 8 to 28 inclusive on p. 4 are for accepting service and perusing bills of costs of other lien holders, and attending on taxation of the costs of each of the other lien holders. On p. 5 items 1 to 6 inclusive, item 10 and item 13 are for copies of bills prepared for service on other lienholders and for attending to serve same, except that items 10 and 13 include copy for and service on the defendant. It is contended that each lienholder is entitled to tax these items, because it is from the estate of the main defendant that these costs are to be paid, and that each lienholder has the right of perusal of the bills of each of the other lienholders, and the right to attend at the taxation of each of them so as to reduce the same, if possible, and thereby keep down to a minimum the total of costs chargeable against the defendant. There are six groups of these items, and as each of the other lienholders would be entitled to tax the same if the claimant's contention is correct, there would be about $240. taxed by all claimants against the defendant in the laudable endeavour of each lien holder to protect the defendant from excessive charges by any other lien holder. While the vigilance of the lienholders as against each other may be commendable it should not be carried on at the expense of the defendant, particularly as the defendant was itself vigilant to the extent of having its solicitor present at each taxation. Items 8 to 28 inclusive on p. 4, 1 to 6 inclusive on p. 5, are disallowed. Item 10 on p. 5 is disallowed, except as to 1 copy and item 13 on p. 5 is disallowed, except as to 1 service. Items 29 to 31 inclusive on p. 4 are allowed to stand as allowed by the District Court Judge. Those items are drawing bill of costs, copy for taxing officer and copy for defendant. Items, 8, 9, 11, 12, 14 and 15 refer to the taxing of the claimant's own bill of costs, and are allowed to stand as allowed by the District Court Judge.

If, in any mechanics' lien case it should be advisable that the bill of costs of one or more lienholders should be scrutinized by any other lienholder, it could be made a rule of practice, though not a rule of law that the taxing master on the application of

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any one of the lienholders, should arrange that all parties having costs to tax, should attend before him on their respective taxations at one time, similar to the practice provided in para. (p) of R. 698. It must not be taken from this suggestion, however, that the land subject to the liens should be considered a fund or estate as the terms are used in para. (p). The lienholders are not limited to the amount of the proceeds of the land, but have a right against the defendant personally as well.

The amount claimed in this action brings the taxation of costs within R. 3 of the District Court rules, and solicitors' and counsel fees will, therefore, be taxed on the King's Bench scale. It is contended for the lienholder that as these costs are taxed on the King's Bench scale, rule 679, sub-sec. 2, of the King's Bench Rules is also applicable. In answer to this appellant contends that a mechanics' lien is an incumbrance within the meaning of that term as used in para. (ah) of R. 698 of the King's Bench Rules, and that as no defence was entered, sub-sec. 2, Rule 679 should not apply. In my opinion, the word incumbrance, as used in the King's Bench Rules, was not intended to include mechanics' liens, as actions in respect to mechanics' liens are within the jurisdiction of the District Court Act. Rule 1 of the District Court Rules says, "that unless otherwise provided for in the District Courts Act or within these rules, the King's Bench Rules shall apply *mutatis mutandis* to the practice and procedure of the Districts Courts." A comparison of the wording of R. 2 of the District Courts with R. 679 of the King's Bench will make it clear that the former rule corresponds in its application to District Court actions to the latter in its application to King's Bench actions. Rule 2 is therefore, in respect to R. 679 a rule "otherwise provided" within the meaning of R. 1. Rule 679 cannot be applicable to this taxation unless made applicable by R. 3 of the District Court. Rule 3 makes solicitors' and counsel fees, and only those fees, in certain mechanics' lien actions taxable on the King's Bench scale. The King's Bench scale is the column of figures so intituled in the tariff of costs and must not be confused with a King's Bench Rule relating to the tariff. Sub-section 2 of R. 679 is not a part of the King's Bench scale, but a rule relating to increases of the tariff in respect to all fees, except counsel fees. The fact that only solicitors' and counsel fees are brought within the King's Bench scale by R. 3 of the District Court and that sub-sec. 2 of R. 679 provides increases for all fees except counsel fees, makes it clear that the latter subsection is not made applicable by R. 3. The increase of 30% allowed by the taxing master and by the District Court Judge is disallowed.

I understand that this bill was prepared in accordance with

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the practice obtaining in respect to Mechanics' Liens in several Districts. In view of that, there will be no costs to either party on the application before the District Court Judge or on the appeal.

Judgment accordingly.

Re GAUDREAU; Ex parte ROYAL BANK OF CANADA.

Saskatchewan King's Bench, in Bankruptcy, MacDonald, J. June 1, 1922.

CHATTEL MORTGAGE (§IIA—5)—*Mortgage to bank—Advances made in ordinary course of business—Mortgage given in demand for security—Consideration—Mortgage taken by local manager of bank—Chattel Mortgage Act R.S.S. 1920 ch. 200. secs. 9, 27 and 28—Construction—Affidavit of bona fides—Validity of mortgage.*]—Application by a trustee to have it determined whether a certain chattel mortgage is valid.

R. Robinson, for trustee; *H. Ward*, for claimant.

MACDONALD, J.:—The facts are that on July 18, 1921, the authorised assignors were indebted to the Royal Bank of Canada, claimant, in the sum of $5583.70, representing advances made by the said bank to the said J. N. Gaudreau and E. Gaudreau in the ordinary course of business. The bank demanded security for such indebtedness, and the mortgage in question was given pursuant to such demand. The trustee claims that the said mortgage is not valid on various grounds. His first ground is that the consideration is not truly expressed.

The following are the material terms of the chattel mortgage in this connection:—

"Whereas the mortgagors are indebted to the mortgagee in the sum of $5583.70 contracted in the course of its business. And whereas the mortgagee has demanded security for such indebtedness. And whereas pursuant to such demand the mortgagors have agreed to execute this mortgage to the said mortgagee as additional security for such indebtedness. Witnesseth that the mortgagor for and in consideration of $5583.70 of lawful money of Canada to him in hand well and truly paid by the mortgagee at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) hath granted," etc.

It is true that at the time of the execution of the mortgage no money was in fact paid by the bank to the mortgagors, and that the mortgage was in fact given in consideration of a past indebtedness. Nevertheless, I am of opinion, that the consideration for which the mortgage was given was truly expressed so as to satisfy the requirements of the Chattel Mortgage Act, R.S.S. 1920, ch. 200, had there been no recitals at all in the mortgage, and the consideration was merely expressed as $5583.70 "in hand

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well and truly paid," it is clear on the authorities that that would satisfy the requirements of the statute as to truly expressing the consideration though such a consideration was a past indebtedness. *McCready* v. *International Harvester Co.* (1915), 21 D.L.R. 769, 8 S.L.R. 261, and the cases therein cited. Now, the recitals, instead of contradicting the expression "in hand well and truly paid" merely explain it, and shew that the expression was used in a "commercial sense" as explained in said authorities. True recitals cannot falsify the true expression of the consideration. I am therefore of opinion that within the meaning of the Act the consideration was truly expressed.

The next objection raised is that the mortgage was taken by the local manager of the bank at Elrose, Saskatchewan, and that there is not on file written authority from the bank to him to take the chattel mortgage in question. This argument is based on clause b. of sub-sec. 1, of sec. 9 of the Chattel Mortgage Act, which provides that:—

"Every mortgage . . . . which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within thirty days from the execution thereof be registered, together with:—

(b) an affidavit of the mortgagee or one of several mortgagees, or the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith and is properly authorised by power in writing to take such mortgage and a copy of such authority is attached thereto (except as provided under section 27) stating:" etc.

Section 27, therein referred to, merely provides that an authority for the purpose of taking or renewing a mortgage or conveyance intended to operate as a mortgage may be a general one, and that when such general authority is filed with the clerk it shall not be necessary to attach a copy thereof to any mortgage filed.

It will be noted that said clause b of sub-sec. 1 of sec. 9 does not contain a substantive provision that a written authority to an agent must be filed. The provision is only an adjectival one, descriptive of the kind of agent who may make the affidavit of *bona fides* on behalf of a mortgagee.

Section 28 of the Chattel Mortgage Act, however, provides that in the case where the mortgagee is a corporation, if its head office is outside Saskatchewan then the affidavit of *bona fides* may be made by any general or local manager, secretary or agent of the corporation within Saskatchewan.

The description of an agent who may make the affidavit as given in sec. 9 of the Act is a general one. The provision in

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sec. 28 is a special one as to the agent of corporations having their head office outside Saskatchewan. In this case the Royal Bank of Canada has its head office outside of Saskatchewan. The affidavit of *bona fides* was made by the local manager at Elrose, Saskatchewan, as authorised by sec. 28 of the Act. There was therefore no affidavit made by, nor any necessity for the making of the affidavit, by an agent authorised in writing to take the mortgage for it is the special provision in sec. 28 that governs in this case. *Generalia specialibus non derogant.*

I am therefore of opinion that this objection also fails.

It was further suggested that the local manager of the bank at Elrose, Saskatchewan, had no authority to make the affidavit of *bona fides*, but this point was abandoned at the argument.

The next objection taken to the chattel mortgage is one based on a disputed question of fact. The affidavit of execution is to the effect that the mortgage in question was executed on July 18, 1921. This affidavit was taken by one Hunt as a witness before a commissioner for oaths. E. Gaudreau files what purports to be an affidavit by him to the effect that the mortgage in question was signed by J. N. Gaudreau on July 18, 1921 but that it was not signed by him, E. Gaudreau until July 22 or 23, 1921. It is therefore argued that the affidavit of execution should have set forth both dates and that as it did not do so, the mortgage is invalid for non-compliance with the Act. As to this objection I need only repeat what I intimated on the argument that the cross-examination of E. Gaudreau on his affidavit shews his evidence to be altogether so unsatisfactory that I cannot hold it is sufficient to rebut the presumption that the mortgage was in fact executed on the date set out in the affidavit of execution.

This objection therefore fails, and the trustee is directed that the chattel mortgage in question is a valid security, and the Royal Bank of Canada, claimant, is entitled to rank as a secured creditor in respect to the goods comprised in the chattel mortgage. The trustee shall pay the claimant's costs. The trustee's costs shall also be payable out of the estate.

Judgment accordingly.

MESSER v. MESSER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, Turgeon and McKay, JJ.A. March 6, 1922.

JUDGMENT (§IIA—60)—*Finding of trial Judge—Facts—Credibility of witnesses—Interference with by Appellate Court.*] —Appeal by defendant from the trial judgment in an action between husband and wife on a promissory note. Affirmed.

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R. L. Klaholz, for appellant. No one contra.

HAULTAIN, C.J.S., concurred with TURGEON, J.A.

LAMONT, J.A.:—This is purely a question of the credibility of the witnesses. The trial Judge who saw and heard them accepted the evidence of the plaintiff against that of the defendant and his witnesses. We, who have not seen or heard them, cannot say he was wrong in so doing, there being nothing to shew that he misconceived the purport of the testimony given by the witnesses and it was not overborne by documentary evidence.

TURGEON, J.A.:—In this case the wife, as plaintiff, sues her husband, as defendant, to recover the amount of a promissory note for $750 made by him in her favour.

Taylor, J., in the Court of King's Bench gave judgment in favour of the plaintiff. The matter is purely a question of fact, to be determined by the credibility to be attached to evidence which is absolutely contradictory.

The only defence which the husband sets up to the note, which he admits that he made, is, that it was a fraudulent transaction put through by him on the advice of one Ferguson in order to defeat the claim of a creditor; that is, he endeavours to escape liability on the note by alleging his own fraud. The trial Judge has found against him on this, and in favour of the wife on her testimony. I can see no reason for disturbing this judgment. I may go further and say that, if I were reading the evidence in this case without a knowledge of any previous judgment in the matter, I should arrive at the same conclusions as that arrived at by the trial Judge.

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

MCKAY, J.A.:—This is an appeal from a judgment given in favour of the respondent, by the trial Judge, on contradictory evidence.

The appellant's contention is that the note sued on was made without value, and in pursuance of a fraudulent scheme to defeat a creditor of the appellant. The respondent denies this and asserts it was given to her by the appellant, her husband, for value. There is no doubt, "It is within the province of an appellate Court and it is its duty, 'even where, as in this case, the appeal turns upon a question of fact to re-hear the case, not shrinking from overrulling it if, on full consideration, the Court comes to the conclusion that the judgment is wrong. *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704. *The "Gairlock,"* [1899] 2 Ir.

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R. 1.' " *Annable* v. *Coventry* (1912), 5 D.L.R. 661 at 669-70. 46 Can. S.C.R. 573.

And in *Arpin* v. *The Queen* (1886), 14 Can. S.C.R. 736, it was held by the Supreme Court of Canada that, where a judgment appealed from is founded wholly upon questions of fact, the Court will not reverse it unless convinced, beyond all reasonable doubt, that such judgment is clearly erroneous.

The trial Judge who saw and heard the witnesses has seen fit to believe the respondent, and after carefully reading the evidence I cannot satisfy myself that he was wrong.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

SMITH v. CORP'N of S. VANCOUVER and CORP'N of RICHMOND

British Columbia Supreme Court, Macdonald, J. May 13, 1922.

LIMITATION OF ACTIONS (§IIF—60)—*Personal injuries—Death—Negligence—Families Compensation Act, R.S.B.C. 1911, ch. 82—Municipal Act, 1914 (B.C.) ch. 52, sec. 484—Construction.*]—Action by widow for damages for the death of her husband.

A. D. Taylor, K.C., and *F. A. Jackson*, for plaintiff.

G. H. Cowan, K.C., for Mun. of Richmond; *D. Gonaghy* and *G. S. Wismer*, for Mun. of S. Vancouver.

MACDONALD, J.:—Upon the motion for judgment herein, after I had, upon the findings of the jury, decided in favour of the plaintiffs and held the defendants liable on the ground of negligence, there were still two questions reserved, for further consideration.

In the first place, it was contended that, as the accident and death of George C. Smith occurred on November 11, 1916, and the action was not commenced by Charlotte E. Smith, his widow, until October 15, 1917, that such action, against the defendant municipalities was barred by sec. 484 of the Municipal Act, 1914 (B.C.) ch. 52. I do not think this section applies to an action of this nature. Speaking generally, the limitation of action to 6 months, in my opinion, pertains to the unlawful performance by a municipality of anything purporting to have been done under authority conferred by legislation. It might be contended that it would not govern an action for misfeasance, where the municipality did not "purport" to act under any Act but was simply guilty of neglect or default rendering it liable. Further, aside from the question, as to whether sec. 484 is applicable to such an action of misfeasance for personal injuries, through misfeasance on the part of a municipality, it

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would appear that claims for compensation under the Families Compensation Act, R.S.B.C. 1911, ch. 82, may be properly instituted if commenced within the limit of 12 months therein stipulated. *Vid. B.C. Electric R. Co.* v. *Gentile*, 18 D.L.R. 264, 18 C.R.C. 217, [1914] A.C. 1034, 83 L.J. (P.C.) 353, and cases there cited—particularly *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59, 54 L.J. (P.) 9, 33 W.R. 477,—where Lord Shelborne at pp. 67 and 70 refers to the Act, giving a new cause of action to the wife and children of a deceased person, who might, if he had lived, maintained an action. Lord Blackburn, to the same effect, says that a totally new action is given against the person, who would have been responsible to the deceased if he had lived and adds: "An action which, as is pointed out in *Pym* v. *Great Northern R. Co.* (1862), 2 B. & S. 759, 121 E.R. 1254; (1863), 4 B. & S. 396, 122 E.R. 508, is new in its species, "new in its quality, new in its principle, in every way new."

It was then submitted that, in any event, as far as the children of the deceased were concerned, their right of action was barred by sec. 485 of the Municipal Act, as well as by the provisions of the Families Compensation Act, R.S.B.C. 1911, ch. 82.

It was argued that, as the action was commenced in the name of Charlotte Smith, as widow, without any reference to the children, they thus lost the benefit of the Families Compensation Act as they were only added as parties in October, 1921. The ground seems tenable, that, if the action brought by the widow, did not enure to the benefit of the children, and really amounted to an action brought on their behalf, then they cannot recover. No authority was cited directly on the point, but it was contended that the wording of sub-sec. 2 of sec. 4 of the Families Compensation Act sufficed to support the claim of the children. It provides that, where there has been no executor or administrator of the person deceased, who would have a right of action, if death had not ensued, then, the right of action conferred by the Act "may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons as if it were brought in the name of such executor or administrator."

Sub-section 3 of said sec. 4 provides for payment into Court by the defendant, and if the amount paid in be not accepted, for an issue as to its sufficiency. The defendant, so paying in, does not need to specify how the amount is to be divided

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amongst the parties entitled under the Act. It may be inferred from sec. 6 of the Act that the names of the parties for which benefit the action is brought, need not be stated in the writ of summons, as the "plaintiff on the record" is required in the statement of claim, to furnish the names of such persons together with their addresses and occupations. This stipulation and procedure under the Act, was observed, as the children were added as parties before the statement of claim was delivered, and when delivered, it complied with said sec. 6. The Families Compensation Act was remedial in its nature and intended to benefit the class of persons referred to in such enactment. I think it is a fair construction to place upon the Act, that the action so brought by the widow, was for her benefit as well as her children. The tendency of the Courts, to afford compensation, under this Act, is indicated by authority, particularly in the case of *Sanderson* v. *Sanderson* (1877), 36 L.T. 847, where the defendant had paid into Court a sum of money, which was accepted by the widow in satisfaction, but as there was no provision in the section under which such payment was made for ascertaining the shares to which the parties were entitled, it necessitated a special case being presented to the Court. Malins, V.C., in default of such provision, decided that the best he could do, would be to treat the money as the personal estate of the deceased, and divided it according to the Statute of Distributions, giving one-third to the widow and the remainder to the children. Then the fact that the children need not necessarily be named at the trial, in order to obtain the benefit of the Act, is emphasised by the case of *The George and Richard* (1871), L.R. 3 A. & E. 466, where the proctor for an unborn child was held entitled to assert a claim under the Act on its behalf. There will be judgment accordingly for the plaintiffs, for the respective amounts allowed by the jury.

It was then contended, on behalf of the Mun. of S. Vancouver, that the liability, if any, only existed as against the Mun. of Richmond. It appears that the bridge in question was constructed by the provincial Government in 1909 and both municipalities contributed towards the cost of construction. By an agreement between them, which was not proved and made evidence in the previous trial of *Evans* v. *Corp. of Richmond* (1918), 43 D.L.R. 214, 26 B.C.R. 60; (1919), 48 D.L.R. 209, both municipalities contributed towards the maintenance and repair of the bridge. While the Mun. of Richmond appointed and had immediate control of the bridge tender, the Mun. of S. Vancouver contributed towards his wages. Then it was submitted that, even with these facts proven, they would not create

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a liability against S. Vancouver, because the span of the bridge where the accident occurred, was not within the Mun. of S. Vancouver, and did not form a portion of its highway. The question is, whether the boundaries of S. Vancouver as originally defined, were properly extended by Order in Council pursuant to sec. 4 of 1910 (B.C.) ch. 78. If this section is not properly applicable then the only other power, permitting of such extension of boundaries of municipality, is contained in sec. 13, R.S.B.C. ch. 172, but this section can only be operative upon the consent of the ratepayers and so has no application in this instance. It was proved, that the $7,000 required to be paid by S. Vancouver to Richmond, pursuant to said sec. 4 of ch. 78, was not paid within the stipulated period. It was submitted, that this provision was a condition precedent, and that such failure, having occurred, the power of the Lieutenant-Governor in Council under the section absolutely ceased. I think that the payment of this amount was a matter of adjustment between the municipalities and was not a controlling factor, as far as the executive of the Province was concerned. It might, and probably would, decline to act until the payment was made and the proviso in that respect was simply inserted to effect such result. I think the power to act still remained and was properly exercised by an Order in Council to that effect which was produced at the trial. Assuming then, that the extension was legally consummated, I find that the span of the bridge was, according to the evidence of Col. Tracey, C.E. physically within the boundaries of S. Vancouver so extended and that the bridge formed a portion of the highway connecting both municipalities. The Mun. of S. Vancouver was aware of the nature and extent of the safeguards or warnings, in use for some time upon this Intermunicipal Bridge, when the span was open. The jury has found that they were such as to constitute negligence. Accepting such finding, I think that both municipalities are jointly liable and there should be judgment accordingly.

Judgment for plaintiff.

DAY v. CANADIAN PACIFIC R. Co.

British Columbia Court of Appeal, Martin, Galliher, McPhillips and Eberts, JJ.A. March 7, 1922.

NEW TRIAL (§II—8) — *Grounds—Injuries—Trial—Misdirection to jury—Excessive damages.*]—Appeal by defendant from the trial judgment and verdict of the jury and asking for a new trial on the ground of excessive damages, and misdirection. Affirmed.

E. P. Davis, K.C., and *J. E. McMullen*, for appellant.

E. C. Mayers, for respondents.

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C.A.

The judgment of the Court was delivered by

GALLIHER, J.A.:—Taking 10 years, 1911 to 1920 inclusive, it is shewn that the earnings averaged $4,000 a year. Of these years, 1911 and 1912 were exceptional years, owing to activity in real estate in Victoria, gradually declining until 1914 and from 1915 to 1918 dropping off very considerably and from that on until Day's death shewing a considerable upward tendency.

I cannot say that the jury could not reasonably consider that this might continue or even improve. They might upon the evidence so find and being entitled so to find they might reasonably assume that his earnings would be $4,000 per year out of the business. On that basis and the prospect of life and earning ability being fixed at 12 years, that would amount in that time to $48,000.

Though we cannot speculate as to just how the jury arrived at the amount fixed, it seems more than a coincidence that on that basis and deducting all the claims urged by Mr. Davis, it works out at just $20 less than the amount awarded, viz., $20,000.

It was open to the jury to deal with it in this manner, and if they did so I cannot say that they dealt with it unreasonably, and a new trial should not be ordered on this ground.

The objections taken by Mr. Davis as to misdirection are as follows:—

"You multiply the number of years that you fix upon by the annual earnings that he makes—his annual income whether it is earnings from his business, *or business plus profitable investments,*" and then again "So you take his *whole income.*"

The words objected to by Mr. Davis I have italicised, and did they remain without any further reference in the charge, I think the defendants would be entitled to a new trial. The matter was again referred to:—

"MR. DAVIS:—I think your Lordship made it clear excepting the earnings, you were speaking merely of his business income. My learned friend is under the impression that it was not limited to that, but I think it was. I think that is what your Lordship meant.

THE COURT:—When I speak of earnings I mean the earnings in his business.

MR. DAVIS:—Yes, that is what I understood.

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THE COURT:—I spoke of income from any properties which he may have, but that property is still here so far as that is concerned."

In view of this I do not think that it can be said the jury might have been influenced or were misled by the statement.

The appeal must therefore be dismissed.

Appeal dismissed.

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